



STATE BAR OF NEVADA JULY 2012 EXAMINATION

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



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- EXAM 1, QUESTION 1 -

JULY 2012

EXAMINATION NO. 1;

QUESTION NO. 1: ANSWER IN LIGHT BLUE BOOKLET

During a phone conversation with a female confidential police informant, Dan agreed to sell her a large amount of methamphetamine and to meet her in a public garage to complete the transaction. On the appointed date and time, Dan drove his truck containing the methamphetamine to the garage and parked. The police watched Dan deliver the methamphetamine to the informant and then arrested Dan. Upon arresting Dan, officers searched him and found a cell phone in his jacket pocket. Dan admitted that the cell phone was his. An officer then took possession of the phone.

Later, at the police station and before booking the cell phone as evidence, the officer conducted a search of the cell phone's call records and text messages. It was confirmed that the phone had been used to speak with the informant. Additionally, this search revealed evidence that appeared to be related to illegal narcotic use and drug trafficking. During this search, the police did not have either a warrant or Dan's consent to search the phone.

1. Did the warrantless seizure of Dan's cell phone and the search of data contained within it violate the Fourth Amendment? Please answer fully.

2. Assume that the police seized Dan's cell phone at the scene of arrest, did not search it, then waited seven days before obtaining a search warrant from a judge. Would the warrant-authorized search of the data contained within Dan's cell phone violate the Fourth Amendment? Please answer fully.

3. Assume that the seven-day delay is deemed unreasonable by the trial judge. Would the fact that the officers had obtained a search warrant provide a good faith basis to avoid the application of the exclusionary rule? Please answer fully.

1)

===== Start of Answer #1 (1136 words) =====

"D" = Dan

Warrantless Search and Seizure of D's Phone

The 4th amendment protects against unreasonable searches and seizures by the government. Any searches performed without a warrant are presumptively unreasonable, unless the search fits into an exception. If a search violates the 4th Amendment, the exclusionary rule provides that evidence discovered as a result of the search be excluded at trial.

State Action

The 4th Amendment applies only to state action. In this case, there is clearly state action since the police arrested and searched D.

Search and Seizure of Phone from D

Reasonable Expectation of Privacy (Standing)

In order to bring a 4th Amendment claim, a defendant must have a reasonable expectation of privacy-- the search here was of D's person, so this is satisfied.

Warrantless Search

Though the officers did not have a warrant, they performed a valid search incident to an arrest-- when police properly arrest a person, they may perform a search of the person to ensure they have

no weapons. They may also search the person for evidence of the crime which they have been arrested for, and seize such evidence they find.

In this case, the officers were arresting D for selling meth, and thus properly searched him for evidence of this crime-- the police knew that the conversation with the informant had occurred over the phone, so a cell phone could be evidence of his crime.

Validity of Arrest

In order to support a search incident to an arrest, the arrest itself must be valid. In order to arrest a suspect for a misdemeanor, police require an arrest warrant, or actually must have seen the crime being committed. In order to arrest a suspect for a felony, officers only need probable cause because of the seriousness of the crime.

In this case, selling meth is a felony. The officers had probable cause to arrest D because they saw him sell meth to the informant. The arrest of D was proper. Accordingly, the police properly performed a search incident to an arrest, and properly seized evidence which could incriminate D for the crime he was being arrested for.

Search of Data on D's Phone

As stated above, one must have a reasonable expectation of privacy in something to bring a 4th Amendment claim-- here, D would argue that he has such an expectation of privacy in the data on his phone, that the officers should have gotten a warrant prior to searching the phone. The

evidence of the phone being used to speak to the informant (as well as further illegal narcotic use and drug trafficking), D would argue, should thus be excluded.

The Supreme Court has, in recent history, been very hesitant to find a strong expectation of privacy in cell phones and their data. While a warrant is required to search a person's home, no warrant (only probable cause) is required to search a car or a person outside their home. A cell phone can be compared to simply a book in the person's pocket which contains information. On the other hand, a cell phone might be simply accessing data which is stored in someone's house, which would suggest a warrant is needed. However, because of the Supreme Court's stance on cell phones, it is most likely that D did not have such a high level of privacy in his phone to make the phone like a home, where a warrant would be required. Accordingly, only probable cause was required.

Here, the officers had probable cause to search the phone-- from a totality of the circumstances, there was probably evidence of D's crime (in the form of phone records of his call to the informant) in his phone. Accordingly, the search of the data on the phone did not violate the 4th amendment.

Warrant-Authorized Search of Cell Phone

As stated above, searches which are performed without a warrant are presumptively unreasonable. However, if a valid warrant is issued and executed reasonably, there is no presumption of unreasonability. The facts do not suggest that there is any problem with the

warrant or its execution after it was issued. Therefore, the search after issuance of a warrant would not be an unreasonable search within the meaning of the 4th Amendment.

However, D would argue that the 7-day delay was an unreasonable violation of his due process rights. Due process provides that a person may not be deprived of life, liberty, or property without due process of law. The deprivation of his property for 7 days without process would violate his right not to be deprived of property. In terms of the 4th Amendment, there is no reason for the police to wait 7 days before getting a warrant to search the phone, and while the search was valid pursuant to the warrant, the seizure lasted for an unreasonably long time.

Effect of Court Finding that Seven-Day Delay is Unreasonable

Evidence seized in violation of the 4th Amendment is subject to the exclusionary rule, as stated above. Further evidence gained from this excluded evidence is also inadmissible, as "fruit of the poisonous tree". Here, the information on the phone would have come as a result of the unreasonable search, meaning it would be inadmissible at trial.

However, evidence which is otherwise inadmissible under the 4th Amendment may be admitted under the independent discovery, intervening source, and inevitable discovery exceptions. The most relevant here is the inevitable discovery exception, which states that evidence which would otherwise be excluded is admissible if the police can show they would have discovered the evidence even without the 4th amendment violation.

In this case, the officers would argue that because they were able to get a warrant, they would have discovered this information even without the 7-day delay. In accordance with the inevitable discovery doctrine, the police would argue, the evidence should not be excluded.

However, this argument would not be successful. While the inevitable discovery doctrine allows evidence gained as a result of inadmissible evidence (the "fruit"), it does not allow the admission of that initial evidence (the "poisonous tree" itself). Here, the phone itself was seized unreasonably, as the court held. The purpose of the exclusionary rule is to deter police misconduct-- if the police were able to use the inevitable discovery doctrine in this manner, they could always wait an unreasonably long time before getting a warrant if they knew the warrant would be issued later.

The officers would need to show some good reason for waiting 7 days to obtain a search warrant, but the fact that the court held the delay was unreasonable precluded this. The fact that the police eventually were able to get a warrant would not avoid the application of the exclusionary rule, because if this were allowed then the rule's purpose, deterring unreasonable seizures, would be frustrated.

Question #1 Final Word Count = 1136

==== End of Answer #1 =====



**STATE BAR OF NEVADA
JULY 2012 EXAMINATION**

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

- EXAM 1, QUESTION 2 -

JULY 2012

EXAMINATION NO. 1;

QUESTION NO. 2: ANSWER IN RED BOOKLET

Husband and Wife own their home in Nevada as joint tenants with right of survivorship. Husband and Wife also have a joint checking account. Husband owns a motor home in his name alone, which he purchased prior to his marriage to Wife. Husband also owns lucrative mineral rights in Nevada in his name alone, which he inherited from his mother's estate. Husband has a bank account in his name that he opened for the benefit of his and Wife's adopted son, David, wherein Husband has deposited the profits earned from the mineral rights over the past several years. David is the named beneficiary of Husband's bank account upon Husband's death. Husband has three daughters from a prior marriage, namely, Alice, Betty, and Connie.

Husband is in the intensive care unit at a Winnemucca hospital, where he is terminally ill and receiving strong pain medication. Husband begins handwriting a will. Husband does not provide for his Wife and their adopted son David; rather they are specifically excluded from receiving anything from Husband's estate. His estate is to be distributed to his three daughters. The house is to be given to Alice. The motor home is to be given to Betty. The remainder of his estate is to be given to Connie.

Husband signs the document, but he does not date it. Nurse Nancy observes Husband's execution of the document, writes in the date and signs the document as a witness. Connie also observes her father's execution of the document. Connie signs the document as a witness. Husband dies two weeks later.

1. Fully explain whether Husband left a valid will.

2. Assume that Husband died without leaving any will. Fully discuss the rights of Wife, David, Alice, Betty, and

Connie with respect to Husband's estate and distribution of the following assets:

a. Home in Nevada;

b. Joint checking account;

c. Motor home;

d. Mineral rights; and

e. Bank account wherein profits earned from the mineral rights have been deposited.

2)

===== Start of Answer #2 (2284 words) =====

1. Validity of the Will

Invalid Regular Will

_____ A valid regular will in Nevada requires: the testator was 18 or older, the testator had testamentary intent and capacity, the testator signed the will, the signing was in the presence of two witnesses, and two witnesses sign the will in the testator's presence.

Age

We do not know Husband's age specifically, but we can assume he is over 18, as he has been married twice, has four children, and is terminally ill.

Intent

Husband's intent to make a will is clear. He handwrote a will on his deathbed, and attempted to completely dispose of all of his property in the will. Whether Husband had capacity is a closer issue. Testamentary capacity requires that the testator knew the nature of his acts, that he understood the nature and extent of his property, and that he appreciated the natural objects of

his bounty. All three issues are clearly resolved in favor of Husband having testamentary capacity here. Although he was on strong pain medication, testatmentary capacity is a very low bar, and because he named all of his property in the will, and named all of his relatives (i.e. the natural objects of his bounty--those a person would be expected to give his property to at death) whether by giving them property or explicitly excluding them, Husband meets the test for capacity.

Sign

Husband signed the will.

Two Witnesses

Husband must have signed the will in the presence of two witnesses, and must have had two witnesses sign the will in his presence for the will to be valid. The meaning of "presence" has not been decided in Nevada. Some states require conscious presence (the testator and witnesses must have understood where each other was at the time) and other states require that the testator and witnesses could have actually observed each other signing the document had they looked (meaning there were no visual impediments). Even if the stricter line of vision test is applied here, the parties signed in each other's presence because the signatures were done in the same hospital room. There are no facts indicating there was a visual impediment.

However, in Nevada, the two witnesses must be disinterested. If a witness who is a

beneficiary under the will signs the will, it is only a valid signature if it is supernumerary (meaning there are two other disinterested witness signatures and the interested witness signature was not necessary). Here, there are two signatures. One was from the nurse, who is not interested, and the other is from Connie, who was. The will does not have the necessary number of signatures, so it is not a valid regular will.

____ Although it is clear that this will is invalid as a regular will under Nevada law, it is worth mentioning that, if it were valid, Wife and David have no rights under it as an omitted spouse or child because the will explicitly excludes them from inheriting anything. A testator may disinherit a wife and child (adopted children count the same as biological children in the omitted child statute) by clearly stating that this is his intention--otherwise, the state will presume that he forgot to include them, and they will be entitled to their intestate shares.

Valid Holographic Will

____ Nevada law allows holographic wills to be valid if they are signed, dated, and all the material provisions are in the handwriting of the testator. Here, Husband signed the document he wrote on his hospital bed, and it was signed in his handwriting, and all of the material terms were in his handwriting (material terms are the terms that dispose of the testator's property). The date on the will was done by the nurse, but that does not invalidate it as a holographic will. Holographic wills can be valid on pre-filled forms or forms filled by others as long as the material terms are in the handwriting of testator.

The holographic will is valid. However, Husband cannot dispose of the house to Alice because it is joint tenancy property and will go immediately on his death to Wife (this is explained in more detail below). The house will not be in Husband's estate at death and is adeemed because it is a specific bequest--Alice receives nothing. Betty receives the motor home, and Connie receives the remainder of Husband's property.

It is worth mentioning that Wife and David have no rights under the holographic as an omitted spouse or child because the will explicitly excludes them from inheriting anything. A testator may disinherit a wife and child (adopted children count the same as biological children in the omitted child statute) by clearly stating that this is his intention--otherwise, the state will presume that he forgot to include them, and they will be entitled to their intestate shares.

2. Intestacy

Community Property State

Nevada is a community property state. When a valid marriage exists, anything acquired by a husband and wife during marriage is presumed to be community property. Separate property is property owned by either spouse before marriage, or acquired during marriage with separate property funds, or acquired by gift, will, or inheritance (other than where the gift or devise was made because of some effort or benefit bestowed by the community on the donor or testator).

Community property belongs to the community, and each spouse has an equal, undivided half-interest in the community. A spouse claiming that property presumed to be community property is actually his or her separate property has the burden of proving by clear and convincing evidence that the property is actually his or her separate property.

Intestacy

In issue is what would become of Husband's estate if he had died intestate, meaning without leaving a valid will. Nevada has very specific laws to deal with intestacy, and they intersect with Nevada's community property rules.

Surviving Spouse Share

In Nevada, when two people are validly married, and one dies intestate, the other spouse inherits the entire community. The surviving spouse, in this case Wife, already owns half of the community property. At intestate death, the deceased spouse, in this case Husband, automatically passes his share of the community property to the surviving member of the community. If Husband dies intestate, Wife will inherit all property that is deemed to be community property. Specific analysis of the property characteristics of Husband's estate is below.

In addition to receiving the entire community, the surviving spouse is entitled to a share of

the deceased spouse's separate property. The amount of separate property to which the surviving spouse is entitled in Nevada depends upon who else survives the decedent. The surviving spouse receives the entire separate property if the decedent died leaving no heirs (meaning no issue, no parents, no siblings or children of siblings). The surviving spouse receives 1/2 of the decedent's separate property if the decedent is survived by parents, siblings, issue of siblings, or a single line of lineal descent (meaning the decedent only has one child). The surviving spouse receives 1/3 of the decedent's separate property if the decedent is survived by two or more lines of lineal descent. Here, Husband is survived by four children--his adopted son with Wife, and three children from a previous marriage. Therefore, he is survived by 4 lines of lineal descent, and wife inherits 1/3 of Husband's separate property.

Rest of the Separate Property

The other 2/3 of Husband's separate property passes by the order set out in Nevada's intestacy laws. If decedent is survived by issue, it goes all to issue by right of representation. Without issue, separate property would pass to decedent's parents, and if none, then to his siblings or issue of deceased siblings, and if none, then to his next of kin or the next of kin of a predeceasing spouse, and if none, it would escheat to the state.

Here, Husband is survived by issue, as discussed above. His four children--David (adopted with Wife), and Alice, Betty, and Connie (from another marriage)--are all treated equally under intestacy laws in NV. Adopted children are treated as full biological children if the adoption is

valid, and we have no reason to believe it was not. The four children will take by right of representation.

Right of representation gives property equally to those who are equally related to the decedent at the first level of descent where there is a surviving taker. Here, the first level of descent is his children, because there is at least one living child. In fact, here, they are all living. Therefore, they all take an equal 1/4th interest in the remainder of their father's separate property. The remainder was 2/3, so Alice, Betty, and Connie each take 1/6th of Husband's separate property ($1/4 \times 2/3 = 2/12 = 1/6$) and Wife takes the other 1/3rd.

The property that passes in this manner (all community property to Wife, 1/3rd separate property to Wife, 1/6 of separate property to each of Husband's 4 children) will be characterized below. If the assets are not divisible among these fractional lines, a court will order the sale of the assets so that the proceeds can go to Wife and the four children in the percentage to which each is entitled.

Characterizing the Assets Left in Intestacy

A. Home In Nevada

____ Husband and Wife owned their home as joint tenants with right of survivorship (JTWROS). We have no evidence of how the house was acquired, but even when a home is

acquired with community property funds (thus giving rise to the presumption that the home is community property), if title is taken with specific language indicating the tenants are JTWRORS, that is the clear and convincing evidence needed to overcome the community presumption.

The home is a joint tenancy. Each JTWRORS owns an undivided half-interest in the property, and upon death of a joint tenant, that tenant's interest passes immediately to the other tenants in equal share. A joint tenant may not dispose of his share of a joint tenancy by his will because his share is not in his estate at death--rather, it already belongs to the other joint tenants equally. Here, Husband and Wife were the only joint tenants, so on husband's death, the wife acquired the entire ownership of the joint tenancy when she acquired husband's half.

Even if the home had not been joint tenancy property that passed entirely to the wife, as a surviving spouse, the wife would have been entitled to claim the home as a marital homestead in Nevada and remain there until her death if she chose to.

B. Joint Checking Account

_____ The only thing the facts say about the joint checking account is that it is owned by Husband and Wife. A bank account is characterized as separate or community property by the type of funds in the account, but where a Husband and Wife have a joint account and no other facts are given, there is a presumption that the account is community property. There are no facts here to overcome the presumption.

The account is community property, thus, for the reasons stated above, it is entirely owned by Wife if Husband dies without a will.

C. Motor Home

____ Husband purchased the motor home prior to his marriage to Wife. Separate property funds were used to purchase the asset, and therefore it is presumably separate property. There are no facts here indicating any action was taken to change the nature of the property. It appears that Husband paid for the motor home in full before marriage--if Husband had bought the motor home on credit and paid for it throughout his marriage using community property funds, we would have to apply the proration rule to determine how much of the value of the home belongs to the community property and separate property funds.

The motor home is the separate property of Husband. 1/3rd goes to Wife, and 1/6 goes to each of his four children. The court may need to order the sale and division of proceeds to satisfy the interest.

D. Mineral Rights

____ Husband inherited mineral rights from his mother. The property was acquired by inheritance, and therefore it is presumably Husband's separate property. No facts indicate any

evidence that can be used to prove by clear and convincing evidence that the mineral rights were actually community property. Therefore the rights are separate property. 1/3rd goes to Wife, and 1/6 goes to each of his four children. The court may need to order the sale and division of proceeds to satisfy the interest.

E. Bank Account for Mineral Right Deposit

_____ The bank account in which Husband deposits the profits from the mineral rights is held in Husband's name. Normally, a bank account is characterized by the type of funds it contains--here, the account contains profits from the mineral rights that are Husband's separate property. Profits from separate property are separate property of the owner spouse. This account would normally be Husband's separate property.

However, this bank account is a Totten trust account. The account is held with a named beneficiary--David--who will receive the contents of the account on the owner's death. A Totten trust is a valid way to convey property or money to another person at the owner's death as long as the beneficiary is named on the account and the owner does nothing during life that appears to negate the intention to give money to the beneficiary (such as remove the principal from the account). Here, there are no facts suggesting any acts that would negate the intention, so the gift is valid.

The bank account is a Totten trust that belongs to David at his father's death, and it belongs

entirely to David.

Question #2 Final Word Count = 2284

===== End of Answer #2 =====



**STATE BAR OF NEVADA
JULY 2012 EXAMINATION**

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

- EXAM 1, QUESTION 3 -

JULY 2012

EXAMINATION NO. 1;

QUESTION NO. 3: ANSWER IN DARK GREEN BOOKLET

In the mid-1980's, a few health food manufacturers discovered the benefits of an oil obtained from rare lok beans.

Adding a small amount of lok oil to a drink such as tea makes a drink taste very sweet without added calories or any aftertaste.

Diluted lok oil also has a short-term stimulant effect similar to that of caffeine, but without the negative health effects.

In 2008, Prime-Lok, Inc., a Nevada corporation headquartered in Minden, began domestic cultivation of lok beans and large-scale manufacture and sale of lok oil drinks. Prime-Lok began to sell beans and oil to mainstream soft drink manufacturers. As sales increased, the retail price plummeted and sales skyrocketed. Prime-Lok's product labels, as well as print, television and internet advertising, tout the healthy stimulant effect and other benefits of lok oil drinks. Prime-Lok's website features testimonials from people who claim that regular use of lok oil drinks over several years remedies depression.

Abner, a New York teenager, died after mixing amphetamines and a six-pack of a soft drink containing lok oil.

Congress then conducted hearings on the possible need for regulation of lok oil. The hearings disclosed the following results of more than 20 years of research:

- Agreement that lok oil use, at its typical dilution of 1 part oil to 100 parts liquid, results in no adverse health effects. Disagreement remains as to the potential for adverse effects of consumption of higher concentrations of lok oil.
- Consumption of 3 gallons of diluted lok oil over a 1-2 hour period combined with amphetamines produced short-term adverse cardiac effects, with a 5% greater risk of death than consumption of amphetamines only during the same period.
- Researchers were unable to confirm, but unable to discredit, the claims that lok oil drinks had any anti-depressive effects.
- There is some anecdotal evidence to indicate heart damage could result from consumption of whole beans or undiluted lok oil.

In mid-2011, Congress enacted, and the President signed, Abner's Law. The law's stated purpose is to protect consumers, particularly children, from possible risks associated with

consumption of high doses of lok oil. Its key provisions: (1) require the U.S. Department of Agriculture (DOA) to set standards for and license lok bean cultivation operations; (2) require DOA to set standards for and to license the manufacture and sale of full-strength lok oil; (3) permit lok oil use only when diluted in drinks; (4) and require the DOA to develop regulations governing the sale of lok oil drinks to consumers.

Following administrative rulemaking, the DOA promulgated its final regulations regarding the sale of lok oil drinks, effective December 31, 2012. Section 1 permits manufacturers to advertise lok oil as a no-calorie sweetener but, in order to discourage use as a stimulant or anti-depressant, prohibits all other advertising regarding lok oil or its actual or claimed effects. Section 2 mandates that the labels of all lok oil products contain a warning in 18-point font: "Consumption of lok oil drinks poses health risks."

Prime-Lok, concerned that the regulations will preclude it from continuing to advertise the benefits of its drinks and require it to label its products with what it considers to be an untrue statement, has filed a lawsuit against the Secretary of Agriculture and the DOA in the United States District Court in Reno, Nevada. Prime-Lok seeks declaratory and injunctive relief to block implementation of both sections of the regulations.

1. Fully discuss if this case is properly before the court.

2. Discuss fully all constitutional challenges Prime-Lok may raise as to Sections 1 and 2 of the lok oil sale regulations.

3)

===== Start of Answer #3 (1530 words) =====

1.

Justiciability:

Courts may only hear a case if it presents a justiciable case or controversy brought by adverse parties. To be justiciable the plaintiff must have standing. Standing requires the plaintiff to show: Injury, Causation, and Damages.

An injury can be shown even if it has not occurred yet if it will imminently be incurred. Here the injury alleged by PL is the unconstitutional restrictions on the advertisement and sale of its product. Because the regulations have been approved and will be effective in several months there will be sufficient imminence in the injury alleged to bring about the suit.

To show causation the plaintiff must show that the harm alleged can be directly traced to the government conduct.

Here, the harm alleged is the imminent unconstitutional restrictions on the sale of the product by PL and the restrictions can be directly traced to the government's inaction of Abner's law; thus, there is sufficient causation.

To have standing the plaintiff must show that they have or imminently will suffer damages as a

result of the government action. Additionally, a decision in the plaintiff's favor must remedy the harm alleged by the plaintiff.

Here, PL will argue that they will imminently suffer damages as a result of the unconstitutional regulation; thus, a decision in their favor would remedy their damages suffered.

However, the government will argue that any damages at this point are speculative at best. Plaintiff has not put forth any evidence showing that when the regulations go into effect the regulations will result in any pecuniary loss; thus there are no damages.

Ultimately, plaintiff will prevail on the standing issue of damages because they are alleging a constitutional violation of their commercial speech rights and the court can entertain the suit.

Ripeness:

A court can only hear a case if the issues to be litigated are ripe. When looking to ripeness the court will look the imminence of the harm alleged in the absence of hearing the suit, and the fitness of the issues for judicial review.

Here, the regulations have not only been adopted but they have been sufficiently codified in a statute and are set to take effect in December; thus the imminence of injury to PL exists because the injury is not speculative.

Further, the issues are ripe and fit for judicial review because the statute has been adopted and signed into law and the regulations have also been adopted and laid out. Thus, the court has sufficient record for which they may hear the case and base their constitutionality decision upon.

Federal Court Jurisdiction:

Subject Matter Jurisdiction:

Federal courts only have subject matter jurisdiction to hear cases which are in diversity or based on federal question jurisdiction.

Here the plaintiff (PL) is basing its suit on the constitutionality of a federal statute, Abner's Law, thus the court will have federal question jurisdiction and can entertain the suit.

Under the well-pleaded complaint rule, it must appear from the face of the plaintiff's complaint that the suit is based on a federal statute or federal question. Here, assuming that the challenge to Abner's law appears on the face of PL's complaint, they will meet the well-pleaded complaint rule and the federal court will have subject matter jurisdiction to hear the case.

Personal Jurisdiction:

Federal courts have personal jurisdiction against federal officials in all federal courts.

Here, the plaintiff has brought suit in the forum in which they are incorporated thus, they are domiciled in the forum and can bring suit there. Thus, there is personal jurisdiction.

Declaratory and Injunctive Relief:

A plaintiff seeking declaratory or a preliminary injunction such as the plaintiff here must show: (1) that they will suffer irreparable harm if the action which they seek to prevent is allowed to happen and an injunction or declaratory relief is not granted; and (2) that they have a likelihood of success on the merits when the court entertains the entire suit following the entry of an injunction. Additionally, the court may require the plaintiff to post a bond to cover any damages caused by the preliminary injunction if issued and plaintiff does not prevail on the merits.

Here, money damages would sufficiently compensate plaintiff for their lost profits relating to the advertisement and labeling restrictions if they were to prevail on the merits; thus, they will not suffer an irreparable injury.

Thus, the court should not issue a preliminary injunction or declaratory relief

Sovereign Immunity:

The 11th Amendment forbids civil suits brought against the government. However, individual

government actors may be sued in their representative capacity.

Here, Prime- Lok (PL) has brought suit against the secretary of agriculture; this is a government actor sued in their representative capacity thus sovereign immunity will not apply. However, PL has also attempted to sue the DOA which is a branch of the government and not an individual government actor. Thus, the DOA will be able to effectively dismiss suit against them by relying on the protections of the 11th amendment's sovereign immunity. If PL wishes to sue the DOA they will have to sue the individual actor in charge of administering the DOA in his representative capacity.

2.

Challenging Constitutionality, Government Action:

Whenever a plaintiff is challenging the constitutionality of a law they must first point to government action.

Here, the government action challenged is the Abner's laws which were formulated by congress; thus there is government action.

Commerce Clause:

Congress has the power to regulate interstate commerce through the commerce clause. In regulating commerce the congress can regulate (1) the instrumentalities of interstate commerce; (2) the channels of interstate commerce; and (3) the economic activities which have a substantial effect on interstate commerce.

Here the regulation in Abner's law is regulating the instrumentalities of interstate commerce because it is regulating a product which is sold in interstate commerce; thus, congress has acted pursuant to a constitutional power in regulating interstate commerce which is a product of their power to regulate commerce from the commerce clause. The product is sold in interstate commerce because it is advertised in print, television and the internet. Additionally the product is manufactured in Nevada and an individual in New York was injured by the product; thus, further evidencing the fact that the product is part of interstate commerce.

Congress can delegate rulemaking:

Pursuant to their power to legislate, congress can delegate rulemaking to departments of the federal government.

Here congress constitutionally delegated rulemaking to the DOA.

1st Amendment Freedom of Speech:

The first amendment guarantees freedom of speech. Commercial Speech is also protected under the first amendment so long as it is not deceptive or for an illegal activity. An individual or company cannot be deprived of their freedom of speech by a government actor.

Commercial Speech:

Congress has the power to regulate commercial speech. However, when commercial speech is regulated, the government action regulating the commercial speech is subject to immediate scrutiny. Under immediate scrutiny review, the government will bear the burden of showing that the regulation of the commercial speech is substantially-related to the achievement of an actual important government interest. Additionally, the regulation need not be the least restrictive means, but it must be narrowly tailored to achieve the actual important government interest.

Congress has an important interest in regulating products which have adverse health effects.

Here, based on the effects of their findings and the harmfulness of lok oil, Congress' regulations were in response to an important interest, the health and safety of the public.

Here, regulating the sale of lok oil by requiring the warnings discouraging the use of the product as an anti-depressant and requiring the adverse health warnings were substantially related to the

important government interest in protecting the health and safety of the general public.

PL will claim that the regulations are not narrowly tailored because they are unconstitutionally overbroad or vague. A law regulating speech will be unconstitutionally overbroad if it regulates more speech than what the constitution allows it to. A law will be unconstitutionally vague if a reasonable person would be unable to know what speech is not allowed.

As noted above, the regulation only needs to be narrowly tailored, it does not need to be the least restrictive means.

Here, the regulation was narrowly tailored because there was not an entire ban on advertisement nor was there an entire ban on sale of the product. The regulation still leaves open avenues for the sale and advertisement of lok oil. Additionally, the regulation here was based on findings of congress in which they concluded that lok oil had adverse health effects when mixed or consumed in large amounts and also that it produced no anti-depressant effects. Thus, the congressional regulation was narrowly tailored because it was in response to findings which were conducted.

Commercial speech which is in the form of deceptive advertising or advertising for an illegal product or activity is not protected.

Here, the regulation of Section 1 prevents lok oil from being advertised as an anti-depressant.

This ban was based on congression findings that lok oil had no anti-depressant effects; thus, any advertisement of lok oil as having such properties would be deceptive and misleading and therefore unprotected.

Question #3 Final Word Count = 1530

==== End of Answer #3 =====

END OF EXAM



**STATE BAR OF NEVADA
JULY 2012 EXAMINATION**

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

- EXAM 1, QUESTION 4 -

JULY 2012
EXAMINATION NO. 1;
QUESTION NO. 4: ANSWER IN ORANGE BOOKLET

Mike, a junior in high school, was a competitive off-road motorcycle ("dirt bike") racer. Mike's parents, Bill and Ellie, purchased Mike a new dirt bike and an after-market power booster for his seventeenth birthday. Shortly thereafter, Mike installed the power booster, manufactured by Power Boosters, Incorporated, onto his new dirt bike. No warning labels were affixed to the power booster. On the last page of the instruction manual, the following appeared "Warning: Use of this product on dirt bikes may cause front wheel to vibrate."

After Mike installed the power booster, he asked his parents if he could take the modified dirt bike out to the family ranch in rural Nevada. Mike and his father had built a dirt bike course at the ranch to assist Mike in his training. Mike's parents gave him permission as long as no one else went along. Mike was recently grounded by his parents for hosting a party in the family home while his parents were out of town.

The next day in the school cafeteria, Mike challenged his rival, Dirk, to a race at the ranch. Mike told all of his friends to come watch him beat Dirk.

On race day, Mike told his girlfriend Lila to wait for him at the finish line of the course. The race began and Mike built a huge lead over Dirk. Although he knew he had the race won by a large margin, Mike engaged the power booster for the first time as he approached the finish line. The power booster caused the front wheel of the dirt bike to shake violently. Mike was thrown from the bike uninjured as the bike careened out of control. Lila, who moments earlier had turned her back to the finish line to celebrate Mike's victory with her friends, was hit by the dirt bike and killed instantaneously.

Lila's parents, Tom and Kris, were outraged when they heard about the accident and began blogging about the accident on their popular local news blog. In the blog entries discussing the accident, Tom and Kris referred to Lila's boyfriend as "Mike the Murderer." No criminal charges were ever brought against Mike.

Fully discuss all potential causes of action and all defenses to those causes of action.

1)

===== Start of Answer #1 (3067 words) =====

Tom and Kris v. Power Boosters

Strict Products Liability:

A commercial supplier owes a strict duty to any foreseeable plaintiff using their product. To hold a commercial supplier liable under strict products liability there must be 1) a strict duty owed by a commercial supplier 2) the placing of an unreasonably dangerous product into the stream of commerce, 3) causation, and 4) damages. In strict products liability can be based on a manufacturing defect, a design defect, or a failure to adequately warn.

Failure to Warn:

A commercial supplier breaches their strict duty to warn when they fail to warn of uses and foreseeable misuses. This duty goes to all possible plaintiffs and anyone that may be impacted by the product. No privity is required any more.

Here, Mike installed a power booster after market part to his dirt bike. No warning labels were actually affixed to the power booster. On the last page of the instruction manual there was a warning that use of the product on dirt bikes may cause front wheel to vibrate.

This would constitute a failure to warn because a supplier should put a warning on to the dangerous fixture. Here they waited until the last page of an instruction manual to indicate that use of this product might cause front wheel to vibrate.

The failure to warn must also be a cause in fact and proximate cause however most courts will find that any tort victim is foreseeable when a commercial supplier places an unreasonably dangerous product into the stream of commerce.

Design Defect:

A failure in design is when the products design itself is the dangerous condition. the fact that the product will cause a dirt bike to vibrate violently indicates that the design itself might be faulty. Therefore, TOM and Kris may also be able to recover under a theory of strict products liability for failure of a design. The only way that power boosters can negate liability under an improper design is that there is no feasible alternative available. That a new design is either not feasible or that it will defeat its underlying purpose. Nothing in the facts indicate that a new and better design is not feasible. Further, the fact that they are already warning of a problem that is meant to be used on a dirt bike also negates this.

Damages:

They are damaged by the loss of their daughter. Courts generally require a loss of property or a physical injury to recover under a strict products liability action.

Battery:

Battery is the intentional causing of harmful or offensive contact.

Negligence Cause of Action against the commercial supplier:

Duty to foreseeable plaintiffs, breach of that duty causes in fact and proximate cause, and damages.

Lila's parents may try to assert a negligence cause of action against Power Boosters as well. They will have to show a duty to plaintiff, a breach of that duty and cause in fact and proximate cause. Here they can show a breach by the fact that they allowed an unsafe product into the stream of commerce. A manufacturer would not put an item into the stream of commerce that is unreasonably dangerous to the average user. Cause in fact and proximate cause are also shown by the fact that the rumblign bike tire and the severe shaking caused mike to fly off of the bike and into Lila.

Defenses

Power boosters Incorporated may try to assert that the item itself did not leave its manufacturing plant in a defectively dangerous condition. Power boosters may try to impute the problem to the way that mike installed the power booster onto his new dirt bike. This argument will fail however. The item was defectively dangerous in its failure to warn and failure to redesign. the fact that they already knew there was a problem with putting this item onto a dirt bike that it will cause the front wheel to vibrate.

Negligence of Mike:

Because mike was the one who installed the power booster to the bike the manufacturer might try to assert that he was the cause. However this will not relieve them of their liability. of

failure to warn.

Mike v. Manufacturer:

Strict Products Liability:

A commercial supplier owes a strict duty to any foreseeable plaintiff using their product. To hold a commercial supplier liable under strict products liability there must be 1) a strict duty owed by a commercial supplier 2) the placing of an unreasonably dangerous product into the stream of commerce, 3) causation, and 4) damages. In strict products liability can be based on a manufacturing defect, a design defect, or a failure to adequately warn.

Failure to Warn:

A commercial supplier breaches their strict duty to warn when they fail to warn of uses and foreseeable misuses. This duty goes to all possible plaintiffs and anyone that may be impacted by the product. No privity is required any more.

Here, Mike installed a power booster after market part to his dirt bike. No warning labels were actually affixed to the power booster. On the last page of the instruction manual there was a warning that use of the product on dirt bikes may cause front wheel to vibrate.

This would constitute a failure to warn because a supplier should put a warning on to the dangerous fixture. Here they waited until the last page of an instruction manual to indicate that use of this product might cause front wheel to vibrate.

The failure to warn must also be a cause in fact and proximate cause however most courts will find that any tort victim is foreseeable when a commercial supplier places an unreasonably dangerous product into the stream of commerce.

Design defect--

A design defect is unreasonably dangerous design known to cause harm because of the fact that it was in the handbook but in the back page. Mike can bring the cause of action under a design defect theory as well.

Mike v. Tom and Kris

Defamation:

Defamation is a defamatory statement of or concerning the plaintiff that is published to a third party. A statement is defamatory if it tends to adversely affect and impact one's character. Slander is the spoken word and Libel is written. A defamatory statement casts adverse light onto ones character.

Published to a third party: Here this defamatory statement was published to a multitude of third parties when TOM and Kirs put this statement onto their popular news blog. The publication requirement is met.

Defamatory statement

Here, the statement is defamatory because it tends to cast adverse light onto Mike's character. There is no indication that he murdered Lila. Furthermore, no criminal charges have been brought against him further lending support to the fact that he is not criminally liable for the death of Lilla.

Constitutional Defamation analysis:

Although a statement maybe defamatory in the tort sense, a defamation cause of action might be limited by the constitution if it involves a public figure or a matter of public concern. Someone is a public figure if they obtain pervasiv fame or notoriety or if they voluntary insert themselves into a particular public controversy. Something is a matter of public concern if it is something that the public need to know about. If a matter is about a public figure and a matter of public concern together the plaintiff must prove actual malice 1) reckless disregard to the truth or falsity of the statement or 2) knowledge of falsity. If if is a private figure and matter of public concern the plaintiff must prove at least negligence. If it is a private figure and matter of private concern then damages are presumed.

Here, Mike does not fall int the category of a public figure. Here, the only fact that indicates someone outside of his small town might know if him is that he is "training" for some dirt bike competition. The facts also indicate that he is a comeptitive off road racer. However, this does not indicate that he has obtained pervasive fame or notoriety in the community or that he has voluntary assumed a central role in a controversy.

Further it does appear that this would constitute a matter of public concern. This was not a nationally televised dirt bike race. It was out in rural Nevada and the only people in attendance were people from Mike's school.

Because Mike is not a public figure and this is not a matter of public concern, damages are presumed and he may collect from Tom and Krist.

False Light:

False light applies when a defendant attributes to plaintiff views he does not hold or actions that he does not take that are highly offensive to a reasonable person. This is essentially the tort of gossip. There is no newsworthy exception and defendants are liable when they speak falsely of the plaintiff.

Here, the fact that Tom and Kris have casted Mike as a "murderer" this is false light. The facts indicate that he was never criminally charged and making accusations that someone is a murderer without any further support would be highly offensive to the reasonable person.

Because there is no newsworthiness exception for this tort, Tom and Kris may be liable for false light.

Tom and Kris v. Mike

Survival Action:

A survival action is one that is brought by the executor of the estate for the pain and

suffering felt by the actual tort victim in their last moments of life. This allows for the victim themselves to recover (although she is now deceased) for the last moments of pain and suffering. However, here the facts indicate that Lila wa killed instantaneously and therefore this is not actionable.

Wrongful Death:

Wrongful death is a tort action that is brought on behalf of the survivors. This covers actions such as loss of consortium and any loss of future earnings. Nothing in the facts indicate what Lilas potential figure earnings were, but if Tom and Kris brought this action against mike they could recover these types of damages.

Negligence:

For a plaintiff to recover in a negligence cause of action you must prove duty, breach, cause in fact, proximate cause, and damages.

Standard of Care:

If a special standard of care does not apply, then every person is supposed to act as a reasonably prudent person (RPP) under the same or similar circumstances. If it is a child or someone under 18, the standard of care is as a person with similar age, education, and life experience. However the child standard of care does not apply if the child is engaging in an adult activity. The general reasonable prudent person standard will apply.

Here, Mike is a junior in high school. However, he is also a competitive off road dirt bike racer. Jurisdictions may split as to whether dirt bike racing constitutes an adult activity. Because he is competing as a dirt bike racer it is likely that this constitutes an adult activity and therefore Mike will be held to the adult RPP standard of care.

Breach:

Breach is when a defendant does not live up to the statutory standard of care. Mike breached his standard of care here to those around him because a reasonable prudent person would not engage a power booster for the first time as you are approaching a finish line full of people. Furthermore, at this point Mike knew that he had won the race by a large margin and therefore it was unnecessary for him to engage a power booster right before a finish line full of people.

Res Ipsa Loquitor:

Res ipsa loquitor helps a plaintiff establish a breach by showing: it is not something that would occur in the absence of negligence, plaintiff was not a party to the negligence and defendant had control of the instrumentality in question.

Here Lilas parents may show that Mike breached his standard of care by showing that this type of damage, death, would not occur in the absence of negligence and because Mike was in constructive control over the instrumentality that caused harm, Lilas parents may show that he breached.

Cause in FAct:

Cause in fact is "but for" causation. But, for Mike hitting the power booster, Lila's death would not have occurred.

Proximate CAuse:

Proximate cause judges the fairness and foreseeability of defendant's conduct. Independent and intervening forces will not be a superseding cause if they are in the normal incidents of or the increased risks caused by such action. Here, Mike may say that it was the manufacturing defect that actually caused the accident and that it was not foreseeable that him using his power booster would have caused this type of accident. Although maybe the exact cause (having the bike vibrate and run into Lila) was not foreseeable, death is foreseeable when talking about a large motorcycle and with a power booster attached to it.

Mike was also the proximate cause of Lila's Death.

Damages:

Lila is now dead. The family may show that they have loss of consortium claims or loss of future earnings type damages. They can also recover for their own pain and suffering.

Defenses

Indemnification and Contribution

Mike may eventually look to the manufacturer for indemnity for this action. If it is found

that the accident was the product of a strict products liability action and Mike has to pay individually, then Mike can look to the manufacturer for indemnity. (see above to products liability analysis)

Contributory Negligence:

If Lila's parents are asserting a wrongful death cause of action, the negligence of the tort victim may be imputed to them and reduce their damages. Nevada follows partial comparative fault, therefore Lila could be up to 50% at fault and still may recover. Here Lila was waiting at the finish line of the course. However, before Mike even past the finish line she had her back turned to celebrate Mike's victory with her friends.

If a court determines that this is negligence then this may reduce her recovery.

Battery

Battery is the intention causing harmful or offensive contact with the victim's person. Intent may be found when the defendant purposefully caused the harmful or offensive contact or when it was substantially certain to occur. Here, Mike engaged the power booster for the first time as he approached the finish line and the power booster caused the bike to shake violently. Here, the bike hit and killed Lila instantly.

Although it is not a super strong case, Lila's parents may likely assert it.

Negligent Infliction of Emotional Distress:

A defendant breaches a duty to not engage in acts causing emotional distress when the the plaintiff is within a zone of danger and physical manifestations result. In addition, as a bystander who is a close familial relative may also be able to recover if just in the "presence" of the accident.

Here, Tom and Kris were not at the race when their daughter was killed therefore no NIED claim will prevail.

Tom and Kris v. Bill and Ellie

As landowners, special standards of care apply when dealing with natural and artificial conditions that occur on the land. Here, the artificial condition that is on the land is a dirt bike track. What standard of care applies depends on the status of the individuals on the land: trespasser, anticipated trespasser, licensee, or business invitee.

Anticipated Trespasser:

An anticipated trespasser is one where the landowner should know is on the land and owes them a duty of warning of artificial conditions on the land that are not obvious. Here, it is arguable that Lila was an anticipated trespasser. Mike's parents gave Mike permission to go to the rancho to the dirt bike course as long as no one else went along. However Mike was recently grounded by his parents for hosting a party in the family home while his parents were out of town. Therefore, it is arguable that they owed Lila a duty of warning about the artificial condition on the land if its dangerous propensities were not obvious.

Attractive Nuisance:

Attractive nuisance doctrine applies when a landowner knows or has reason to know that children are near his land, that they may not appreciate the risks due to their age, and that the cost of repairing or fixing the attractive nuisance is slight when compared to the risk of harm.

Here a dirt bike course is arguably an attractive nuisance. However, on the other hand the dirt bike course is out on a ranch in rural Nevada. The facts also do not indicate that they have known children to be out there other than their own. Therefore they should not be liable under the attractive nuisance doctrine.

Vicarious Liability:

Tom and Kris may assert that Bill and Ellie should be vicariously liable for their sons actions. However, courts generally do not hold parents liable for their childrens negligence. Although, Tom and Kris may assert that they were independently negligent for allowign their son to go to the dirt bike course without any parental supervision.

Negligence:

_____ for cause of action for negligence must show a duty a breach of that duty, cause in fact, and proximat cause.

Standard of care:

RPP-- Bill and Ellie had a duty to act like RPP under same or similar circumstances.

Breach:

Here, it is arguable that they breached their standard of care by allowing their seventeen year old son to go out to a family ranch alone in rural Nevada. Although Mike and his father had bought the dirt bike course to assist Mike in his training. Mike's parents gave him permission to go as long as no one else went along. However, Mike was recently grounded by his parents for hosting a party in the family home while his parents were out of town. Reasonably prudent parents likely would not allow their son who has been known to throw parties when they are out of town to go out to a home in rural Nevada.

Cause in Fact:

But for Bill and Ellie allowing Mike to go to the ranch by himself, Lila would not have died.

Proximate cause:

Fairness and foreseeability of holding defendants liable. Here, it is foreseeable that misuse of a dirt bike or a dirt bike track could cause death or serious bodily harm. Any harms or intervening forces that are in the normal incidents of and increased risks are foreseeable and may be liable.

Question #1 Final Word Count = 3067

==== End of Answer #1 =====

END OF EXAM



**STATE BAR OF NEVADA
JULY 2012 EXAMINATION**

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

- EXAM 2, QUESTION 1 -

JULY 2012

EXAMINATION NO. 2;

QUESTION NO. 1: ANSWER IN PURPLE BOOKLET

It has been a rough year for Al's Nevada Bayou Restaurant. Cash-strapped earlier in the year, Al's pledged its outstanding accounts receivable from several large catering customers to Big Bank in exchange for a \$50,000 loan. Big Bank and Al's entered into an agreement signed by the parties documenting the transaction and describing the accounts receivable by customer and amount. Big Bank sent letters to Al's catering customers informing them of the agreement. Big Bank did nothing else.

Al's was having difficulty locating crawfish for its upcoming crawfish festival which attracts thousands of customers annually. Al's sent an email to one of its suppliers, Bubba's Seafood in Louisiana, asking whether Bubba's could supply Al's with 2,000 pounds of 5-6 ounce crawfish. Bubba's responded by email that it "can ship 2,000 pounds of crawfish at a price of \$1.00 per ounce within the next two days, F.O.B., New Orleans, Louisiana." Al's responded by email: "I accept. 10% discount for paying within 7 days. Al's." The next day, Bubba's delivered 2,000 pounds of 3-4 ounce crawfish to a licensed third-party carrier in New Orleans, notified Al's of the shipment and sent Al's all of the necessary documents to enable it to obtain possession of the crawfish from the carrier.

While in transit to Al's restaurant in Las Vegas, the carrier's truck was involved in an accident (through no fault of the carrier) and all of the crawfish were destroyed. Al's learned of the accident the day before the crawfish festival and was unable to find an alternative source for crawfish. As a result, the festival was a financial disaster, with the revenue being less than half of what it was in prior years.

Al's defaulted on its loan to Big Bank and Big Bank took steps to exercise its rights against Al's accounts receivable. Furious, Al's sued Bubba's, claiming that it was responsible for Al's lost revenue from the crawfish festival and for Al's defaulting on its loan with Big Bank. Bubba's countersued Al's, claiming that Al's is obligated to pay for the crawfish lost in transit. Bubba's seeks to attach Al's accounts receivable.

Please provide full answers and analysis to the following questions:

- 1. Is there an enforceable contract between Al's Restaurant and Bubba's Seafood? If so, what are its terms?**
- 2. Will Al's be successful in suing Bubba's for the lost revenue from the crawfish festival?**
- 3. Will Bubba's be successful in suing Al's for the crawfish lost in transit? If so, what is Bubba's measure of damages?**
- 4. What rights, if any, does Big Bank have in Al's accounts receivable as against Al's and Bubba's?**

1)

===== Start of Answer #1 (1486 words) =====

1) IS THERE AN ENFORCEABLE CONTRACT BETWEEN AL'S RESTAURANT AND BUBBA'S SEAFOOD? IF SO, WHAT ARE ITS TERMS?

APPLICABLE LAW

The agreement involves sale of Crawfish which are goods and therefore the agreement between Al's ("A") and Bubba's ("B") is governed by article 2 of the UCC.

Al's and Bubba's regularly deal with the type of good involved (crawfish) and thus they are both merchants for purposes of this transaction.

CONTRACT FORMATION / UCC 2-207

The elements of a valid contract are offer, acceptance, and consideration or substitute such as detrimental reliance.

An offer is a manifestation which an objectively reasonable person would construe as an invitation to enter agreement. The offer must have particular terms and be made to a particular party.

An acceptance is a manifestation which an objectively reasonable person would construe as assent to the offer.

Under the common law mirror image rule an acceptance which includes different or additional terms is construed as a rejection and counteroffer. However, pursuant to UCC 2-207, between merchants (see above), a reasonable acceptance constitutes acceptance despite different or additional terms. Further, the different terms are included in the contract unless:

1. They materially alter the terms of the offer;
2. the offer expressly limits acceptance to the terms of the offer; OR
3. the offeror notifies the offeree that the offeror rejects the different or additional terms within a reasonable time

Here A and B are merchants because they regularly deal with crawfish. A's initial email to Bubba was an inquiry requesting if crawfish could be provided at certain terms. B's response was an offer because it stated terms with particularity and identified A as the offeree. Note that according to the offer risk of loss passes when B places the crawfish in the possession of a

licensed carrier at the FOB point which is Louisiana. A's second email in response was an acceptance with additional terms because it added a 10% discount term for paying within 7 days.

Because the discount term does not materially alter the agreement, B did not expressly limit acceptance to the terms of the offer and B did not reject the 10% discount term the term is included.

STATUTE OF FRAUDS

To be enforceable (an issue separate from valid contract formation) the general rule is that contracts for sale of goods valued at \$500 or more must be in writing, signed by the party to be charged. Here the statute of frauds is implicated because the contract calls for 2,000 lbs of crawfish at \$1 per ounce (\$2,000). The email correspondences of the parties satisfy the SOF because they reflect the price and quantity terms and parties to the agreement (note that UCC statute of frauds implies a reasonable price where none is stated).

Also note that under the doctrine of partial performance a contract may be enforced despite noncompliance with the SOF where it has been partially performed as is the case here.

RISK OF LOSS

Although the terms of the offer stated that risk of loss would pass at the FOB point (Louisiana), the

UCC provides that in carrier contracts shipment of non-conforming goods constitutes both acceptance and breach of the agreement and further results in risk of loss remaining on the seller until the goods are either accepted despite their non-conformity or returned to the seller.

Thus risk of loss remained with seller B at the time of shipment because B shipped 3-4 ounce crawfish while the contract called for 5-6 ounce crawfish.

CONCLUSION

There is an enforceable contract between A and B with terms discussed above.

2) WILL AL'S BE SUCCESSFUL IN SUING BUBBA'S FOR LOST REVENUE FROM THE CRAWFISH FESTIVAL?

RISK OF LOSS

Although the terms of the offer stated that risk of loss would pass at the FOB point (Louisiana), the UCC provides that in carrier contracts shipment of non-conforming goods constitutes both acceptance and breach of the agreement and further results in risk of loss remaining on the seller until the goods are either accepted despite their non-conformity or returned to the seller.

Thus risk of loss remained with seller B at the time of shipment because B shipped 3-4 ounce

crawfish while the contract called for 5-6 ounce crawfish.

BREACH

A and B had an enforceable contract (*supra*). Because the contract did not state a time for performance a reasonable time will be implied. Thus under the perfect tender rule B is in breach only if B does not deliver exactly what was requested under the contract within a reasonable time.

It is not clear from the facts what a reasonable time is. The fact that the crawfish were destroyed while risk of loss was on B does not automatically constitute breach on behalf of B if a reasonable time has not passed. B is permitted to replace and deliver the destroyed crawfish so long as this happens within the permitted for performance.

Assuming B does not perform within a reasonable time we turn to the question of A's remedies.

REMEDIES

The general measure of damages in contract is "expectation damages," that is, an amount necessary to place the plaintiff in a position the plaintiff would occupy had the contract not been breached. Generally a buyer who does not receive goods called for under the contract may "cover" (obtain substitute goods at a reasonable price and bill the seller for the difference in

excess of the contract price) or bill the seller for the difference between the contract price and the prevailing market price (if it exceeds the contract price).

Where it is foreseeable to the seller that breach may result in damages beyond general expectation damages the buyer may recover such damages as "consequential damages." Here the facts do not indicate that B was aware A needed the crawfish for an upcoming festival in which thousands would be in attendance. Thus A likely cannot recover for lost revenues.

Note that revenues are generally not the measure of damages in any event. Assuming B was aware of the festival and liable for consequential damages the appropriate measure would be lost profits.

CONCLUSION

For the reasons supra A likely may not recover lost revenues from B.

3) WILL BUBBA'S BE SUCCESSFUL IN SUING AL'S FOR THE CRAWFISH LOST IN TRANSIT? IF SO, WHAT IS BUBBA'S MEASURE OF DAMAGES?

RISK OF LOSS

Although the terms of the offer stated that risk of loss would pass at the FOB point (Louisiana), the

UCC provides that in carrier contracts shipment of non-conforming goods constitutes both acceptance and breach of the agreement and further results in risk of loss remaining on the seller until the goods are either accepted despite their non-conformity or returned to the seller.

Thus risk of loss remained with seller B at the time of shipment because B shipped 3-4 ounce crawfish while the contract called for 5-6 ounce crawfish.

PERFECT TENDER RULE

The general rule under the perfect tender rule is that a seller is in breach for any non-conformity in the goods, subject to a right to cure within the time allowed for performance. B was in breach for shipping the wrong sized crawfish (supra).

A and B had an enforceable contract (supra). Because the contract did not state a time for performance a reasonable time will be implied. Thus under the perfect tender rule B is in breach only if B does not deliver exactly what was requested under the contract within a reasonable time.

It is not clear from the facts what a reasonable time is. The fact that the crawfish were destroyed while risk of loss was on B does not automatically constitute breach on behalf of B if a reasonable time has not passed. B is permitted to replace and deliver the destroyed crawfish so long as this happens within the permitted for performance.

CONCLUSION

Assuming B cured or the risk of loss at the time the crawfish were destroyed was on A, B may recover the contract price.

4) ARTICLE 9 SECURITY INTEREST

APPLICABLE LAW

security interests are governed by article 9 of the UCC.

ATTACHMENT

A security interest attaches when a secured party gives value, the debtor acquires rights in the collateral, and a security agreement is created.

Here bank gave A \$50k, A had rights in the collateral (accounts receivable were owned by A as they were owed to A by A's customers), and the parties entered into a signed security agreement to that affect.

PERFECTION

Bank did not perfect because it neither filed its security interest nor took control or possession of the accounts receivable (emails to customers insufficient).

PRIORITY

Priority in the accounts receivable is first bank, second A, third in Bubba. Although Bank did not perfect an unperfected party takes priority over an unsecured party (in this case B). Further, unless B gets a lien on the accounts pursuant to judgment B has no priority to the accounts over A.

Question #1 Final Word Count = 1486

===== End of Answer #1 =====



**STATE BAR OF NEVADA
JULY 2012 EXAMINATION**

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

- EXAM 2, QUESTION 2 -

JULY 2012

EXAMINATION NO. 2;

QUESTION NO. 2: ANSWER IN YELLOW BOOKLET

Paul was an experienced slot machine technician. He was paid to service, maintain and repair slot machines. His business, Stingy Slots, was so successful that he needed help to satisfy his service requests. He contacted Bob, whom he had met in slot machine repair school, to help him service Stingy Slots's customers. It was agreed that Paul would assign some customer requests to Bob and pay him for each slot machine serviced. Paul intended to draft a written agreement for Bob, but he was so busy that the document was never completed.

Paul gave Bob shirts and hats with the "Stingy Slots" logo to wear during service calls. Chuck convinced Bob to let Chuck handle some of the service requests for Stingy Slots's customers. Bob agreed to give Chuck half of the money that Bob would receive from Paul for slots serviced by Chuck. Chuck wore a Bob's Stingy Slots shirt and hat while servicing slot machines.

After Bob entered into this arrangement with Chuck, Bob started a new business that performed cleaning services for many of the same casinos serviced by Stingy Slots. After the cleaning business became very profitable, Paul who demanded a portion of the profits from the cleaning business contacted Bob.

Chuck landed a new customer, Acme Casino, for slot machine maintenance and repair. Although Acme Casino believed it was hiring Stingy Slots for this service, Paul was unaware of the new customer. Chuck and Bob retained all of the money received from Acme Casino. Chuck charged Acme Casino twenty percent more than Paul's usual rates for maintenance and repair. Seven months after Chuck began performing work for Acme, Paul received this letter:

Dear Stingy Slots,

I am sorry to have to terminate our relationship. Although I paid your serviceman, Chuck, \$60,000 for six months of slot machine maintenance and repair, he never returned to my casino after the first month. Chuck has not answered my calls. I am demanding a return of \$50,000 for five months of service that I did not receive. Additionally, Chuck tipped a slot machine over while trying to un-jam a coin and broke my customer Gabby's leg. She has filed a lawsuit against me. You will be hearing from my lawyer.

Yours,

Acme Casino President

Upon receipt of this letter, Paul called Acme Casino's President and exclaimed, "What are you talking about?"

1. Discuss fully the liabilities and defenses, if any, of the following parties to Acme Casino:

Chuck

Bob

Paul

2. Discuss fully the liabilities and defenses, if any, of the following parties to Gabby:

Chuck

Bob

Paul

3. Discuss fully any claims and defenses that Paul may have against Bob or Chuck.

2)

===== Start of Answer #2 (2044 words) =====

1.

-- CHUCK--

In order to determine Chuck's liability, we must first determine whether or not Chuck was an agent of Stingy Slots (SS).

Principal/Agent Relationship:

In order for there to be a P/A relationship there must be assent, benefit, and control. Under these circumstances, Chuck (C) was recruited by Bob (B). Therefore we must determine if Bob was an agent of SS, and if so, then if Chuck was an agent of SS.

As to Bob --

For there to be assent, there must be an informal agreement b/t the P and the A, where the P has capacity. Here there was an informal agreement b/t Paul (P) and Bob. It does not matter that this document wasn't in writing, as it need only be informal. Second, B was acting for the benefit of P. He was servicing slot machines, bringing in more business, and generally doing things for SS and P. Lastly, it would seem here that B was under P's control. P assigned the customers to B,

gave him his uniform to wear, and generally B wouldn't be doing any work period w/o P. Therefore B was an agent of P.

As to Chuck --

Generally, under these facts, C would be considered a sub-agent in that he was recruited by an agent of P to help out with the work. P never recruited C himself, directly. In this situation, there must also be assent benefit and control. Here there is certainly benefit. Once again C is going and repairing slot machines as seemingly a worker of Stingy Slots, and bringing in business for the company. However, P was unaware of this arrangement, so there was no assent. Secondly, P therefore quite likely did not have any control whatsoever over C. Therefore, C is unlikely an agent of P.

On the other hand, the facts don't stipulate whether or not Paul directly knew of Chuck. If he did, then it's likely there was both assent and control, and C may not be liable personally.

Contract Authorization:

In the event that C was an agent of Paul or SS, generally the principal is not liable for any contracts entered into that aren't authorized. There are four ways to authorize contracts: actual express, actual implied, apparent, and ratification. Here there was no actual express or actual implied authority.

Apparent Authority --

There is apparent authority if the principal cloaks the agent with authority and the third party reasonably relies upon it.

Here Chuck was wearing SS shirts and hats when calling on Acme. Therefore it could be argued that Paul has cloaked Chuck with apparent authority. It also notes that Acme did in fact think Chuck worked for SS and seeing as Chuck had that uniform on, it would be reasonable for Acme to do so. Here therefore, C may not be personally liable for the money owed to Acme, and Paul and SS would be the liable party.

Ratification Authority --

Authority can also be ratified where the principal is aware of the material terms of the contract and accepts the benefits of them.

Here it does not appear that Paul was aware of the contract at all, b/c Chuck and Bob took all the money and Paul didn't know anything until he received the letter. Therefore he gained no benefit and didn't know the material terms. Therefore there was no authorization via ratification.

Partially Disclosed / Undisclosed Principal

If Chuck had been seemingly acting for a principal but not disclosing their name, or not giving a sign that there was a principal period, then they could be held liable personally as well if elected by Acme. However this didn't seem to be the case, as they were openly showing that they "worked" for SS.

Conclusion

If there was a P/A relationship, then Chuck wouldn't be personally liable as a result of apparent authority. If the P/A relationship didn't exist however, then Chuck would be personally liable for the contract entered into with Acme.

-- BOB --

P/A Relationship

As discussed above already, there needs to be assent, benefit, and control for a P/A relationship. As already discussed as well, Bob is indeed an agent of Paul and therefore a relationship exists.

Authorization:

As already discussed, there are four types of authorization and principals are not liable for

contracts entered into by agents unless they were authorized.

Actual Express --

Here Bob had actual express authority to enter into contracts. Paul told him that he could go and fix customers slot machines, and was not monitored by Paul. Bob was assigned customers specifically, and given the authority to do so. This need not be in writing, and can be verbal as well.

This authority can be terminated by a unilateral act of either party, or by death/incapacity of the principal. However, neither of those occurrences happened in this fact pattern.

Actual Implied --

There is implied authorization either by necessity, prior acquiescence, or custom/title.

Here there is arguably all three. Given that Paul had already allowed Bob expressly to enter into contracts, it would then follow that Bob could necessarily do anything that he deems necessary to follow through with his previously expressed authority. Secondly, if Bob had entered into contracts with customers before without Paul complaining, then he would also have authorization by prior acquiescence. Lastly if Bob's "title" normally allows someone of that standing to enter into contracts, then that too would allow him to enter into a contract with Acme.

Apparent --

It also seems that Bob has apparent authority. One must be cloaked and their appearance relied on.

Here Bob retained all the money with Chuck, so it can be assumed that he may have done some of the repairs on the machines for them, even though the letter only mentions Chuck. However, given that Bob was always wearing SS hats and shirts, he would have been cloaked. Therefore anyone that saw him would likely be reasonable in relying on him.

Conclusion

Bob without a doubt had several kinds of authority to enter into contracts. Therefore it is highly unlikely, absent undisclosed principal or or partially disclosed principal-situations (which aren't here), that Bob would maintain person liability for the Acme contracts.

-- PAUL --

P/A Relationship

As already discussed, Bob is certainly an agent of Paul's, and Chuck arguably is if Paul was

aware of his existence.

Liability

Paul will be held liable for Bob's actions as Bob was authorized to enter into contracts in numerous different ways. If Bob was aware of Chuck's existence (creating likely both assent and control), then Paul too will be liable for Chuck's actions.

-- PARTNERSHIP LIABILITY --

It should lastly be mentioned that there may have been partnership here b/t Paul and Bob. A partnership is the carrying on of a business as co-owners for profit, where those profits are shared. There are no filing formalities. Here the profits were certainly shared by Paul and Bob, which is the key function of a partnership. Paul and Bob were both putting in services, with Paul likely also putting in capital.

In a partnership, the partners are all agents of the partnership, and are responsible for each other's actions as well. Therefore Paul could be liable for Bob's actions, and Bob could be liable for Paul's.

Chuck could also have liability through estoppel, if it is deemed that he held himself out to be acting as a partner. However that is unlikely here.

2.

-- CHUCK --

Tort Liability

Generally principals are not liable for the torts of their agents unless there is a P/A relationship and the agent was acting w/in the scope of their employment.

P/A Relationship

See above.

Scope of Employment

Here the test is to look to whether or not the work being done was "of the kind" (in the description), "on the job" (a frolic or detour), and whether it was for the benefit of the principal.

Here Chuck was performing maintenance on slot machines. This is the specific purpose being SS, and would definitely have fit the job description in working for SS. This would have also been considered "on the job," as it was done in a casino while fixing a slot machine. However,

this was not for the benefit of the principal. Under the Acme contract, Chuck was acting purely for himself and for Bob. Paul saw none of the money, and was unaware of the contract with Acme period.

Intentional Torts

Principals are generally never held liable for the intentional torts of their agents unless they stem from employment, authorize them, or they were done with intent to serve the principal. Here this tort was likely negligence, as it was an accident, and wasn't intentional.

Conclusion

Chuck, as a result of the lack of benefit for Paul, will be held personally liable to Gabby for negligence. She can collect punitive and injury damages.

-- BOB --

P/A Relationship

See above.

Scope

Here once again as mentioned, it doesn't seem that Bob actually ever step foot into the Acme casino. He also wasn't the one injured Gabby, as it was Chuck. Therefore Bob did not commit any torts. Even if he was acting under the job description and was on the job, he too wasn't sharing profits with Paul so he wouldn't have been an "agent" in this sense either.

Conclusion

Bob is not likely liable for the tort to Gabby as he didn't commit it. However, if Bob can be determined to be the principal for Chuck (assent, benefit, control) then he COULD be held liable for the tort to Gabby. This is unlikely, as it didn't seem that Bob had the ability to "control" Chuck, as Chuck entered into the agreement with Acme all on his own.

-- PAUL --

Scope / Conclusion

As mentioned above, neither Chuck nor Paul would have been acting for the benefit of Paul when the tort to Gabby occurred. Therefore, Paul will not be personally liable to Gabby for her broken leg.

3.

Agent Duties:

Generally agents have a duty of care, duty of loyalty, and a duty to obey reasonable directions.

All three of these duties were likely violated.

Duty to Obey Reasonable Directions --

Here it doesn't seem that Paul ever gave any direction to enter into contracts without first asking him, as this was done by Chuck, and in a smaller sense Bob, with Acme. Paul merely wanted to assign customers to only Bob; Paul, possibly, also did not allow Bob or give him directions to bring on another agent. These would all have been reasonable directions, as Paul is the boss and in control of SS.

Duty of Care --

If Chuck indeed was an agent, his duty of care may have been violated when he negligently crushed Gabby's leg with the slot machine. Also generally both Bob and Chuck violated this duty when entering into a contract with Acme and not performing the contract. They left them w/o \$50,000 in services, which is bad for SS, as it puts them on the hook to Acme.

Duty of Loyalty --

This duty includes the duty not to usurp opportunities, no self-dealing, and no secret profits.

Here both Bob and Chuck usurped an opportunity. Acme was a casino with slot machines that needed repairs, exactly what SS does. This was an opportunity for the business, and both Bob and Chuck usurped it and left it to themselves. Secondly, they put themselves above SS in that they took all of the work and money for themselves. A patron was injured on the job, and the services weren't rendered while taking the money away. This put themselves above SS. Lastly, they certainly gained secret profits. The each of them made out with \$30,000 and Paul knew nothing about it.

Disgorge Profits / Recover Losses

As a result of all the above duties being breached, Chuck and Bob will have their profits disgorged and therefore won't make out with anything from th Acme contract. Those digorged profits will also then be used to help Paul recover any loseees he may have sustained for Acme and Gabby's actions against Paul and SS, as well as any other costs he may have had to deal with in terms of losing business.

Question #2 Final Word Count = 2044

===== End of Answer #2 =====



**STATE BAR OF NEVADA
JULY 2012 EXAMINATION**

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

- EXAM 2, QUESTION 3 -

JULY 2012

EXAMINATION NO. 2;

QUESTION NO. 3: ANSWER IN DARK BLUE BOOKLET

Owen purchased Blackacre, an unimproved lot in Nevada that is adjacent to a lake. Owen borrowed the purchase money from Larry. Owen signed a promissory note in favor of Larry. The note was secured by a deed of trust on Blackacre. Larry properly recorded the deed of trust.

Owen then borrowed \$20,000 from Nancy. Nancy owns the land next to Blackacre. Owen signed a promissory note in favor of Nancy. The note was secured by a deed of trust on Blackacre. Owen also executed an easement that allowed Nancy to use a path across Blackacre as a quick and convenient way to get to the lake. Nancy recorded the easement but inadvertently failed to record the deed of trust.

Owen then borrowed \$150,000 from Bank. Owen signed a promissory note in favor of Bank. The note was secured by a deed of trust on Blackacre. Bank properly recorded the deed of trust. Nancy then discovered her mistake and recorded her deed of trust.

Owen stopped making payments to Larry, Nancy and Bank. Larry filed suit against Owen and when Owen failed to file an answer, Larry obtained a default judgment against Owen for \$200,000, the outstanding balance then due on Larry's note. Larry recorded his judgment.

Bank then properly conducted a trustee's sale under the terms of its deed of trust. The total outstanding sum then owed to Bank pursuant to the note was \$140,000. At the trustee's sale, Bank was the only bidder. Bank bid \$50,000 and received title to Blackacre. At that time, Blackacre had a fair market value of \$100,000. Three months later, Bank sued Owen for the \$90,000 difference between the sum it was owed pursuant to the note and the amount Bank paid for Blackacre at the trustee's sale. Bank then erected a fence around Blackacre, preventing Nancy from using the path to the lake

Fully explain:

- 1. Larry's rights and remedies regarding his loan to Owen;**
- 2. Nancy's rights and remedies regarding her loan to Owen and her easement over Blackacre;**
- 3. Bank's rights and remedies regarding Blackacre and Owen; and**
- 4. Owen's liability to Bank.**

3)

===== Start of Answer #3 (1014 words) =====

1. Larry's rights

Larry is the holder of a purchase money security interest (PMSI), namely a mortgage, of blackacre. A PMSI is a super priority security interest that takes priority over all other interest; therefore, Larry normally would have priority over the bank and Nancy, and a right to foreclose on the collateral. However, Nevada has by statute adopted the one-action rule. this rule, unless waived by the debtor, requires the creditor to exhaust the collateral before suing on the note, otherwise, the creditor forfeits their secured interest in the collateral.

Here, because Larry filed suit before foreclosing on the collateral, Larry has waived his priority interest in the collateral. Nevada follows the first in time rule to secured interest and because the judgment is recorded after the bank and nancy required their interest, it is junior to all of the other recorded interest. because the land at the time of the foreclosure sale was only yielded a price of \$50,000, and the bank had an interest of 140,000 and Nancy had an interest of 20,000, Larry's security interest is extinguished out. Accordingly, Larry has no claim to blackacre and may only proceed agaisnt Owen personally for the debt and may attach other property that Owen owns.

2. Nancy's rights

Nevada is a race-notice state, which means that no conveyance or mortgage is good against

subsequent interest that does not have notice and is not recorded. In Nancy's case, because she failed to record her deed of trust prior to the bank's recording and there are not facts indicating that the bank was aware of this deed of trust, Nancy's claim is junior to the bank's and is wiped out by the trustee sale because there was no equity in the property belonging to Owen remaining for her to collect on. Nancy, however, may sue on the note and obtain a judgment against Owen for the balance of her loan.

Note, however, that if the bank failed to give her notice of the trustee sale, her interest in the land would not be extinguished by the trustee sale and the bank would take subject to her interest.

An easement is a non-possessory right to use the property of another. An easement may be express or implied in law, and it may be either appurtenant or in gross. In an easement appurtenant, there is a dominant estate and a servient estate. In such an easement, the dominant estate may use the servient estate for its benefit. An easement in gross, however, is to an individual regardless of whether they own a particular piece of land. In order for an easement to run against subsequent holders, there must be an agreement that touches and concerns the land, and notice.

In this case, Nancy holds a valid easement appurtenant to access Blackacre. The access right touches and concerns the land and the bank is on notice of the conveyance of the easement since it was recorded before its security interest and it obtained a deed by trustee sale. The bank by fencing off Blackacre and preventing Nancy from using the path violates her rights to the easement. Therefore, she can maintain an action for damages and seek an injunction from the

courts .

3 & 4. Bank's rights and remedies regarding Blackacre and Owen;

The bank holds a valid security interest in Blackacre by having a promissory note and recorded deed of trust. The deed of trust allows the beneficiary of the trust to foreclose against the debtor by serving a notice of default and notice of intent to sale on the debtor. the trustee sale conveys to the buyer all of the rights to the proeprty owned by the trustor, Owen in this case.

Because the bank takes from a trustee sale, the bank does not take the title with any warranties of title by the trustee or owen.

When a collateral is inadequate to satisfy the secured obligation, the law allows the creditor to sue on the note to recover the undersecured portion of the obligation against the debtor personally. HOwever, Nevada has adopted an anti-deficiency statute that limits this right. Under the anti-deficiency statute, a creditor is prohibited from seeking a deficiency if it is a PMSI, the creditor is a financial institution, the debtor did not obtain a refinance and the debtor used the property as its principal residence. It also prohibits a deficiency judgment from being awarded if the creditor violates the one-action rule. Furthermore, Nevada requires that the creditor applies for the deficiency judgment from the district court within 6 months of the trustee sale.

Here, neither prohibition applies, therefore, the bank may seek a deficiency judgment against

Owen and the application was made within the 6 months statute of limitations (it is unclear under Nevada law, what constitutes an application. There is authority that held that a motion for summary judgment for a deficiency judgment is sufficient as an application and some authority to suggest that the commencement of a suit, by itself is insufficient, I proceed with the assumption that a proper application was made.). However, the anti-deficiency statute provides that a creditor may only obtain a deficiency judgment for the difference between the balance of the debt and the market value of the property. this rule is to ensure that creditors do not obtain double recovery by obtaining the property for a price substantially below its fair value and then obtaining a judgment for the difference between the unreasonable sale price and the balance of the loan.

Finally, the Owen is not liable to the bank for the amount it paid to acquire Blackacre. The proceeds of a trustee sale is applied to the most senior loan and if there is any remaining proceeds, it is applied to any other junior interest and then distributed to the debtor. Allowing the bank to sue Owen for the \$50,000 it paid would allow the bank to obtain the collateral and have the entire amount of its loan.

As a result, Owen is subject to a deficiency judgment of \$40,000 only.

Question #3 Final Word Count = 1014

=====**End of Answer #3**=====



**STATE BAR OF NEVADA
JULY 2012 EXAMINATION**

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

- EXAM 2, QUESTION 4 -

JULY 2012

EXAMINATION NO. 2;

QUESTION NO. 4: ANSWER IN LIGHT GREEN BOOKLET

Linda is a deputy district attorney in Reno, Nevada. The district attorney assigned Linda to prosecute a case in which Defendant Drake was charged with sexually assaulting a woman named Vicki.

Drake hired Alan, a highly regarded criminal defense attorney, to represent him. Wealthy uncle paid to Alan a customary fee to defend the Sexual Assault charge. Drake's uncle enclosed a note with the payment that read, "Keep me up to date on the progress of the defense. If you take this case to trial and win, expect a handsome bonus from me."

The district attorney assigned a paralegal to help Linda prepare for trial. Shortly after he began working on the case, the paralegal told Linda, "I just talked to Vicki. She told me that she was convicted of a felony Perjury charge in 2008 in Florida. I told Vicki not to tell Alan about it if she wants Drake convicted at trial."

During Drake's jury trial:

Vicki testified that Drake had sexual intercourse with her against her will. Linda did not produce any other evidence that Drake committed Sexual Assault against Vicki.

Alan was so impressed with Linda's trial skills that he asked her to stop by his office during a recess to discuss starting "a boutique criminal defense firm." Alan told Linda, "If you become my partner, I'll teach you everything I know about criminal defense - but only if you agree to never practice law again in Nevada if it doesn't work out."

Alan learned that his current law partner represented Vicki in a sexual harassment suit against her boss in 2006. Alan's partner said Vicki told him in confidence that she hated her boss, and would say "whatever it takes" to get her boss fired.

The jury found Drake guilty of Sexual Assault.

Following trial, but before Drake's sentencing hearing:

Vicki told Linda that her trial testimony was "all a lie."

When Drake was out of jail on his own recognizance, Drake showed Alan his pistol and confided that he was going to kill Vicki for getting him convicted.

Identify and fully discuss all ethical issues confronted by Linda and Alan, and the applicable Nevada Rules of Professional Conduct.

4)

===== Start of Answer #4 (1325 words) =====

ALAN'S VIOLATIONS

DUTY OF CONFIDENTIALITY

An attorney has a duty to keep all communications with a client confidential and may not disclose any information obtained from a client regardless of who pays the attorney fees unless the client consents.

Here, Alan may not discuss the case with Drake's (D) uncle unless D gives informed consent. A third party may pay the legal fee, but that party may not be informed of any confidential communications. Alan should clearly communicate to the uncle that although he is paying the fee, Alan's duties are strictly owed to D and not to the uncle.

LEGAL FEES

The attorney's fees must be reasonable and in writing. The fee agreement must set out all the costs and fees associated with the representation and should be customary to the type of litigation. An attorney may not take a contingency fee for a criminal or domestic relations case. Also, an attorney may not accept a bonus or item of value for his representation of a client that is not set forth in the fee agreement.

Here, Alan may not accept a bonus for his services which would be construed as a bonus or

contingency. Alan should instruct the uncle that he will do the best he can, but will not accept a bonus. Alan may only collect the fees set out in the fee agreement.

If Alan accepted a bonus he would be subject to discipline.

DUTY OF LOYALTY- CONFLICT OF INTEREST

An attorney owes a duty of loyalty to his client and may not conduct himself in a way that may be adverse to his client. An attorney must not enter in to any agreements that would benefit the attorney at the cost of the client.

Here, Alan is trying to hire the prosecutor in a current case against his client. Alan should wait until the case is completely over in order to discuss employment opportunities with opposing counsel. This would constitute a conflict of interest and would have the appearance that Alan and Linda are in cahoots. This is highly inappropriate and has the appearance of impropriety. This is adverse to D and effects his case and his freedom.

Alan would be subject to discipline for this conflict of interest.

DUTY OF LOYALTY - CONFLICT OF INTEREST

An attorney has a duty not to represent a client who has a conflict of interest with a former client without the current client's informed consent. If representation of a current client would require knowledge or use of material from the past representation of the former client, or if the subject

matter of the litigation is similar the attorney must decline the representation unless both the former and the current clients give their informed consent.

Here, Alan's law partner represented the victim in the current case in a sexual harassment case 6 years ago. This is a conflict of interest because the former client is the victim in a criminal case against the current client. Alan would need to get Vicki's consent to defend D and that would be inappropriate given the case and the circumstances.

IMPUTED DISQUALIFICATION

If an attorney comes to work for a law firm that represents an adverse party to one that the attorney or his firm represented in his prior employment that attorney must be screened from the case if screening can reasonably be done and if that attorney was not substantially involved in the case at the previous firm. If screening can not be adequately done then the attorney and his firm must decline representation.

Here, not only did Alan's partner actually represent Vicki in the previous sexual harassment case, he revealed privileged information to him regarding the case. Screening was not done and would not be appropriate given the partner's knowledge and level of representation of Vicki.

This was a violation and both Alan and his partner are subject to discipline.

DUTY TO DISCLOSE FUTURE CRIMES

When a client discloses plans or an intention to commit a crime in the future the attorney must first try to talk the client out of it until the attorney is significantly satisfied the client will not commit the crime. If the attorney can not talk him out of it or has any doubt the attorney must immediately disclose this information to the appropriate authorities.

Here, D not only told Alan he was going to kill Vicki, he showed him the gun. This is clearly an immediate threat to Vicki and Alan must notify the authorities immediately and disclose this communication.

Alan is subject to discipline for this violation. Alan may also be liable if anything should happen to Vicki and he failed to report it.

LINDA'S VIOLATIONS

DUTY OF CANDOR AND FAIRNESS

An attorney has a duty of honesty and candor to the tribunal. An attorney must be fair and must inform the opposing counsel of evidence that negates the defendant's guilt. A prosecutor has an absolute duty to inform a criminal defendant of all information that negates his guilt.

Here, the paralegal told Linda about Vicki's conviction for a crime that pertains to Vicki's lack of truthfulness that is relevant to the case. Because this conviction will be admissible against Vicki to show that she is not a truthful person and may show that she fabricated this claim. By not

disclosing this information to the defendant Linda breached her duty. However, if the defendant's counsel could very easily discover this conviction on their own - if the conviction was in the current jurisdiction and under Vicki's current name - then Linda would not be required to disclose.

Linda will be subject to serious and severe discipline for this violation if there is no way that the defendant's counsel would be able to find this information on their own.

DUTY TO PROFESSION

An attorney has a duty to the profession to conduct herself in a manner that encourages respect and dignity to the profession of law. An attorney must conduct herself and her practice in a professional and honest manner so as to encourage the public to respect the profession. A prosecutor must not prosecute defendants when there is insufficient evidence of their guilt. Malicious prosecution is a case against a defendant solely meant to harass.

Here, Linda did not produce any evidence against D except for Vicki's testimony, which Linda knows is potentially untrue. Linda failed to prove a sexual assault beyond a reasonable doubt and has a duty to dismiss this case.

Linda would be subject to discipline for malicious prosecution. Linda will also be subject to discipline for her breach of duty to the profession.

DUTY TO REPORT VIOLATION

If an attorney has knowledge that another attorney has breached his ethical duties set forth under the rules of professional conduct, the attorney has a duty to report such conduct to the appropriate authorities.

Here, Linda was approached by Alan and offered a job. This was inappropriate and a violation of his duty of loyalty to his client. Linda should report Alan to the appropriate authority.

Linda is likely subject to discipline for this violation.

DUTY OF CANDOR TO TRIBUNAL

An attorney must be truthful to the tribunal and the opposing party.

Here, even though D was already convicted, Linda had a duty to the tribunal and to D to inform them of Vicki's statement that she lied. Linda is a prosecutor and represents the people of Nevada. She does not represent Vicki and therefore owes Vicki no duty of confidentiality and must disclose what Vicki said to her.

Linda had the opportunity at the sentencing hearing to disclose this statement from Vicki and she refused to do so. This is violation of her duty as a prosecutor and as an attorney. This was an injustice to D and Linda must be disciplined for her breach. An innocent person was sent to prison and Linda did not step up and perform her duty to be truthful and honest.

Question #4 Final Word Count = 1325

===== End of Answer #4 =====

END OF EXAM