



**FEBRUARY 2024
EXAMINATION ANSWERS**

**SELECTED APPLICANT ANSWERS
NEVADA BOARD OF BAR EXAMINERS**

QUESTION 1

Question 1 - Selected Answer 1

Amy participated in the unauthorized practice of law

A lawyer may not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction. Hence, Amy may not practice law if the regulating body, the Nevada Bar, has not admitted her to practice. Until Amy was sworn-in as an attorney, she was unauthorized to practice law in NV. To hold herself out as a practicing attorney before swearing in occurred is a violation of her duty.

Amy owed a duty of competence to Bruce

A lawyer must be competent to handle the matter or must become competent in a timely manner. Competence is acting with the legal knowledge, skill, and preparation reasonably necessary for representation.

Amy's only previous work in criminal cases involved minor charges. Bruce's case involved a first-degree murder charge. If Amy did not put in extra work in a reasonable time-frame to become competent to defend a murder charge, she has breached her duty of competence to Bruce.

Amy also failed to interview multiple eyewitnesses who testified at trial that Bruce had shot and killed the victim. A competent attorney would have discovered these witnesses. This further shows her breach of this duty.

Duty to the profession

Amy, and any lawyer, has a duty to act in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession. Amy violated this duty by her various other violations of the duties she holds as an attorney. Such a general disregard for the duties of her profession overall shows a lack of care for the profession. Additionally, holding herself out as a licensed attorney when she is not could put the profession in a bad light. Amy has breached her duty to the profession

Fee agreements

Criminal Contingent fees

Contingent fee agreements are allowed except in criminal or domestic relations matters. Bruce's case involved a criminal matter, and so the contingent fee of \$2,000,000 was improper.

A contingent fee agreement must state the method by which the fee is to be determined and whether and when litigation expenses will be deducted. Amy's inappropriate contingent fee also failed to include this information.

Appropriateness of the fees

Additionally, attorneys' fees must be reasonable. Factors taken into consideration to determine whether a fee is reasonable includes the time and labor required for the representation, difficulty of the issues in the case, the level of skill and experience required, and the average fees in the community. Fees found to be excessive will not be enforced by a court.

Here, Amy is a brand new lawyer (not even licensed yet). While a first-degree murder case involves complicated and important issues, Amy's handling of the case does not justify her stated fee. Additionally, Amy did not put forth sufficient time or labor as shown by her failure to discover the testifying witnesses before trial. Her fee of \$2,000,000 upon acquittal is disallowed because of the contingent fees rule, but is also excessive. Amy has provided no basis for her charges beyond using the funds to establish her new law office.

Client Trust Accounts

Amy's \$400,000 retainer is also improper. A retainer fee is permissible but must be held in a client trust account. That money is the property of the client until the lawyer has earned it. By placing the funds directly into her general bank account, Amy has commingled client funds with her personal funds.

A retainer fee and the fee arrangement must inform the client the basis or rate of the fee and the expenses for which the client will be responsible, unless the lawyer regularly represents the client and charges the same rates as in similar matters.

Amy did not disclose her basis for the fees, nor did she withdraw only the portions that she had earned. Her declaration on the fee agreement that the retainer was non-refundable and deemed fully earned by Amy when paid was inappropriate. Additionally, the amount of \$400,000 is likely excessive unless Amy can justify those costs. There are no facts to indicate that she can.

Duty of Diligence

An attorney must act with reasonable diligence and promptness in representing a client. Amy's failure to discover the testifying witnesses and interview them pre-trial shows a lack of diligence on her part. Amy has breached her duty of diligence.

Duty of Communication

An attorney has a duty to provide information to the client, such that the client can make informed decisions. Additionally, an attorney must notify the client of any settlement offer or proffered plea bargain, unless the client has previously indicated that the proposal would be acceptable or unacceptable or has authorized the attorney to accept or reject the offer.

Amy was offered a plea bargain and failed to pass this offer on to Bruce. She declined the offer without informing him or receiving his consent. Amy has violated her duty of communication.

Amy's specialty in criminal defense

A lawyer may communicate that they practice in particular fields of law. A lawyer must not communicate that they are a specialist or expert unless they (1) are certified as a specialist or expert by an organization approved by the board of governors of the NV Bar, (2) devoted at least 1/3 of their practice to the area of law in each of the preceding 2 calendar years, (3) completed 10 hours of continuing legal education in the area of law in the past calendar year, (4) carry a minimum of \$500,000 in malpractice insurance (unless practicing exclusively in public law), and (5) register with the NV Bar, pay a fee, and submit reporting and compliance forms annually. If an attorney complies with these requirements, she may advertise the certification and must clearly state the name of the certifying organization.

Here, Amy has not been certified as a specialist, she hasn't even been sworn-in as an attorney. She has not practiced for the preceding 2 years so cannot have devoted her practice to criminal defense. There is no indication as to the final 3 criteria but presumably they are also not met. Amy may not hold herself out as a criminal defense specialist.

***** Question 1 ENDS HERE *****

Question 1 - Selected Answer 2

Please fully discuss all ethical issues arising under the NV Rules of Professional Conduct.

As an initial matter, Amy (lawyer) passed the Nevada bar exam and (upon eventual approval of her bar application) was sworn in as a Nevada attorney. As such, she is subject to the Nevada Rules of Professional Conduct (NRPC), and must comport her conduct according to the rules, or else be subject to discipline.

Amy's Law Practice -- Unauthorized Practice

First, there may be an issue with the fact that Amy started her own law practice *before* her bar application was approved/she was sworn in. While waiting for this, Amy started her own law practice specializing in criminal defense. Although Amy received approval on her bar application and was sworn-in as an attorney prior to trial, she should have waited for this approval prior to opening her own law practice and accepting clients, such as Bruce. There is a strong argument that this amounts to the unauthorized practice of law as she is not currently an active member of the state bar until accepted and sworn in. Except as permitted by other ethics rules, a lawyer who is not admitted to practice in NV shall not solicit clients, hold out to the public, or otherwise represent that she is admitted to practice law in NV, or establish an office or other regular presence in the jurisdiction for the practice of law. NRPC 5.5(d). Exceptions include pro hac vice or in association with a local lawyer, neither of which are present here. As such, Amy violated these rules by opening her law practice and accepting representation of Bruce before she was sworn in, making her subject to discipline.

However, this perhaps does not prevent the formation of a lawyer-client relationship with Amy and Bruce, so long as Bruce reasonably believes the relationship exists (no formal writing or agreement is required). Here, the facts indicate that Bruce approached Amy to represent him in a criminal matter, and after being assured by Amy that she passed the NV bar exam and would be admitted to practice before his trial commenced, (and that she had previously handled dozens of criminal law cases at the law school's legal clinic), it appears Bruce reasonably believed that they had a lawyer-client relationship. This point is furthered by the signed written fee agreement between lawyer and client. As such, a lawyer-client relationship arguably still exists between Amy and Bruce, even though Amy has violated the rules of unauthorized practice by starting before being admitted to practice in NV.

Professional Competence

There are a few issues presented for professional competence.

Under the Nevada rules, a lawyer is obligated to provide competent representation to a client and must possess the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. NRPC 1.1.

Knowledge & Skill: Factors relevant to determining whether a lawyer has the requisite knowledge and skill include: (1) the relative complexity and specialized nature of the matter, (2) the lawyer's general experience, (3) the lawyer's training and experience in the field in question, (4) the preparation and study the lawyer is able to give the matter, and (5) whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In some cases, all that is necessary is the proficiency of a general practitioner.

Here, Amy had participated in a legal clinic in law school and worked on dozens of criminal cases (at the law school's legal clinic) involving minor criminal charges. Amy was always supervised by a faculty member in these cases. Amy's work in minor criminal charges may be an issue, as Bruce's case is dealing with a first-degree murder charge. Although Amy has general experience in criminal matters from law school, she only handled "dozens" of cases and she was always supervised and only handled minor charges. Thus, there is likely an issue with Amy's competence to handle this case.

Thoroughness & Preparation: Whether a lawyer is properly prepared is determined by the degree of complexity and consequence of the matter.

Here, Amy had participated in a legal clinic in law school and worked on dozens of criminal cases (at the law school's legal clinic) involving minor criminal charges. Here, Bruce's criminal matter is a first-degree murder charge, which is much more serious than "minor" criminal charges that Amy is likely familiar with. A lawyer may nevertheless accept representation if the requisite level of competence can be achieved by reasonable preparation, which can also be provided through association with a lawyer of established competence in the field. It doesn't appear that Amy associated with a competent lawyer in this matter, so this wouldn't apply here. However, Amy is able to obtain the requisite level of competence through preparation and study, but the facts don't indicate just how much preparation/study Amy put into this to gain competence. With that, it's likely Amy was able to gain the requisite competence needed to handle this case through preparation and study.

Lacking Competence: A lawyer should not accept representation in a matter unless it can be performed competently. A lawyer who represents a client incompetently is subject to punishment by the disciplinary tribunal, regardless of causation or any financial loss to the client. Here, it's likely that Amy was able to gain the requisite competence through preparation and study, but the facts don't say much about how much preparation/study was put forth besides her experience in law school. With just that experience, it's likely that Amy lacks competence and could be subject to discipline.

Reasonableness of Fee:

Another issue may be the reasonableness of the fee between Amy and Bruce.

Under the Nevada Rules, a lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. Lawyer fees are regulated for reasonableness based on the amount and nature of the fees. Only contingent-fee arrangements must be in writing, but all rate or fee arrangements must be communicated to the client before, or within a reasonable time after the relationship commences.

Here, we must consider whether Amy's legal fee of \$2,000,000 (only if Bruce was acquitted, making it a "contingent fee" which must be in writing) and the cost retainer of \$400,000 is "reasonable." Factors include the difficulty of the case, preclusion of other employment, the nature of the relationship & the fee arrangement, the expertise of the attorney, and fees charged in similar localities. Here, Amy is a freshly licensed attorney prior to trial, and has only handled minor criminal matters at her law school legal clinic while supervised by an attorney. Therefore, her expertise isn't very high to justify exorbitant fees. However, being a first degree murder case, it's likely that this case will be difficult and complex. It's unclear from the facts what similar localities fees look like.

Contingent Fees:

Attorneys may charge a fee contingent on the outcome of the case. However, contingent fees are prohibited in (1) criminal cases and (2) domestic-relations cases when the fee is contingent on obtaining a divorce or on the amount of support

recovered. A contingent fee must be in writing, must be signed by the client, and must include a boldface type that is as large as the largest type used in the agreement, the following: (1) the method used to determine the fee, including the percentage retained by the lawyer in the event of settlement, trial or appeal; (2) A statement about whether the client is liable for expenses regardless of outcome, (3) text explaining that the client may be liable for the opposing party's attorney's fees and costs in the event of a loss; (4) the details of the calculation for litigation and other expense deductions, including whether such expenses are to be deducted before or after the contingency fee is calculated; AND (5) A statement that a suit brought solely to harass or to coerce a settlement may result in liability for malicious process.

Here, Amy's \$2,000,000 fee "only if Bruce was acquitted" is a contingent fee, which must meet the elements above to be valid. Here, the fee was in writing, signed by the client. However, the contingent fee did not include any of the boldface type requirements as outlined above. Additionally, this is a contingent fee in a criminal case dependent upon Bruce being acquitted or not, which is invalid. As such, this contingent fee is invalid under Nevada law.

Retainer

A lawyer may require payment in advance of services rendered as long as they are deposited into a client trust account to be withdrawn only as fees are earned or expenses incurred, and the lawyer returns any unearned portion at the time the representation is terminated. NRPC 1.15(c), 1.16(d). If the lawyer charges a true retainer fee (aka money paid solely to ensure the availability of the lawyer), then the lawyer generally does not have to refund the fee if the representation ends, unless the parties agree otherwise.

Here, Amy's cost retainer of \$400,000 is said "to cover expenses of his case" rather than money paid solely to ensure the availability of the lawyer. As such, this doesn't appear to be a true retainer fee, so Amy likely has to refund the fee if representation ends, unless the parties agree otherwise. Here, it could be argued that they agreed otherwise, and as such Amy would not have to refund this amount. However, there is another issue with how Amy handled these client funds. Here, Amy immediately deposited the funds into her general bank account, and withdrew the funds to pay for expenses related to establishing her law office before the end of the representation. Amy should have deposited these funds into a client trust fund account, as outlined below.

Client Trust Fund Account/Commingling of Funds:

A lawyer may require payment in advance of services rendered as long as they are deposited into a client trust account to be withdrawn only as fees are earned or expenses incurred, and the lawyer returns any unearned portion at the time the representation is terminated. In Nevada, all funds received or held for the benefit of clients must be deposited in one or more identifiable bank accounts which must be maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third party. A lawyer must deposit advance payment of legal fees and expenses into the client trust account and can withdraw the fees and expenses only after they are earned or incurred. Lawyers are not allowed to commingle funds/property from clients, and must keep client property and funds separate from their own and are subject to discipline for commingling funds.

Here, Amy did not deposit the funds into a client trust account, and did not withdraw only as fees were earned or expenses incurred. Instead, she immediately deposited the funds into her own general bank account (commingling client funds with her own personal account, a violation), and withdrew the funds to pay for expenses related to establishing her law office before the end of the representation. This is a violation of the rule outlined above, and as such, Amy is subject to discipline for mishandling the client's funds.

Duty to Communicate

Lawyers must communicate offers of settlement to the client. The final decision whether to accept any offer rests with the client. A lawyer who agrees to a settlement without the client's consent and authorization is subject to discipline, but the opposing party may enforce the agreement if the lawyer acted with apparent authority.

Here, the DA's office communicated a plea bargain to Amy, but she declined the plea bargain offer without first discussing it with Bruce because she strongly believed she would prevail at trial. Amy should have communicated this settlement offer to the client, and as such is thus likely subject to discipline for failing to do so. There may be an argument that she was acting with apparent authority (because she strongly believed she would prevail at trial) and so the opposing party should be able to enforce it, but this argument will likely fail because the final decision whether to accept any offer rests with the client, and the facts do not indicate much about Amy's apparent authority to enter into this settlement without Bruce's permission.

Eyewitnesses

Amy should have done her due diligence to speak with key eyewitnesses to know what to expect of their testimony at trial. Her failure to do so here may have cost Bruce the case, and as such he may have a claim for ineffective assistance of counsel, malpractice, or else Amy may be subject to discipline under the NRPC for failing to competently and diligently represent her client by uncovering material facts to the case.

***** Question 1 ENDS HERE *****



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QUESTION 2

Question 2 - Selected Answer 1

1. Did Paradise and Smart have a contract, and if so, what claims and arguments can they raise against each other?

A. Whether and what kind of contract was formed.

The first question is whether the alleged contract is controlled by the Article 2 of the UCC, or by other law.

The UCC governs all sales of products regarding the sale of goods.

According to the purchase order, Paradise sought to purchase Smart Home control pads. Under the UCC, these are considered goods and the UCC, together with certain common law provisions, will apply.

Turning to the transaction, Paradise offered in writing (email) to purchase 500 control pads at a price of \$3,000 per unit. As part of the offer, the delivery was to be made by August 1, 2023. Smart, the seller, responded with a different proposal, by offering to build custom-designed units.

Had Smart shipped the goods as an accommodation, Paradise would have had the opportunity to accept or reject the goods. A shipment before the due date, if made in good faith, would also permit Smart to cure the default if Paradise rejected the delivery.

The reply Smart therefore was not in conformity with the offer, and the terms varied so much that there was no agreement between the parties.

Under the UCC, unless the contract language or circumstances unambiguously indicate otherwise, acceptance may be made in any manner and by any medium reasonable under the circumstances.

Paradise had the ability to reject the counteroffer, by outright rejection, or providing a further counter-offer. Paradise did neither. Paradise ratified the amended terms by telling Smart: "sounds great," which was an affirmative reply to the counteroffer, and confirmed the agreement.

Paradise can make the argument that the verbal acknowledgment did not constitute an acceptance of the counter-offer, either because it was too vague or because it was made verbally.

Smart would argue that Paradise took no further steps, and that Smart was under these circumstances expected to proceed and fulfill the parties' agreement, under the revised terms.

The fact that Paradise contacted Smart and advised they were canceling the order is a clear indication that Paradise assumed it had a binding agreement with Smart. Smart would make that argument. Further, because the goods were custom-built, Smart may have trouble re-selling these goods in attempting to mitigate damages, and may seek recovery of the cost to produce those goods and the lost profit on the entire transaction.

B. Consequences of the breach.

After the repudiation by Paradise, Smart could not continue to manufacture the goods and thereby raise damages. Smart was obligated to minimize the damages, after receiving the direct repudiation from Paradise.

Further, because Smart indicated it would need to specially manufacture the goods, Paradise was now aware that the goods were customized for Paradise, and that a breach by Paradise could result in greater damages.

2. Whether there is a contract between Paradise and Budget and what are the terms?

A. Nature of the contract, if any.

Paradise made a purchase order by email, requesting 500 control pads. Budget replied, and said it would deliver and install them by August 1, 2023. Budget also disclaimed warranties of interchangeability and fitness.

The UCC governs this contract, since it involves the sale of goods. The UCC permits a counteroffer that does not match the offeror's terms, and construes a contract in many situations.

The UCC states that unless the contract language or circumstances unambiguously indicate otherwise, acceptance may be made in any manner and by any medium reasonable under the circumstances. Further, the UCC rejects the common law mirror image rule and recognizes a binding contract despite the presence of nonconforming acceptance in two situations: the shipment of nonconforming goods and the "battle of the forms."

A non-conforming acceptance contains additional terms when its provisions address an issue or topic not addressed in the original offer. A nonconforming acceptance contains different terms when the offer says one thing about a particular issue and the would-be acceptance says something else.

Additional terms become part of the contract unless, among other reasons, "...the additional terms would materially alter the contract."

A clause negating standard warranties of interchangeability or fitness for a particular purpose, in circumstances where they typically apply are considered material, for purposes of the statute.

Consequently, the terms are "knocked out" and the eliminated from the parties' contract.

Therefore, the contract terms between Paradise and Budget consist of the agreement to provide 500 control pads, and delivered and installed by August 1, 2023. The price is stated as "half price," which would imply a price of \$1,500 based on

Smart's pricing, however, it is not clear if price was incorporated into the agreement. If not, the UCC would provide a filler for this term based on the reasonable price at the time established by the contract for the delivery of goods, and \$1,500 would be a plausible unit price if that reflected what the UCC would use as a gap filler.

3. What claims, defenses, and damages can Paradise and Budget raise against each other?

A. Claims by Paradise against Budget.

1. Whether Budget breached the agreement by its late delivery.

The terms of the agreement required delivery and installation by August 1, 2023. Budget failed to complete the contract.

Budget supplied the delivery term and it is not clear that the delivery and installation date were express conditions by Paradise. If the delivery and installation were not an express term, then Budget had the ability to cure its default within a reasonable time.

Under the facts, Budget's delivery truck was involved in an accident and the control pads were destroyed, in July, a date prior to completion of the contract. While Budget may argue that this event excused its performance, the events did not constitute an impossibility or a frustration of purpose. The delivery of goods remained in Budget's control. Budget was able to deliver the agreed-upon control pads a month later. That Paradise signed a receipt constituted acknowledgment of that delivery; Paradise had a limited time to declare the contract in default. There is no evidence that Paradise did so, and, having accepted receipt of the pads without objection, Paradise has, under the UCC, accepted the delivery and may not reject it.

2. Whether Budget breached warranties to Paradise for defective control pads.

As discussed above, Budget's attempt at negating the warranties of merchantability, and fitness for a particular purpose, failed, because they constituted material additional terms that the UCC will not impose on the parties' agreement.

Therefore, Paradise retains those warranties.

Paradise subsequently had problems with the control pads. The problems are not identified, but they were serious enough that tenants were canceling their leases because of those issues. If true, then there are likely serious problems with the control pads. Budget did not honor any warranties after Paradise notified Budget of problems, and did not offer to inspect or replace. Instead, Budget refused to honor any warranties.

Budget is in breach, and is liable to Paradise for its damages.

Under a market value approach Paradise is entitled to the difference between the value of the goods contracted for and the value of the goods received.

Here, the value of the goods received is nothing, since they all require replacing.

Paradise is entitled to damages for replacing the control pads of 500 pads at \$2,500 per unit.

If the value of the goods at the time of contract was \$1,500, Paradise is entitled to the sum of \$750,000. If Paradise can establish that the Budget contract was a very good deal, and that the pads were valued at \$2,500, as they now cost, then Paradise can claim \$1,250,000, but again, assuming the delivered pads had zero value.

Damages for tenants terminating the leases may not be recoverable under the UCC or are unforeseeable. If those damages can be calculated, and are permitted, they would add to the damages owing from Budget to Paradise.

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

Question 2 - Selected Answer 2

Issue: Did Paradise and Smart have a contract?

Formation: A valid contract requires mutual assent of an offer, acceptance and consideration, and a lack of defenses. Here, we apply the UCC because the agreement involved a sale of goods.

Offer: An offer must create a reasonable expectation (promise, undertaking or commitment) in the offeree that the offeror is willing to enter into a contract on the basis of the offered terms. An offer must be definite and certain in its terms. For the sale of goods, quantity is the most important term to include. Here, Paradise sent a written offer "purchase order" to Smart requesting 500 control pads for \$3,000 per unit, along with a deadline to receive the order. This was a valid offer.

Acceptance: The language of the offer controls the acceptance. Here, there was an oral acceptance "sounds great", by a Paradise representative that would indicate Smart could begin performance.

Consideration: Consideration is a bargained for exchange of legal value. Here, Paradise offered to pay Smart \$3,000 per unit and Smart would specially manufacture and deliver control pads. This constitutes valid consideration.

Statute of Frauds: Paradise will argue there was a defect in formation because the agreement was not evidenced in writing, signed by party sound to be bound. Contracts for the sale of goods of \$500 or more require a signed writing. Paradise will argue that the only evidence of a writing was its purchase order form that it sent to Smart, so there was not a valid contract. However, Smart may fall into an exception. Under the the SOF exceptions, part performance may satisfy the statute under the UCC when the goods have been specially manufactured. Here, Smart indicated to Paradise that the control pads would have to be custom made to meet Paradise's order requirements. Paradise was on notice of this special manufacturing necessity. Therefore, Smart and Paradise formed a valid contract.

Breach: A party may be liable for breaching its terms under the contract. Here, Paradise canceled its order two weeks after they entered into an agreement. Typically, offers can be revoked at any point before acceptance. However, Smart accepted the offer and already began performance of the contract. Paradise was held to its contract agreement.

Damages: A non-breaching party is generally entitled to expectation damages. Expectation damages puts the injured party in the position they'd be in had the contract been performed. Here, Smart would argue it's entitled to the entirety of the contract (500 control pads times \$3,000 per unit) because that is what the company planned to manufacture. However, a court would likely only hold Paradise liable for the amount that Smart had already manufactured. Paradise should pay Smart for the 100 specialty control pads, plus any consequential or incidental damages that arose from Smart having to stop the contract and purchase unique materials. Alternatively, the contract price may be required if the seller cannot resell the goods. Here, that may be the case if Paradise refuses to accept the control pads and Smart can't locate another buyer.

Issue: Did Paradise and Budget have a contract?

Formation: See above for rule. Paradise sent a purchase order to Budget with the quantity and price of goods, however, while there was a deadline indicated in this order, there was no apparent "time is of the essence" clause. Budget accepted the purchase order. There was consideration because Paradise would pay for the control pads that Budget was contracted to design.

Mirror Image Rule & Battle of the Forms: While there is no mirror image rule under the UCC, the Battle of the Forms provision governs whether additional terms become part of the contract. An offer's additional terms do not become part of the contract unless both parties are merchants, the terms are not material, and the offeror does not object. Merchants regularly deal in goods of the kind sold OR hold themselves out as having special knowledge or skills as to practices of the goods involved. Here, Budget is a merchant, but Paradise is arguably not because it's a Nevada corporation that constructs high-end complexes. They don't solely deal with the goods that were part of this particular contract. However, if Paradise's construction projects general entail purchase orders for these types of apartment amenities, Paradise is a merchant. Presuming Paradise was a merchant for UCC purposes, the battle of the forms provision would deem Budget's added terms as *material* to the contract. Budget is essentially saying they will accept the offer, but will not accept any liability that might attach to a defect in the goods sold. This is a material change that will not become incorporated into the contract. The last prong would work in Budget's favor because Paradise did not object to the new terms. However, because they would drastically change the outcome if there was any problem with the control pads, these disclaimers are not incorporated unless Paradise accepted them.

Issue: Claims, defenses & damages between Paradise & Budget.

UCC Warranties: *Express warranties* are statements of facts or descriptions of goods made by the seller to the buyer.

Warranties of merchant ability are implied warranties that the goods are fit for their ordinary, foreseeable purpose. Lastly, *warranties of fitness for a particular purpose* apply when a seller has reason to know the particular purpose for which the goods are to be used and that the buyer is relying on the seller's skill and judgment to select. The buyer must actually rely on this warranty. A seller can put limitations on *implied* warranties through specific disclaimers, but only if they are conspicuous so that a reasonable person would notice it. Here, Budget will argue its boldface disclaimer that there are "no warranties" was very conspicuous and Paradise should have been aware of this when it placed the order. However, express warranties are very difficult to disclaim, and Paradise will argue that Budget can't disclaim this particular warranty because the limitation is inoperable. Paradise ordered control pads from a reputable company, not a garage sale. Budget should not be able to disclaim any and all defects without any liability.

Risk of loss: If there was not a common carrier listed in the contract, the agreement determines if the seller is a merchant. There was no common carrier because Budget's own delivery truck contained the control Pads for delivery at Paradise complex. Merchants bear risk of loss until buyer takes physical possession. Here, Budget is a merchant because it normally sells goods of this kind. The goods were destroyed while in Budget's possession and en route to the buyer's destination. Paradise did not have physical possession of the goods, so Budget assumed the risk of loss during transit.

Breach: See above rule for breach. Budget breached its end of the deal by delivering the goods late, and in defective condition. Budget did not install or deliver the control pads until September 1, which was one month after the accepted deadline. Budget will argue that performance was delayed because of an accident and it should be allotted reasonable time to tender performance or cure the defect. However, timing was important to the contract because Paradise relied on the August 1 installation to have the apartments ready for move-in. Budget will argue Paradise waived the timing clause because a Paradise representative accepted the goods when they were delivered.

Substantial Performance: Courts generally perform a balancing test to determine if a breach is minor or material to the contract, and whether there was substantial performance. Factors of substantial performance include the benefit to the non-breaching party, part performance by the breaching party, and hardship to the breaching party. It will argue the breach was minor because a one-month delay is not detrimental to the overall contract. Additionally, it will argue that it still substantially

performed when it re-constructed the control pads and delivered them to Paradise's benefit. However, Paradise will argue that the one month delay caused damages because tenants were living in the rooms at that points and could not use the control pads. This will likely be a minor breach because Budget fully performed, although delayed.

Revoking acceptance: A buyer may revoke acceptance if the goods have a defect that substantially impairs their value and: (i) buyer had a reasonable belief that the defect would be cured, (ii) the difficulty of discovering the defect, OR (iii) the seller gave assurances the goods conformed. Budget will point to the 6-month delay in Paradise's complaint, and that a reasonable inspection should have been performed upon receipt of the control pads. However, due to the large quantity and complexity of the goods sold, it would be difficult to discover the issues, and a 6-month time frame was a reasonable time to learn of any defects. This will not prevent Paradise from recovering from Budget for breach. At the point of breach, Paradise properly put Budget on notice that it wanted a refund of the defective control pads, and that it intended to return the shipment.

Damages: Sale of goods damages are determined depending on the non-breaching party's steps to remedy the contract. Cover damages are the cover price minus the original contract price. Cover must be done in good faith. Here, Paradise was forced to find another company to purchase control pads to prevent losing more tenants. It purchased the same amount of control pads for \$2,500. That is \$1,000 more per unit above the original contract price with Budget. Because Budget breached and delivered defective products (that were not constructively disclaimed in the terms), Budget is liable to pay Paradise the extra \$1,000 per unit for the number of control pads Paradise bought. Additionally, Budget will be liable for incidental damages (costs incident to the breach) and consequential damages if they were foreseeable at the time of formation.

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



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QUESTION 3

Question 3 - Selected Answer 1

1. Bob's claims against Max

Intentional Infliction of Emotional Distress

Bob may claim intentional infliction of emotional distress (IIED) against Max.

IIED lies when the defendant commits an extreme or outrageous act that is intentional or reckless, and which causes actual damages in the form of physical manifestation of emotional distress.

Here, Max brandished a handgun at Bob and then recklessly fired two shots in Bob's direction, forcing Bob to kneel on the ground on a deserted roadway in rural Nevada. Max also threatened to kill Bob and effectively robbed him of his wallet and phone. This is outrageous conduct.

Later, Bob went into a state of shock when he recalled the incident after seeing the bullet hole in his truck door, and he began to sob uncontrollably and suffer anxiety whenever he saw a motorcycle.

Bob has a *prima facie* case for IIED against Max.

Assault

Bob may sue Max for the tort of assault.

Assault lies when the plaintiff is put in reasonable apprehension of an immediate threat or harmful contact which the defendant intended to cause.

Here, Max brandished his handgun, pointing it at Bob and firing two shots in his direction. Bob dropped to his knees following the shots, and Max verbally threatened to kill Bob. Max intended to place Bob in apprehension of being shot.

Bob has a *prima facie* case for the tort of assault against Max.

Trespass to Chattels and Conversion

Bob may sue Max for trespass to chattels and conversion.

Trespass to chattels lies when the defendant commits an intentional act which interferes with the plaintiff's right to possession of the chattel and causes damages.

Conversion lies when the defendant commits an intentional act which deprives the plaintiff of the full value of the chattel.

Here, Max held Bob at gunpoint and demanded his wallet and phone. By intentionally taking Bob's wallet and phone Max deprived Bob of his right to possession as well as the full value of his chattel property.

Bob has a *prima facie* case for trespass to chattels and conversion against Max.

Defenses

Max may claim self defense against Bob to the tort of assault because Bob created a dangerous situation injuring Max. However, this is unlikely to succeed.

A defense of self defense requires that the defender reasonably believe he is about to be harmed and authorizes reasonable force against injury. The defense fails if unreasonable or excessive force is used.

Here, the danger had already passed by the time Max brandished his handgun and threatened Bob. In addition the use of the handgun was excessive. Max will not be successful in this defense.

2. Max's claims against Bob

Negligence

Max may claim that Bob was negligent in operating his truck.
A Person is negligent when they breach the duty of care causing damages.

Duty of Care:

Because Bob is an ordinary person (not a specialist) he is held to the standard of care of a reasonably prudent person.

Breach:

Here, Bob breached the standard of care because he was driving while he was extremely tired. He also breached the standard of care because he failed to stop at a stop sign.

Bob also breached a statutory duty of care created by the stop sign because the stop sign is designed to prevent the type of harm caused by a collision at an intersection, and Max is in the class of plaintiff protected by the stop sign (discussed below).

Causation:

Bob's action in running the stop sign is the actual cause (cause-in-fact) of Max's injuries. "But for" Bob's failure to stop, Max would not have locked up the brakes on his motorcycle and crashed the bike on its side.

Bob's action in running the stop sign is also the proximate cause (legal cause) of Max's injuries. Because a vehicle crash, and crashes resulting from trying to avoid a vehicle-to-vehicle collision are foreseeable injuries from failing to stop at a stop sign, Bob caused Max's injuries.

Damages:

Max suffered personal injuries because he was limping when he climbed out of the ditch. In addition Max suffered property damage because his motorcycle was damaged in the crash.

Therefore, Max has made a *prima facie* case for negligence against Bob.

In addition, Max may claim Bob was negligent *per se*. Negligence *per se* applies when a statutory duty 1) provides for a penalty 2) defines the standard of care 3) the plaintiff is within the protected class, and 4) the statute was designed to prevent the type of harm suffered. Laws against driving while tired as well as stop signs meet the criteria above. Max may successfully plead Bob was negligent *per se*.

Defenses to Negligence

Bob may defend against Max's suit for negligence by raising the defense that Max was contributorily negligent or comparatively at fault.

Under a theory of contributory negligence Bob would not be liable for Max's injuries if Max was more than 50% at fault. Under a theory of comparative fault Max may only recover the relevant percentage of the damages that are assigned by the jury.

Negligence *per se* applies when a statutory duty 1) provides for a penalty 2) defines the standard of care 3) the plaintiff is within the protected class, and 4) the statute was designed to prevent the type of harm suffered. Speed limits on state roads meet all of these criteria and are designed for the safety of motorists.

Because Max was speeding he was negligent *per se*. Max's negligence must be weighed against Bob's negligence and may prevent Max's recovery.

Bob may also defend against Max's suit for negligence by raising the defense that Max assumed the risk of speeding and therefore cannot sue for the natural and probable consequences.

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

Question 3 - Selected Answer 2

Bob vs. Max **Battery**

Battery is an intentional tort in which the defendant intends to cause contact with the plaintiff's person, the defendant's conduct results in such contact, and the contact causes bodily harm that is harmful or offensive.

Bob will attempt to assert the cause of action of battery as Max fired his gun at him. It will be easily shown that Max intended to fire his gun, however he did not intend to cause contact with Bob's person. Further there was no actual contact made with Bob's body. As such he will not prevail on the claim of battery.

Assault

Assault occurs when the defendant intends to cause the plaintiff imminent, harmful or offensive contact, and the defendant's conduct causes the plaintiff to anticipate such contact.

The next claim that Bob has is assault, which is premised on the gunshot. By Max firing the gun although he did not intend for a gun shot to connect with Bob's person there was intent to be harmful/offensive. By any means a gunshot will be proved to be harmful and offensive. Further, there was imminence as the act of shooting was complete. This was not a future threat made by Max, it occurred there at the scene. Finally, there was intent to shoot the gun by Max as there was no indication he shot the gun unintentionally. As such Bob will prevail on his claim of assault.

Intentional Infliction of Emotional Distress

To prevail on a claim of intentional infliction of emotional distress there must be extreme and outrageous conduct by the defendant causing the plaintiff severe emotional distress. Further there must be causation and damages. The damages as described above require severe emotional distress. However, Nevada implements a sliding scale which states that the more outrageous the conduct the less emotional distress is required.

After the gunshot, Bob dropped to his knees and plead for Max to refrain from shooting. Max then pointed the gun on Bob's head which would be enough to satisfy the extreme and outrageous element of Bob's IIED claim. A gun pointed to one's head is extreme as it will cause one to fear for their lives. Next, there was intent which is displayed by Max not letting Bob leave and instead pointing the gun at Bob's head. Finally damages are quite easy to display in Bob's case. First, Bob has exhibited physical symptoms by shaking after the incident occurred. After the incident Bob suffered emotional distress as he needed 18 months of therapy to look at a motorcycle without anxiety. Bob's physical symptoms, therapy, and anxiety will suffice to the damages element.

False Imprisonment

False imprisonment requires that the defendant intends to confine another within a limited area, the defendant's conduct causes the plaintiff's confinement or defendant fails to release the plaintiff despite a duty to do so, and the plaintiff is conscious of the confinement. Confinement may be shown by physical barriers, threats, invalid use of authority, duress, or failure to provide a means of escape.

First by pointing the gun at Bob's head while he was kneeling, showed that Max intended to keep Bob at his knees. Had Max not wanted to confine Bob, he would have allowed him to simply get up off his knees after firing the shots and leave. Bob reasonably stayed on his knees due to this use of force by Max. Although there were no walls or barriers around Bob, he was confined because of Max's use of the gun and threats. Although Bob was released shortly after giving his phone and wallet, the timing is irrelevant as to the cause of action. As such Bob will prevail on his claim of false imprisonment.

Conversion

Conversion requires an intentional act which interferes with the plaintiff's right of possession, and is so serious that it deprives the plaintiff of the use of the chattel. The plaintiff may recover the full value of the property and in Nevada the plaintiff is allowed to recover actual losses.

Bob's conversion claim will arise from Max's theft of his wallet and phone. It is clear that Max intended to take the phone and wallet away from Bob and keep it to himself. However, to arise to conversion Bob must show that the value was so deprived as to the use of chattel. There are no facts that the phone or wallet were damaged, it is just shown that the chattels were taken and never returned. As such Bob may recover for the respectable amounts of the wallet, the phone, and whatever may have been in the wallet.

Trespass to Chattels

Trespass to chattels is shown when there is an intentional interference with the plaintiff's right of possession by either dispossessing or using/intermeddling with the plaintiff's chattel, only intent to do the act is necessary, and there must be damages.

It is mentioned that the bullets that Max had fired struck Bob's truck and pierced a hole through it. This was also intentional by Max as he intended to fire those shots. Max may attempt to argue that he did not intend to shoot the truck, however this would be irrelevant as all that is required is that he intended to shoot the gun. As such, the level of intermeddling would not reach the level of conversion as it is just one hole in the truck which may be repaired. As such Max will be held liable for trespass to chattels and Bob may recover the cost of repairing his truck.

Max's Defenses

Self Defense

The defense of self defense requires the defendant to show that they reasonably believe that the force is necessary and proportionate to the force the plaintiff is inflicting.

Max may attempt to assert the defense of self defense as a result of the collision. However this defense will fail as there was no intentional use of force or threat by Bob after the collision occurred. Further, there are no facts that indicate the collision

was intentional by Bob.

As such Max does not have any defenses he would prevail on for the torts he has committed.

Max vs. Bob

Negligence

Negligence as a cause of action requires the plaintiff to show four main elements, duty, breach, causation, and damages. Max should assert a negligence action for the way in which Bob operated his vehicle.

Duty

A duty is owed to all foreseeable persons who may be injured as a result of the defendant's failure to meet reasonable standard of care. Foreseeability of harm to another is sufficient to create a general duty to act with reasonable care. The majority Cardozo rule states that the defendant is only liable to those within the zone of foreseeable harm. By operating a vehicle on the city roads, Bob has duty to operate his vehicle as a reasonably prudent person would. This would be an inherent duty as Bob is a driver.

Breach

A breach occurs when the defendant's conduct falls below the standard of care. The traditional approach is to compare the defendant's conduct with the conduct of a reasonably prudent person, an objective test. It can be argued that Bob breached his duty of safe driving by first operating his vehicle while tired, and by running the stop sign. A reasonably prudent person would not drive if they were in a mental state that is unable to notice traffic signs and road collisions. Further, a reasonably prudent driver is expected to stop at stop signs, which Bob did not. As such by operating his vehicle in this manner, Bob has breached his duty by falling below the standard of care.

Negligence Per Se

Under negligence per se a plaintiff can establish both duty and breach in one. Negligence per se requires there to be a criminal or regulatory statute to impose a specific duty, which the defendant violates, the defendant harms someone within the protect class intended by the statute, and the harm is the type the statute is designed to protect. Although not discussed in the facts, there are statutes within Nevada penalized failure to stop at stop signs. This statute is designed to prevent automobile collisions. Further since the statute is for protecting drivers it is designed to protect the bodily injuries that arise out of accidents. Since Max was also a driver the statute is intended to protect him. As such Max may alternatively show a duty and breach via negligence per se.

Causation

The element of causation requires cause in fact and proximate causation. Cause in fact is tested by the "but for test" which states that but for the defendant's conduct injury would not have occurred. Proximate cause states that the defendant is only liable for reasonably foreseeable consequences of a foreseeable type, which is the majority rule Nevada follows. The defendant is not liable for superseding causes which break the chain of proximate causation. The but for test will be easily met here as but for Bob running the stop sign Max would not have to lock breaks and skid into the shoulder. Further there would not be an issue for Max to prove proximate causation as Bob would be liable to other drivers for his actions as a result of running a stop sign. It is directly foreseeable that a substantial accident results because of running a stop sign. As such causation is met.

Damages

The plaintiff must show that there was actual injury which includes bodily injury or property damage, not just economic loss. It is stated that Max was limping out of the dust of clouds, so he did suffer a bodily injury. Further, his bike was damaged as a result of the skidding. As such damages could be proved.

Max will prevail on a negligence cause of action, so long as Bob does not have any defenses.

Bob's Defenses

Comparative Fault

Nevada is a partial comparative fault jurisdiction. The partial comparative fault rule states that if the plaintiff is less at fault than the defendant, the plaintiff's recovery is reduced by percentage of fault. However if the plaintiff is more at fault than the defendant, the plaintiff recovers nothing. Bob will argue that Max was riding his motorcycle in excess of the speed limit and that he was more at fault than Bob. However, although speeding is negligent, it is not more negligent than running a stop sign. As such, Bob may win on reducing Max's damages due to Max's comparative fault, however Max's damages will not be barred.

Assumption of the Risk

The defense of assumption of the risk states that a plaintiff is barred from recovery if the plaintiff has voluntarily and knowingly assumed the risk of their action. Bob will also attempt to argue that Max assumed the risk of an accident by driving in excess of the speed. Again, this argument will fail as drivers do not automatically completely assume the risk of an accident by speeding.

Superseding Cause

As stated above a superseding cause is one which breaks the chain of causation. This would bar the plaintiff's recovery as causation would not be met. The last defense Bob may raise is that Max's speeding broke the chain of causation. However this would fail as speeding by other drivers is not an unforeseeable intervening cause.



**FEBRUARY 2024
EXAMINATION ANSWERS**

**SELECTED APPLICANT ANSWERS
NEVADA BOARD OF BAR EXAMINERS**

QUESTION 4

Question 4 - Selected Answer 1

1. Round Mountains Claims

Round Mountain ("RM") would have zoning violation claims against Opal, Ivan and Posie.

In 1970, the properties were rezoned by way of a zoning ordinance that stated residential use is the highest use of the real property. This is indicative of a cumulative zoning system. In a cumulative system, land can be used for its zoned purpose, or any higher purpose. However, land cannot be used for any lower purpose than what it is zoned for.

Here, the 1970 enactment modified the zoning to residential only for the properties operated as businesses by Opal. For 52 years, Opal continued to operate the properties as commercial without issue, despite the change in zoning.

However, the state government does have the authority to regulate the properties that were once conforming but now are not. In this scenario, all property deemed non-conforming cannot be eliminated from that zone all at once unless just compensation is paid to each owner. Thus, the city will be able to bring an ejectment action or force the properties to conformation so long as just compensation is given to the owners at the time of ejectment.

Additionally, this type of action brings up a Takings Clause issue where the government is taking land from private citizens. Generally, a taking requires public use and just compensation. Here, the use would be residential so if the state can show some sort of public use for said residential property, and provide just compensation (fair market value at the time of taking) it can successfully take the properties.

2. Ivan v. Round Mountain

Ivan will argue that RM's actions constitute an impermissible government taking. It will also be argued that RM's failure to enforce the zoning ordinance will act as a waiver to its rights rendering any actions unenforceable against Ivan or the business run in the shop.

For the government to take private property, there must be (1) a stated public use for the property, and (2) just compensation for the owners of the property. There are two different kinds of takings. Physical takings are where the government actually confiscates the property. Regulatory takings are when a regulation renders no economically viable use for the property. Mere diminished of value is not enough.

Here, RM is performing a regulatory taking by enforcing the zoning regulation against business that have been in place since before the enactment of the regulation. However, under Ivan's ownership, the nature of the business was changed, which will likely make his arguments against the zoning laws moot as the use changed after the enactment of the regulation.

3. Posie v. Round Mountain

Posie will argue that RM's actions constitute an impermissible government taking. It will also be argued that RM's failure to enforce the zoning ordinance will act as a waiver to its rights rendering any actions unenforceable against Posie or the business run in the shop.

For the government to take private property, there must be (1) a stated public use for the property, and (2) just compensation for the owners of the property. There are two different kinds of takings. Physical takings are where the government actually confiscates the property. Regulatory takings are when a regulation renders no economically viable use for the property. Mere diminished of value is not enough.

Here, RM is performing a regulatory taking by enforcing the zoning regulation against business that have been in place since before the enactment of the regulation. Posie is using the property the same as it has always been used. Thus, RM must provide just compensation if it wishes to enforce the zoning regulation against her.

4. Ivan v. Max

As a tenant, Max owed Ivan certain duties. Max agreed to a month to month lease with Ivan. This created a periodic tenancy as there was no specific end time. usually in commercial leases this will be governed as a year to year tenancy even though payments are made monthly. However in this case, the parties seemed to have specifically contracted for a month to month tenancy in perpetuity. In such a lease, termination must be made only by notice equal to the lease period. Max failed to notify of his cancellation of the lease. Thus, Max is in breach of the agreement all together.

Duty to Repair

A duty to repair can be largely modified by the terms of the lease agreement. Here, it is unclear what the terms were. Thus, the default rule is that the tenant must only maintain and perform ordinary repairs. There is no duty to remedy usual wear and tear.

Here, during removal of the fixtures, Max created more damage than usual wear and tear. Max had a duty to repair said damage and failed to do so. Thus, Max will be liable for the cost of repair incurred by Ivan.

Duty to Pay Rent

When a tenant breaches this duty but abandons possession, the Landlord can treat the abandonment as surrender and reclaim the property, can ignore and continue charging rent, or re-let and sue for deficiency. The landlord must also actively try to relet the property in order to have a claim for damages as a result of the breach.

Here, Max gave no notice of his abandonment. Ivan must try to re-let the property, which may be difficult given the new zoning law enforcement. Additionally, since the agreement was only month to month, Ivan will be limited in his recovery. In Nevada, once a landlord has notice of abandonment, he may take possession and dispose of the tenants property. Here, Max is liable for breaching the duty to pay rent so Ivan will prevail in recovering some of the rent payments.

Fixtures

Ivan may try to recover the fixtures put into the property and then removed. Fixtures added to a property that are business specific and readily removable are allowed to be taken out by the tenant at the time of dissolution of the lease. Here, Max

made material alterations to the property for his intended use. He also spent \$50,000 of his own money to do so. Thus, he is entitled to remove said fixtures when the lease is terminated.

However, upon removal, Max has a duty to return the property to its previous condition, assuming no agreement to the opposite with the landlord. Here, there is no evidence that Ivan permitted the renovation so Max must incur the expense to return the property to its original state at the time he signed the lease.

5. Ivan v. Opal

The Contract

Land sale contracts require the delivery of equitable title. It also requires all essential terms be written and the Statute of Frauds must be satisfied by writing signed by the parties to be bound or part performance if the buyer does any 2 of the 3 following: takes possession, pays all or almost all of the price, or makes substantial improvements.

Here, the parties entered into what seems to be a valid installments contract where monthly payments are made by Ivan to Opal until the full value of the property is paid. Included in the agreement are two express covenants that will likely not be included in the contract because they are so vague and they unreasonably interfere with Ivan's right to possess and use the property. Otherwise, the parties have a valid land sale contract.

Breach of Implied Warranty of Marketable Title

This warranty assures that, among other things, there is no defect of violations of zoning laws or ordinances in effect at the time of the conveyance.

Opal is in breach of this warranty as there has been a zoning ordinance in place for 50+ years that limits the scope of use of the property. However, Opal will argue, likely successfully, that it was enacted after her purchase of the property, was never enforced against her, and that she had no way of knowing of its existence. These arguments will be persuasive and may defeat Ivan's valid claim for breach.

6. Neighbors v. Ivan

Nuisance

Defined as the unreasonable interference with the use and enjoyment of land.

Here, the land was rezoned as residential. Assumedly, most of, if not all of the properties around the coffee shop are residences. Ivan, as the landowner leasing the property to Max, would be held liable for the nuisance along with Max. Under those circumstances, the homeowners would have a viable claim for nuisance. Whether it would succeed is another question. That is unlikely. The smell of coffee beans and increased traffic is not a severe interference with the use of one's land. However, since the coffee shop closed its doors, there is no longer a controversy to be adjudicated. Thus, this claim will fail.

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

Question 4 - Selected Answer 2

City of Round Mountain claims

Zoning ordinance: Governments may enact statutes to reasonably control land use for the protection of the health, safety, morals and welfare of its citizens. Zoning power is based on the state's police power but is limited by the Due Process & Equal Protection Clauses. City of Round Mountain was allowed to enact this ordinance to limit Round Mountain to only residential uses as long as it was not discriminatory, which it was not here.

Cumulative Zoning: Cumulative zoning ranks land and categorizes it into a hierarchy of use. Single use family homes are the highest use. The City of Round Mountain enacted a cumulative zoning ordinance. Because neither Posie nor Ivan were using their Units for residential purposes, the City of Round Mountain can fine them for violating the ordinance unless they can present valid defenses.

Posie v. City of Round Mountain

Nonconforming Use: A previously allowed use cannot be eliminated all at once unless just compensation is paid. Courts will look at the extent of the change of the property's use. Here, Posie purchased Unit 2, and she kept it to its original use as a flower shop. The shop operated for 10 years before the zoning ordinance took effect, and Posie continued its same use demonstrated by the same hours of operations and primary business purpose that Opal used it for (naming the store "Flowers"). Posie can claim a defense of a once lawful use against Round Mountain's zoning violation and she will likely be able to keep her flower shop.

Ivan v. City of Round Mountain

Nonconforming Use: See above for rule. Ivan's tenant, Max, made substantial changes to the coffee shop that would violate the non-conforming use. He changed the hours of operation from 9-5pm daytime hours, to 2pm-10pm nighttime hours. The primary purpose of the business changed from a yarn store to a coffee shop (change in name to "Hearts"). It kept late hours, caused traffic, and higher noise levels. Ivan would lose his appeal to City of Round Mountain because his new establishment violated the zoning ordinance.

Zoning Variance: A variance is the principle means to achieve flexibility in zoning. It grants a landowner permission to depart from the restrictions of an ordinance. A landowner pursuing a variance must show no undue hardship or diminution to neighboring property values. If Ivan kept his store as a yarn business, he would likely be able to apply for a variance because the store was successfully run for 60+ years. However, the new coffee shop's disturbances and nightly traffic will likely drive down property values and cause hardship to the neighbors. The City should deny Ivan's request for a zoning variance.

Just compensation: Because the city will likely condemn the use of Ivan's yarn turned coffee shop, he can sue the city for just compensation to prevent a Takings Clause violation. The remedy for a land owner whose land is condemned is payment of the fair market value (FMV), which is the highest prices the property would bring on the open market. Here, if Ivan has to close down his store pursuant to the ordinance, he will likely be able to collect the FMV.

Ivan v. Max

Periodic Tenancy: A periodic tenancy continues for successive intervals until properly terminated. A period tenancy can be entered into expressly or by implication if rent is paid at set intervals. Written notice is required for termination. Here, Max and Ivan established a period tenancy because Max paid rent on a month-to-month basis. Max did not give notice (1 month based on the payment intervals) to terminate the agreement. Ivan can likely prevail on a claim for breach of rent payment for at least one month, and then any costs incidental to the breach.

Duty to Pay Rent: A tenant has a duty to pay rent to the landlord. If the tenant breaches but is not in possession of the premises, the landlord has several remedies. In Nevada, if the landlord has notice that the tenant abandoned the property, the landlord may dispose of the tenant's personal property and take possession of the premises. Here, Ivan can sue Max for the rent owed, or he can re-let and hold Max liable for the deficiency. Ivan can also dispose of Max's remaining property.

Duty to Repair: A tenant owes a duty to repair the premises and must maintain it in reasonably good & routine repairs. Additionally, a tenant must not commit waste. Waste can be voluntary (willful destruction), permissive (negligent) or ameliorative (unilateral change that increases value). Max committed ameliorative waste because he made improvements to renovate Unit #1, presumably without Ivan's permission. The hardwood floors, window coverings, special blush lights and built-in booths likely all added value to the property, but was done without permission. Long-term tenants may make changes, but Max was on a month-to-month lease so there's no indication he was there for the long run besides the improvements. Ivan can pursue a claim for damages to any decrease in property value because Max committed waste.

Trade fixtures: A fixture is a chattel that's been so affixed to land that it has ceased being personal property and become part of the realty. A fixture passes with the ownership of the land and stays put. A trade fixture is a chattel that's used in commercial property that is part of the purpose of the business. At the coffee shop, the new floors, lighting and built-in booths with heart shaped tables attached to the booths all constitute fixtures because they've become affixed to the real property. However, because they were for the purposes of the business, they are considered trade fixtures and the owner can remove them as long as they don't cause substantial damage to the premises. Here, because Max caused damage with the scars on the floors and holes in the walls, he is liable to pay Ivan to repair those damages, but he can keep the fixtures.

Ivan v. Opal

Contract termination: Conveyance of land involves two steps: the contract and the deed. The contract must be in writing and signed by the parties. Here, Opal and Ivan entered into a valid contract for the duplex in Round Mountain, Nevada.

Installment Contract Breach: Ivan can attempt to sue Opal for breaching their Installment Contract because she terminated it before Ivan made the final payments and assumed the deed. An installment land contract is an alternative to a mortgage and allows the purchaser to obtain legal title only when the full contract is has been paid. Forfeiture clauses allows the vendor to cancel the contract, retake possession and retain all money paid. Ivan and Opal's contract stated a condition precedent that must be abide by until the contract was paid in full. Opal will claim that Ivan failed to meet the condition precedent when he subleased the property to Max and allowed Max to turn the premises into a late-night hang out spot that was a nuisance to the neighbors. Ivan will argue that he's been paying rent, and made improvements to the property, which

would make the lease irrevocable. Additionally, Opal can't terminate the lease solely because Ivan "caused too much trouble." Trouble was not a condition in the installment contract unless it was illegal or a nuisance to the neighbors. However, a court will likely find this installment contract to perform similarly to a lease because it's a month to month payment, like a tenant, and therefore, Opal is free to terminate the agreement with notice and evict Ivan from the Unit.

Covenant: A covenant is a promise to do something or refrain from doing something. Ivan entered into a covenant with Opal to refrain from using the property illegal and not cause a nuisance to the neighbors. Covenants to refrain from this type of activity run with the land. Max was under the same obligation to obey this covenant as a tenant to Ivan. Max breached the covenant when he caused a nuisance by turning the yarn store into a late-night coffee house.

Neighbors v. Ivan

Nuisance: A nuisance is an invasion of property rights by tortious conduct. Private nuisance is a substantial and unreasonable interference with another private person's use or enjoyment of property that the other individual possesses. The neighbors claim Ivan's use of the coffee shop constituted a nuisance because of the late-night noise and pervasive smell of burnt coffee and lack of parking. All of these changes and interruptions taken cumulatively would greatly interfere with someone's enjoyment of their home. Nightly disturbances and battling with customers over parking can become bothersome, especially if it's every night. The neighbors have a valid claim against Max for nuisance, and therefore, against Ivan as the owner of the Unit.

Equitable Servitude: An ES is a promise in equity that will enforce against successors of burdened land regardless of whether it runs with the land. Remedies for these types of servitude's are injunctive relief. If the neighbors are seeking a court order to enjoin Ivan or his tenants from using the premises for an improper purpose, they can do so under an equitable servitude.

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



**FEBRUARY 2024
EXAMINATION ANSWERS**

**SELECTED APPLICANT ANSWERS
NEVADA BOARD OF BAR EXAMINERS**

QUESTION 5

Question 5 - Selected Answer 1

Bob committed embezzlement.

In Nevada, any bailee of any money or property who converts it to her own use with the intent to steal it or defraud the owner is guilty of embezzlement. Proof of the specific intent to steal is required. In this case, Bob was given \$5,000 in cash from Lynn to deposit into her bank account since he was a bank teller at the bank. As a bank teller, Bob is considered a bailee who had permission to deposit the money. However, during the transaction, Bob kept half of the cash for himself with the intent to steal it from Lynn since he did this while she was distracted. Therefore, Bob has committed embezzlement.

Bob solicited Adam.

Solicitation occurs when a person attempts to persuade another to commit a crime. In this case, Bob approached Adam saying it would be easy for someone to rob the bank if Bob and Adam were in on the robbery. This could be solicitation since Bob was convincing Adam how easy it would be to commit the crime.

Adam threatened Bob.

Adam is guilty of threatening Bob. A person who, with the intent to extort or gain any money or other property or to compel or induce another to make, subscribe, execute alter or destroy any valuable security or instrument or writing affecting or intended to affect any cause of action or defense, or any property to influence the action of any public officer, or to aid or abet or procure any illegal or wrongful act threatens direct or indirectly to accuse any person of a crime. In this case, Adam threatens to tell on Bob regarding Bob's embezzlement unless Bob shares the money with Adam. In this act, Adam is aiding Bob in his embezzlement and threatens to accuse Bob of the crime, therefore, Adam may be charged for threatening Bob.

Adam solicited Hal.

As stated above, solicitation occurs when a person attempts to persuade another to commit a crime. In this case, Adam sought out Hal to rob the bank with the promise of splitting the proceeds three ways.

Bob, Adam, and Hal committed a conspiracy to commit robbery.

Conspiracy is an agreement between two or more persons to accomplish an unlawful purpose with the intent to accomplish that purpose. In Nevada, it is not necessary to prove the performance of an overt act in furtherance of a conspiracy in order for the crime of conspiracy to be completed.

In this case, Bob and Adam agreed to rob a bank with Hal's help. Even though an overt act was not necessary, there was an overt act to complete the conspired crime, which was arranging for Hal to go to Bob's teller window the next day and demand Bob give Hal the money while brandishing a gun

Bob did not successfully withdraw from the conspiracy.

To withdraw from a conspiracy, the co-conspirator must repudiate prior aid, do all that is possible to countermand prior assistance, and do so before the chain of events is in motion and unstoppable. In this case, Bob did not seek withdrawal of the conspiracy until Hal approached Bob's teller window and demanded the money. Therefore, Bob will still be liable for the conspiracy to commit robbery,

Adam and Bob committed robbery.

In Nevada, robbery is the unlawful taking of personal property from the person of another, or in the person's presence, against his will, by means of force or violence or fear of injury, immediate or future, to his or a family member's person, or the person of anyone in his company at the time of the robbery. Robbery is not a specific intent crime in Nevada. In this case, Hal, through the conspiracy with Bob and Adam, was able to rob the bank by force by means of force by demanding Bob turn over the money in the teller drawer. Therefore,

Pinkerton Liability

In Nevada, a conspirator may not be held liable for a specific intent crime committed by a co-conspirator unless the conspirator had the requisite specific intent for the underlying crime. However, a conspirator may be held liable for any general intent crime committed by a co-conspirator that is reasonable consequence of the object of the conspiracy. If a conspiracy if to commit robbery, the person is guilty of a felony and subject to a prison term. In this case, Adam and Bob conspired to commit robbery, which is general intent crime, and will therefore be held liable for the crime committed by Hal as co-conspirators.

Constitutional Issues for Hal

The fourth amendment (4A) of the U.S. Constitution protects persons against unreasonable searches and seizures. It is applicable to the states via the fourteenth amendment. In order to assert a 4A challenge, there must be governmental conduct and a reasonable expectation of privacy with regard to the place searched of the items seized. A person has a reasonable expectation of privacy when he has an ownership or possessory interest in the place searched., A valid search warrant must be issued by a neutral and detached magistrate based on probable cause, must be supported by affidavit, and must describe the place to be searched and the items to be seized. In this case, the police searched Hal's bedroom and closet. The police are considered government actors, therefore Hal has standing to bring a 4A claim to exclude evidence illegally obtained by police in violation of his constitutional rights. Hal had a reasonable expectation of privacy in his bedroom and locked closet. Although the roommate could give police consent to enter the home, the roommate could not give consent to enter Hal's bedroom nor his closet.

Exigent Circumstances

The police likely do not have an exception to the warrant requirement due to exigent circumstances. Whether the police have exigent circumstances to enter a constitutionally protected space depends on the totality of the circumstances, such as whether the police were in hot pursuit or the situation was an emergency. Here, the police arrived at Hal's apartment and stated that Hal was a prime suspect in the bank robbery. The facts do not state whether the police viewed Hal as dangerous. Moreover, the police are not in hot pursuit of Hal since he is merely a suspect in the robbery.

Exclusionary rule

The issue is whether the gun and the found money should be excluded from evidence. Under the exclusionary rule, evidence obtained in violation of the fourth amendment may not be introduced at trial to prove guilt as "fruits of the poisonous tree". Under the 4A, evidence seized during an unlawful search cannot constitute proof against the victim of the

search. In this case, the gun and the found money should be excluded from evidence since the police needed to obtain a search warrant to enter Hal's bedroom.

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

Question 5 - Selected Answer 2

1. Crimes Committed by Bob

Against Lynn

The first issue is what crimes Bob will be convicted or charged with. Here, there are many different property crimes that Bob may be charged with.

Larceny is the trespassory taking and carrying away of personal property of another with the intent to steal. Larceny by trick is a specific type of larceny which occurs when the D tricks the other party and obtains possession through fraud or deceit. False Pretenses occurs when the D knowingly makes a false representation of a past or present material fact, which causes the person to whom it was made to convey title to the D who intends to defraud. The last type of property crime that the prosecutor may consider is embezzlement. Embezzlement is the fraudulent conversion of another person's personal property of another by one who is already in lawful possession of that property. The D always had the lawful possession. In NV, the court holds that embezzlement is also when an agent of an entity with whom money is entrusted, uses or appropriates the money, and does it in any manner that is inconsistent with the purpose for which the money was deposited or entrusted.

Here, there will likely be a debate about larceny by trick, false pretenses, and embezzlement. Bob did not trick Lynn into giving him the money and he did not use any fraud or deceit. There may be an argument that by him taking the money and not depositing this would be considered deceit but this would likely not be enough. Additionally, false pretenses would likely not work because this was not done by using a false representation of material fact. There is no evidence to suggest that he lied about a fact when talking to Lynn. The final issue would then be embezzlement. The prosecutor will argue that there was an embezzlement because B did have lawful possession of the money. He was a bank teller and it was his job to handle the money so he was given the money with the permission of Lynn and instead of depositing the full amount he only did half the amount. Because he always had lawful possession the strongest argument for the prosecution is that this was embezzlement.

Regarding the Bank Robbery

The next issue is what the liability will be for the bank robbery.

Conspiracy

The next issue is whether B will be found guilty of crimes relating to the robbery. A conspiracy is when two or more parties enter into an agreement to commit a crime. The elements include the intent to enter into an agreement, the intent to commit the underlying crime, in NV and CL a meeting of the minds or two guilty minds. In NV, there does not need to be an overt act in furtherance of the crime.

Here, A and B agree to commit a robbery. They both talk about it and decide that they would be able to get more money if they work together and contract with someone who will take part in the robbery. They make a plan and find a person to commit the crime. The parties have conspired to commit an unlawful act.

B may argue that there was a factual impossibility for them to rob the bank because H was not going to use force or fear in the commission of the crime. However, the prosecution could argue that there was a conspiracy to commit an embezzlement or other crime when the agreement was made since this was not their lawful money they were taking.

Co-Conspirator Liability

A co-conspirator is guilty for the crimes of the co-conspirator that are done in furtherance of the crime or is reasonably foreseeable as a result of the crime that was committed. Here, the parties will be liable for the crimes of the co-conspirator. Please see below for defenses and the crimes that were committed.

Robbery or Burglary

Robbery is the taking of property through force or fear. Here, B will argue that there was no robbery because there

Burglary

Burglary is the entering of a building with the intent to commit a felony (or some misdemeanors within). Under the common law, breaking was necessary and it must be at night, however, NV has done away with these requirements.

Here, the prosecution will argue that there was entry into the building by all parties when they all were there at the same time. A and B were there for work but it was an unlawful purpose, and H was there to take the money from them. All three intended to commit an unlawful act and specifically a felony when they went into the building. The felony that could be charged could be the underlying charge is larceny or embezzlement because it is taking of personal property with the intent to deprive. Please see above for the embezzlement analysis.

Withdrawal of the Conspiracy

Generally, once a conspiracy is formed and made a party cannot withdraw from the conspiracy. However, they can withdraw from the future crimes of their co-conspirators by communicating their intent to withdraw to all conspirators and they take affirmative action to withdraw. B may attempt to argue that he withdrew from the crime at the time that H came to the window. He told him that he did not want to take part any longer and attempted to get out of it. However, the Prosecution will likely argue that there was no affirmative step to get out of the conspiracy and he did not communicate to all parties. Therefore, he should still be held liable for the actions of H.

Duress

B may attempt to also argue duress. Duress is when the person did not commit the crime on their own volition and was forced to commit the crime by another person. However, duress will not be used as a defense for the intentional killing of another. Here, there will be an argument that he only moved forward with the crime because H had said that he would kill him if he did not continue with the crime at hand. B may have a valid claim under the duress defense but it may only absolve him of the crime of robbery. He will still likely be held guilty of conspiracy.

2. Crimes Committed by Adam

The next issue is whether A has committed any crimes.

Lynn

Receiving Stolen Property

The next issue is whether A will be convicted with receipt of stolen property. Receipt of stolen property in NV occurs when the D receives property knowing that it is stolen or under such circumstances should know that it is stolen. Additionally, the purpose of receiving is for one's own gain.

Here, A says that he saw what B did showing that he knows the money was stolen. Instead of reporting B, A tells him to give him some of the money in order to keep him quiet. Therefore, he knows that the money is stolen and takes it with the knowledge and for his own gain. The prosecutor will likely be able to charge him with this crime.

Extortion

The next claim that could be charged is extortion. Extortion is the threat of future harm to deprive an owner of his property. Here, this may be charged however, A is not going to reveal information about the true owner it would be revealing the crime that B did. Likely will not be charged.

Accessory after the Fact

Next, the court may bring an accessory after the fact charge which holds that a party will be guilty of this if they aid, abet, and help after the commission of a crime. Here, there may be a claim that allowing him to take the money and profiting off of this crime would be aiding the crime and abetting or concealing the behavior.

Regarding the Bank Robbery

Please see above analysis for the conspiracy and robbery analysis. However, there will likely be an argument that A did not conspire to rob because there was no factual possibility to rob and that it only occurred later when B decided not to participate any longer. However, when entering into a conspiracy the co-conspirators are liable for the actions of the others if it was reasonably foreseeable that it would occur. Here, there will be an argument it was reasonably foreseeable when entering into the agreement to steal the money that this type of harm would occur and there would be an actual robbery.

3. Constitutional Arguments re Hal

The next issue is whether H will be able to suppress the evidence found in the closet. The Fourth Amendment provides that people have a right to be free from unlawful search and seizures. Any exercise of control by a government agent over a person or thing is a seizure. A search warrant is generally required for a government search and seizure of property that is located where one has a reasonable expectation of privacy. If there is a search and a REP there must be a warrant that is issued. A warrant must be based on probable cause and must be issued by a neutral and detached decision maker. Here, there is no evidence in the facts that there was a warrant.

The first requirement is that the action be state action. This means that it must be a state agent, police officer, or it was authorized by the state, a school acting on the direction of police searching students. Here, there was state action when the police came to H's house and asked to search the home.

Reasonable Expectation of Privacy

Next, the court will look at whether the party can bring the suit for suppression. A party can move to suppress evidence if there was a reasonable expectation of privacy in the area that was being searched. A person has a reasonable expectation of privacy in their person, property, and papers. Here, H is the one bringing the motion for suppression of the evidence. The house that was searched was his own home and the items that were later found were found in H's closet. He will argue that this is his home he has a present possessory interest in the apartment and therefore, he has a reasonable expectation of privacy in the home.

Exceptions

Next, the court will look at if there is an exception to the rule that would allow the officers to search without a warrant. These exceptions include a stop and frisk, automobile search, consent to the search, plain view, exigency, and search incident to arrest.

The officers will likely only be able to argue under consent. A party may consent to the search of a property if they have free range of the property. However, if there are two parties that have the right to consent and one withholds the right to consent then the officers cannot search.

Here, the officers will argue that they talked to the roommate and explained the situation telling the roommate that H was wanted and on the run from the officers. The officers and prosecution will argue that the roommate had free range over the property and explicitly consented to the search. Once they had consent to search they were allowed to search the locked areas. H will argue that the officers knew that this was his room and knew that it was not the roommate's room. They also were told that it was not his room but proceeded to go through it anyway. H may attempt to argue that the roommate did not have the authority to consent. But the prosecutor may rebut that he was on the run and the court should treat this as vacating any interest in that room. This argument may not work, however, the court may find that there was no violation.

Exclusion Rule and Fruit of the Poisonous Tree Doctrine

If the court finds that the evidence was found in violation of H's fourth amendment rights then there could be a move to exclude it under the exclusionary rule. The rule is a judge made rule that prohibits the prosecution from admitting evidence that was the direct result of a violation of the 4th, 5th, or 6th amendment. Additionally, evidence flowing from that violation may also be excluded under the fruit of the poisonous tree doctrine which holds that but for the violation the evidence would not have been found. There are exceptions however, including, the independent source, inevitable discovery, or purged taint (many intervening factors from illegality and the finding of evidence). Here, the court could move under the exclusionary rule to suppress the evidence if it finds the consent was not adequately given.

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



**FEBRUARY 2024
EXAMINATION ANSWERS**

**SELECTED APPLICANT ANSWERS
NEVADA BOARD OF BAR EXAMINERS**

QUESTION 6

Question 6 - Selected Answer 1

CAN WENDY TERMINATE THE MARRIAGE BY ANNULMENT? IF NOT, BY DIVORCE?

ANNULMENT. A spouse may annul a marriage if the marriage was predicated on incapacity, intoxication, mistake, duress, or fraud. Fraud requires one spouse intentionally withhold information or make a statement to induce the other spouse into marrying them.

Here, W wants an annulment on the basis of fraud because H married her without disclosing that he was involved with another woman who became pregnant. H could argue he did not intend to defraud W. They were only engaged for two months. Maybe had relations with the women but did not yet know the woman was pregnant so Hal never intended to defraud her.

Not sharing sexual relations may be bad for the relationship but does not raise to the level of fraud. Further, in the ten years of marriage, there as no evidence Hal further had relations with other women, or was paying for this unknown child or doing anything to show he knew and intended to keep it from W as a way to get her to marry him. Thus, W will likely not be able to get the marriage annulled.

DIVORCE. Nevada will allow divorce only after one year of legal separation with intent to separate and not cohabitate. Divorce is allowed where there are such irreconcilable differences.

Here, W demanded H move out and stated the marriage was not going to work. Hal agreed and moved out. Further, Hal began depositing paychecks into his individual account vs the joint account as further evidence of their intent to end the marriage.

Here, however, Hal hasn't expressed that he is so unhappy or wants a divorce. Only W has expressed intent to divorce and Hal seems to be going with her demands in an effort to appease her. There may not be the requisite intent between H and W. Further, the parties have only been separated for 6 months so W will need to wait 6 more months before filing for divorce in Nevada. Further, it may be advisable to seek marriage counseling and potential reconciliation before moving to divorce.

WAS WENDY AND HAL'S AGREEMENT PRIOR TO MARRIAGE A VALID AND ENFORCEABLE PRENUP?

PRENUP. The SOF requires a prenup be in writing. A prenup can reduce property rights and spousal support (so long as the spouse isn't left on welfare) but cannot affect child support. Courts can overlook provisions that are unenforceable.

Here, the prenup is in writing. W keeping her house as separate property is valid is allowed and so is keeping inherited jewelry separate. W is able to waive alimony, since it is conditioned on her making \$250K a year, not likely to be on welfare with that salary. However, the prenup cannot waive child support. That clause will be unenforceable.

One risk to the enforceability of the prenup is the timing in which it was executed.

TIMING PRENUP. Generally, prenups should be negotiated, both spouses should have a chance to have it reviewed by their own attorney's and it should be done well in advance of the wedding.

Here, the prenup was prepared or offered by one party. H was given no chance to have it reviewed by an attorney. Further, H was given no time to reflect on the rights he was giving up since it was presented to him just before they were leaving for the chapel.

ENFORCEMENT. Nevada will enforce a prenup if not unconscionable, it was voluntary, and there were full disclosures of assets, finances and obligations.

Here, the prenup was not unconscionable. It was reasonable for W to want to keep her separate property separate and reasonable for H to request she waive alimony if she was making a substantial living. Further, both parties voluntarily agreed to sign the prenup without must push back. Lastly, it appears the parties disclosed their assets, W her home and H none. Thus, the prenup is likely to be enforced.

RIGHTS AND OBLIGATIONS OF FOLLOWING PROPERTY

COMMUNITY PROPERTY STATE. Nevada is a community property (CP) state. All property acquired during the course of marriage is presumed to be CP. All property acquired before or after permanent separation is presumed to be separate property. Additionally, property acquired by gift, devise, or bequest is presumed to be separate property.

MONEY IN BANK ACCOUNT IN W'S NAME

In order to determine the character of an asset, courts will trace back to the source of funds used to acquire the asset.

The source of W's account is income from her paychecks. In Nevada, all earnings during marriage are presumed to be for the benefit of the community. Here, W has mad substantial earnings that she is keeping separate from the community. She is using her personal account for personal hobbies and shopping. Hal could argue that some of that money belongs to the community.

Further, when W used money from her individual account to purchase the boat to be used for the benefit of the community, she arguably transmuted the property to CP. However, no transmutation in writing existed so that may not be found.

EQUITY IN W'S HOME

When the community pays for separate property assets, the community is entitled to reimbursement plus a pro rata share of the equity. Here, community funds (from the joint account) were used to pay the mortgage on W's separate property. Further, the property has appreciated. Under the Nevada proration rule, the community will be entitled to a share of the equity based on the outstanding balance on the loan and dividing the property's appreciation based on the number of monthly payments made with SP funds and the number of payments made with CP funds.

BOAT AND TRAILER

Assets purchased with SP funds will remain SP. Here, the gift from W's grandmother is separate property under NV law. When W deposited into her individual account it remained separate property. However, in using that SP to purchase an

asset for the benefit of the community, the asset may be have been transmuted to a community asset. W stated she wanted to purchase it for the benefit of Hal and the kids. However, again, absent express agreement, the boat and trailer, titled in W's name is likely her SP.

SLOT MACHINE JACK POT

A jackpot or windfall winnings are separate property. If they are considered CP, they would still be part of the community if H and W are separated because they are still legally married.

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

Question 6 - Selected Answer 2

Annulment & Divorce: Wendy cannot get an annulment, but she can get a divorce from Hal on grounds of incompatibility.

Annulment: Annulment is a judicial declaration that a marriage was never valid because of a defect, disability, or prohibition existing at the time of the marriage ceremony. A party can get an annulment to end a marriage instead of a divorce if the marriage was void or voidable. A void marriage is a marriage with consanguinity or bigamy. A voidable marriage is a marriage entered into while incapacitated, intoxication, or under mistake, duress, or fraud. Fraud or deceit can affect consent if it occurs before the marriage and involves the misrepresentation or concealment of information that goes to the heart of the marriage. The voidable marriage is valid unless the spouse seeks an annulment. The party seeking an annulment must show by clear and convincing evidence that they wouldn't have entered into the marriage except for the fraud, the misrepresentation was intentional, and the misrepresentation was calculated to induce the marriage. Continuing to cohabitate with the other spouse after discovering the fraud ratifies the marriage and waives the ground for an annulment.

Here, Wendy would bear the burden of demonstrating by clear and convincing evidence that she wouldn't have entered into the marriage except for the fraud, the misrepresentation was intentional, and the misrepresentation was calculated to induce the marriage. Wendy could argue that she would not have entered into the marriage if she knew Hal was involved with another woman, and Hal hid that from her to get her to enter into the marriage. Wendy will have a hard time showing that the misrepresentation was calculated to get her to enter into the marriage, because she probably entered into the marriage for other reasons, like loving Hal, not just because she didn't know he was involved with another woman. Regardless, Wendy ratified the marriage after she learned Hal was involved with another woman and had another child in March 2022 and continued to cohabitate with him for over a year, until July 2023.

Divorce: Nevada courts have subject matter jurisdiction to enter a divorce decree if one spouse is a Nevada domiciliary and has been a resident of Nevada for at least six weeks. Nevada is a pure no-fault state, which means that the grounds for divorce do not require wrongdoing by either spouse. Nevada recognizes three grounds for divorce: insanity, separation (where the spouses have lived separate and apart for one year without the intent to assume a marital relationship), and incompatibility. There is no exact definition, but the plaintiff provides testimony that they no longer get along with their spouse and there is no hope for reconciliation.

The court has subject matter jurisdiction over the divorce because both spouses live in Nevada and have for several years. Wendy cannot seek a divorce on grounds of separation, because she and Hal have not been living separate and apart for a year. But, she can seek a divorce on grounds of incompatibility. In addition to Wendy's own testimony that she and Hal are incompatible and there is no hope of reconciliation, Wendy will point to the stress and loss of trust in the relationship, Hal's child from a previous relationship, and the separate living arrangements and financial relationships the parties have started.

Validity of the Pre-Martial Agreement: The premarital agreement between Hal and Wendy is likely not valid because it was entered into too close to the wedding to be voluntary and its not clear that the parties made a full and fair disclosure of their assets.

To be valid, a premarital contract must comply with the Statute of Frauds and to be enforced, must be voluntary, cannot be unconscionable, and must have been made after a full and fair disclosure of assets, finances, and obligations. The premarital agreement cannot affect child support. The agreement can reduce or eliminate property rights or spousal support, but not if the spouse will be left dependent on welfare. A court can overlook the provisions that eliminate spousal support.

Here, the agreement complied with the Statute of Frauds because it was in writing. A court could find that the agreement was not voluntary, though, because Wendy asked Hal to sign it right before going to the wedding chapel to get married. Courts sometimes consider a premarital contract not be voluntary when it was made too close to the wedding, because one spouse could feel pressured to agree instead of calling off the wedding. In this case, though, putting off the wedding would not be as coercive because Hal and Wendy got married at a chapel on the Strip and there is no indication that friends and family had traveled to come to the wedding. The court could find that there had not been a full and fair disclosure of assets if Wendy did not disclose the value of her home and inherited jewelry. The court would also decline to enforce the provision regarding child support and would not enforce the spousal support provision if it would leave Wendy dependent on public support and would have discretion to overlook the provision.

Rights and Obligations with Respect to Property

Nevada is a community property state. All property acquired during the course of a marriage is presumed to be community property. All property acquired before marriage or after permanent separation is deemed to be separate property. Property acquired by gift, devise, or bequest is presumed to be separate property. The party claiming property is separate property has the burden to rebut the presumption by clear and convincing evidence. At divorce, the court will equally divide separate property unless there is a valid and convincing reason not to.

Money in Wendy's Bank Account: \$94,000 of the balance in the bank account titled in Wendy's name is community property, subject to distribution at divorce. The account balance was \$6,000 when Wendy and Hal got married, which was Wendy's separate property. Wendy deposited half of her salary in the account throughout her marriage, which was community property because it was acquired during the course of the marriage.

Commingling does not automatically transmute separate funds if the funds remain traceable. Here, the funds remain traceable because Wendy knew the account balance when she got married and can trace out the separate funds.

Equity in Wendy's House: When a property is acquired with community and separate funds, the community and separate interests are determined by apportioning the respective contributions. Nevada courts apply the *Malmquist* approach, which provides that when community property is used to pay off a mortgage on separate property, the community is entitled to reimbursement and a pro rata share of the appreciation. The *Malmquist* approach considers the outstanding loan balance and divided the property's appreciation by the number of monthly payments made with separate property and community property.

Here, the community is entitled reimbursement for the monthly mortgage payments made during the marriage and a pro rata share of the appreciation. The court will divide the property's appreciation by the number of monthly payments made with community property during the marriage and the number of mortgage payments Wendy made before the marriage and divide the appreciation accordingly.

Boat and Trailer: The boat and trailer can be shown to be Wendy's separate property. Property acquired by gift, like the \$50,000 birthday gift to Wendy, is presumed to be separate property.

Assets purchased with separate property remain separate property. The court can trace co-mingled funds under either the exhaustion method or direct tracing method. The exhaustion method assumes that, at the time of purchase, all community funds had been used to pay community living expenses. The direct tracing method is used when separate funds were in a co-mingled account just long enough to purchase an asset.

Here, the court can use the direct tracing method to determine the boat and trailer were Wendy's separate property. As stated, the \$50,000 was a separate property gift. It was deposited into the co-mingled bank account, and the next day, Wendy spend \$49,000--almost the entire separate property amount--to buy the boat and trailer. Wendy could use the timing of the purchase to rebut the presumption that the boat and trailer were community property.

Hal would argue that the separate property was transmuted into community property. Transmutation is an agreement between spouses to change the character of an asset or a serious of assets. Here, Hal would argue that Wendy gifted the boat and trailer to the community because she bought it to take Hal and their children water-skiing, not for herself. Without more, though, such as a written or oral agreement, Hal would likely lose.

Slot Machine Jackpot: The slot machine jackpot is community property.

All property acquired during the course of a marriage is community property, unless the spouses have separated and a decree of separate maintenance has been issued by a court of competent jurisdiction.

Here, the slot machine jackpot is community property because, even though Wendy and Hal had separated, a decree of separation had not been entered and the marriage was still ongoing. Hal won the lottery jackpot in September 2023. He had moved out of the house, but neither party had initiated divorce proceedings or sought a decree of separate maintenance. Therefore, the lottery winnings are community property.

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



**FEBRUARY 2024
EXAMINATION ANSWERS**

**SELECTED APPLICANT ANSWERS
NEVADA BOARD OF BAR EXAMINERS**

Nevada Performance Test - 1

Performance Test 1 - Selected Answer 1

MEMORANDUM

To: Senior Firm Partner
From: Applicant
Re: Dr. Houser v. Nevada Board of Medical Examiners
Date: February 29, 2024

Nevada Board of Medical Examiners suspended his medical license for 6 months and placed him on probation for 3 years. Fined him 30k (3 counts) and ordered him to pay costs of 40k

he received proper notice of a hearing-- Dec. 1, two board members and a hearing officer did not settle and participated without counsel
2/1/2024 - voted to suspend license and probation and fine. NOT RECEIVED FINAL WRITTEN ORDER

wants to challenge immediately

AS QUICKLY AS POSSIBLE, WITHOUT INCURRING ADDITIONAL COSTS AND EXPENSES

Dr. White-- Respondent breached standard of care
Dr. White and Dr. Houser equally credible but Dr. White given edge b/c he was an outside expert

Introduction

Dr. Houser

I. What procedural options does Dr. Houser have to challenge the Board's actions?

A formal hearing was conducted on December 1, 2023 where an investigative committee recommended charges against Dr. Houser. In the report by the investigative committee, facts were laid out. On February 1, 2024, the Board held an adjudicative hearing and voted to discipline Dr. Houser. The question is whether the administrative process is sufficiently complete to provide Dr. Houser the standing to challenge the Board's decision.

A. Did the "Report of Investigative Committee Summary of Hearing and Recommendations" constitute a final order?

Under, NRS 233B.130(2)(d), and as interpreted by the Nevada Supreme Court in *Rush*, a petition for judicial review may not be filed until after service of an administrative agency's final decision, but must be filed within 30 days after service of the final decision of the agency.

Here, the administrative agency has not issued a final decision. While the investigative report states findings of fact and conclusions of law with a concise and explicit statement of the underlying facts in support, it did not come from the Board, as required by NRS 233B.125. It is not a final decision, but a recommendation, as it clearly states on its last page. Further, it says in bold font on the last page, "This report is not a final order of the Board of Medical Examiners." Thus, the investigative committee's report is not a final order.

B. Did the Board's vote on February 1, 2024 constitute a final decision so that Mr. Houser may file a petition for judicial review?

The issue is whether, since the report did not constitute a final decision but did contain findings of facts and conclusions, the Board's vote on February 1, 2024 integrated those findings of facts and conclusions to make a valid final decision. Under NRS 233B.125, an agency's final decision must be in writing and must include findings of fact and conclusions of law. In *Rush*, the Nevada Supreme Court held that while the administrative agency had stated its disposition on the record, that utterance did not constitute a final decision because it did not "include findings of fact and conclusions of law with a concise and explicit statement of the underlying facts in support." According to the Nevada Supreme Court, "premature petitions for judicial review do not vest subject matter jurisdiction in the district court. A petition for judicial review may not precede the administrative agency decision it contests, and the agency decision must satisfy NRS 233B.125 in order to constitute a decision subject to judicial review." *Rush*.

Here, the Board has not served a final decision on Mr. Houser as required under the NRS. As explained above, the investigative report is not a final decision and neither is a vote on whether to discipline Mr. Houser. The vote was not written and did not include the requisite findings of fact. In *Rush*, the Nevada Supreme Court held that an statement of the Board's disposition in a case does not constitute a final decision because it does not "include findings of fact and conclusions of law with a concise and explicit statement of the underlying facts in support." Further the Court in *Rush* rejected the argument that a court's verbal decision integrated the reasoning from an earlier decision. By analogy, we may assume that the court will reject any argument that the Board's vote incorporates the investigate report's findings. Thus, the Board's vote on February 1, 2024 did not constitute a final decision because it was not written and did not contain findings of fact, and as a result, Mr. Houser may not yet file a petition for judicial review

C. Once the Board serves Dr. Houser with its final decision, what steps should Dr. Houser take?

Once a final decision has been served, a petitioner may seek judicial review under NRS. 233B.133 and apply for a stay of the final decision under NRS 233B.140.

Here, Mr. Houser must wait until he is served with the Board's final decision but once he is, he should file a petition for judicial in the district court and apply for a stay of the final decision so that he may continue to practice.

II. What legal arguments could Dr. Houser make under NRS 233B.135 in response to the actions taken by the Board?

Under NRS 233B.135(3), a court may remand or set aside a final decision by an agency if the substantial rights of the petitioner have been prejudiced. Relevant reasons why a final decision may prejudice a petitioner include, in relevant part, that the final decision is: arbitrary or capricious or characterized by abuse of discretion; in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; and/or made under unlawful procedure. Once Mr. Houser has standing to challenge the Board's decision, he should raise all of the arguments laid out above under NRS 233B.135(3).

A. The Board's final decision is arbitrary and capricious

A court cannot substitute its judgment or evaluation of the record developed at the agency level for that Board. *Gilman*. Rather, the court must review the evidence presented to the agency to determine whether the agency's decision was arbitrary or capricious and thus was an abuse of the agency's discretion." *Id.* The decision of the agency will be affirmed if substantial evidence exists to support it. *Id.* Substantial evidence is "that which a reasonable mind might accept as adequate to support a conclusion." *Id.*

Here, the court has issued discipline that far exceeds its fines and costs in the other two cases you provided me. Indeed, Mr. Houser's punishment exceeds the costs and fines in those cases by a factor of five. That decision is based on one expert's testimony, who as I will mention shortly, is biased against Mr. Houser. Mr. Houser has offered conflicting evidence. The Board cannot sustain their decision on that light and disputed evidence alone. Thus, the Board's final decision will be arbitrary and capricious.

B. The proceeding violated NRS 233B.122(1) and NRS 630.352(1) by having members participate in the adjudication who also conducted the investigation.

Under NRS 630.352(1) and NRS 233B.122(1), no agency member who acts as an investigator may take part in the adjudication of such case."

Here, one of the Board members who was on investigative committee participated in Board's adjudication. Thus, the proceeding violated NRS 233B.122(1) and NRS 630.352(1).

C. The fine levied against Mr. House violated NRS 630.352(4)(h) by imposing a fine that exceed \$5,000 for each violation

Under NRS 630.352(4)(h), the Board may not impose a fine not to exceed \$5,000 for each violation.

Here, Mr. House was charged with three violation and fined \$30,000, which is \$10,000 a violation. Thus, the fine levied against Mr. House violated NRS 630.352(4)(h) by imposing a fine that exceed \$5,000 for each violation.

Harsher penalties on him than physicians who have done worse things -- altho did not raise at hearing

C. Costs too much

ordered him to payu costs of 40k

Gilman- \$18,093-- not too much b/c agency's budget-- not too tempted to find misconduct

Case #1-- 4,504.34 costs

Case #2 -- \$6,870.43 costs

nothing to suggest this cases so much more costly for board

"a party upon whom costs are imposed may seek judicial review to determine whether the costs imposed were excessive."

Court approves lunch for board members. "because these actual costs do not exceed the amount that could have been assessed for salaries and per diem allowances, the Board did not abuse its discretion... However, it was improper for the Board to assess against Dr. Gilman the costs of feeding the prosecuting attorney.

b/c the reasonableness of the investigative costs incurred could not be determined without an explanation of how such costs were necessary to the action, the board abused its discretion by assessing costs without explanation. DC erred by denying judicial review

D. Bias, Due Process

Chairperson of Board did surgical rotation under the expert (Dr. White) used by the Investigative Committee at the hearing
Another member of the Board is a surgeon whose group is competing with Dr. Houser for a lucrative on-call contract at a local hospital

A medical license to practice is a property interest protected by the Due Process Clause of the Fourteenth Amendment of the US Constitution as well as by Article 1, Section 8 of the Nevada Constitution. Not only must a tribunal deciding on whether a practitioner keeps a license harbor no actual bias against the person facing a deprivation of his property interests, but "justice must satisfy the appearance of justice."

The test is: "whether the [adjudicator's] situation is one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused."

A presumption of honesty and integrity cloaks those who serve as adjudicators. That presumption may be overcome, however, by showing that the adjudicators have a conflict of interest, such as a financial stake in the outcome of the case

However, no bias may be inferred if the pecuniary interest is too remote to create a possible temptation to convict.

In re Ross (1983) - where dues were paid directly to the State bar treasury and the Board of Governors was responsible for the bar association's financial integrity, the board violated the petitioner's due process rights by sitting as the trier of fact in his hearing because doing so "presented a constitutionally unacceptable potential for bias." In *ross*, the cost of the case had completely taken up the State Bar's yearly budget deficit so the temptation to impose penalty on the lawyers was strong. Got them on perjury, not actual substantive claim

Conclusion

Restate conclusion.

***** NPT 1 ENDS HERE *****

Performance Test 1 - Selected Answer 2

MEMORANDUM

From: Applicant

To: Senior Firm Partner

Re: Research and Memorandum Request

Date: February 29, 2024

Relevant Facts

I. Procedural Options Dr. Houser at Challenge the Board's Options with List of Next Steps with Applicable Statutory References

A. Attempted Settlement/ Consent Order under NRS 233 B.121

NRS 233B.121(5) establishes that an "informal disposition may be made of any contested case by stipulation, agreed settlement, consent order and default." Here, Dr. Houser is distraught over his suspension, the fines and costs assessed, worried about his reputation, and does not want the Board's actions to negatively impact his practice. As a result, I would advise us to contact the Board, establish the legal deficiencies as set forth to challenge the Board's actions under NRS 233B.135, and see if there is a way to resolve the matter informally, so as to not incur additional costs and expenses.

B. Challenge after Issuance of Final Order

If settlement negotiations fail, then I would proceed with a challenge of the final order, once it has been requested, issued and received. Below outlines the steps required for the challenge as requested by Dr. Houser in the event that the case does not resolve itself simply:

1. Summary of Procedural History

Dr. Houser's case is a contested case under NRS 233B.032. A complaint has been filed by a medical malpractice action with the NV Board of Medical Examiners (hereinafter "The Board") against Dr. Douglas Houser (hereinafter "Houser"). The Board's Committee investigated, filed a formal Complaint alleging: Malpractice, Failure to Maintain Proper Medical Records, and Violations of Standards of Practice established by regulation, provided proper notice of the hearing, and held the hearing on December 1, 2023. The two board members and a hearing officer thereafter on February 1, 2024 voted to suspend Houser's medical license for six months and placed him on probation for three years. They also fined him \$30,000 and ordered him to pay costs and expenses in the amount of \$40,000. Notably, while Houser received a copy of the Report of the Investigative Committee--Summary of Hearing and Recommendations, he has not yet received a final written order which includes separately stated findings of fact and conclusions of law as required by NRS 233B.125. The fact pattern establishes that Houser did not waive the requirements for a finding of fact and conclusion of law required by NRS 233B.121(5). The fact pattern establishes that the adjudication was made on February 1, 2024.

2. A Petition for Judicial Review under NRS 630.356 Shall Proceed after Receipt of the Final Order from the Board because per Rusk, the District Court does not Have Jurisdiction under a Petition after the Final Order is Issued Here, consistent with the Supreme Court of Nevada's 2019 decision in Nevada State Board of Architecture Interior Design and Residential Design v. Dennis E. Rusk (hereinafter "Rusk"), Dr. Houser should proceed with a judicial review under NRS 630.356 upon receipt of the final order from the Board.

Currently, the Report from the Board, like the disposition on the record in Rusk does not include a findings of fact and conclusions of law with a concise and explicit statement of the underlying facts in support. Accordingly, per Rusk, that Report is not a final decision for the purposes of commencing the period for judicial review under NRS 233B.130(2)(d) and there will be no subject matter jurisdiction under a final order has been issued. Because NRS 233B.130(2)(d) requires a petition to be filed after the service of an administrative agency's final decision, no petition to be judicial review should be filed as of now. Rather, under NRS 630.352, the Board is required to provide a final order to Dr. Houser within 30 days of the adjudication. As the Board's adjudication was made on February 1, 2024, the Final Order shall issue no later than March 2, 2024. As Dr. Houser's counsels we should request for a written copy of the decision and order to us (the counsel of record) under NRS 233B.125.

After receipt of the final order, we can then seek judicial review for Houser under NAPA which provides for judicial review of administrative decision such as the decision by the Board to suspend Houser, and to assess fines and costs against him. Here, Houser is the Defendant is the party of record by an agency by naming the Board as the respondent and by filing a petition in the district court in and for Carson City, serve the petition upon the Attorney General within 30 days of the final decision of the agency. Service must be complete within 45 days of the filing of the petition under NRS 233B.130. Should the district court deny the petition for judicial review, then Dr. Houseman may appeal to the Supreme Court of Nevada under NRS 233B.150.

3. Memorandum of Points and Authorities

Within 40 days of the Board's notice that the record of the proceeding under review has been filed with the Court, Dr. Houser shall serve and file a memorandum of points and authorities under NRS 233 B.133.

4. A Stay Should Also Be Requested

In light of Dr. Houser's concerns on the impact of the suspension and the fine on his practice, we should also apply for a stay of the final decision under NRS 233B.140 at the same time that it files the Petition for Judicial Review. Dr. Houser will likely need to provide security before the Court will grant a stay. Unfortunately, that does not prevent the Board from circulating

the copy of the disciplinary findings and orders to the persons affected, each hospital in the geographic area and members of the media under NAC 630.270.

II. Legal Arguments Dr. Houser could make under NRS 233B.135 based on his concerns and Responses Taken by the Board

A. The Board's Decision is Clearly Erroneous per NRS 233B.135(3)

Under NRS 233B.125, Dr. Houser can argue that the final decision of the Board should be set aside in part because his substantial rights has been prejudiced due to multiple infractions. On review, per Gilman, the Court will review the evidence presented to the agency in order to determine whether the agency's decision was arbitrary or capricious and thus an abuse of the agency's discretion. The Court will affirm the decision if substantial evidence exists to support it. Substantial evidence is that which a reasonable mind might accept to support a conclusion. Thus, Dr. Houser is stuck with what he has presented to the Board at the hearing, including his failure to call any witnesses. Dr. Houser however has testified on his own behalf. Dr. Houser is objectively considered to be an expert in his field of laparoscopic gall bladder.

The applicable standard of proof to be applied under NRS 233B.125 is preponderance of evidence. While per NRS 630.346, the panel of the Board and the hearing officers are not bound by the formal rules of evidence, there is nevertheless a statutory requirement that the finding of the Board to be supported by preponderance of evidence. There is no requirement that the respondent must have an outside expert testify in order to defeat the Board's efforts to meet the preponderance of evidence standard of proof in establishing malpractice.

Dr. Houser will also allege that the Board's finding is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record NRS 233B.135(3)(e). Critically, the Board found that the testimony of the witnesses and the Respondent to be equally credible but recommended to the Board that the IC has satisfied its burden of proof on the sole basis that IC provided testimony from an outside expert, namely Dr. David White, M.D., a professor of surgical medicine at the UCLA in California, and Respondent has not.

Dr. Houser can show that he has practiced medicine in Nevada for over 20 years, has performed more than 1,000 laparoscopic gall bladder surgeries without incident, and that he is considered an expert in the field. Given that the Board found Dr. Houser's testimony which is that (1) laparoscopy is inherently high risk, (2) that cholangiography does not decrease bile duct injury and not routinely used, and (3) that the anatomy is not identified incorrectly, an argument can be made to reverse the finding that the IC has met its proof of burden in relation to all counts of the Complaint.

Dr. Houser will also allege that the Chairperson of the Board did his surgical rotation under Dr. White, the expert used by the Investigative Committee during the hearing and so is affected by other error of law NRS 233B.135(3)(d). Here, one of the three board members and the chair did his surgical rotation under Dr. White at the UCLA. The Board ultimately based its finding on the fact that Dr. White was an outside expert while the Respondent did not hire an outside expert. There is not only an appearance of impropriety but also the likely preception that the basis of the Board's decision is clouded. The issue of course is that the board member due to his personal relationship with the expert testifying against Dr. Houser will be unduly influenced by the expert.

B. Additional Legal Arguments for Setting Aside the Board's Decision

1. The Board's Decision is Unlawful because the Board Member Who Participated in the Investigation also Participated in the Adjudication under 233B.122

First, the Board's decision is in violation of statutory provisions. Under NRS 233B.122, no agency member who acts as an investigator or prosecutor in any contested case may take part in the adjudication of such a case. This likely ensures that the Board does not assume both the responsibility of an investigator and an adjudicator at the same time under NRS 630.352. Nevertheless, one of the Board members on the investigative committee also participated in the adjudication of Dr. Houser's contested case on February 1, 2024, which taints the Board's adjudication and finding.

2. The Assessed Fine is in Excess of the Statutory Authority of the Agency under NRS 233B.135

Second, the Board's decision to fine Dr. Houser \$30,000 in fines is likely in excess of its statutory authority which allows for the imposition of a fine not to exceed \$5,000 per violation under NRS 630.352(4). Here, the fact pattern establishes that there are three counts of violations, namely that Houser failed to use reasonable care, skill or knowledge to perform the laparoscopic gall bladder surgery by failing to identify Patient's anatomy, failed to maintain timely legible and accurate complete medical records. The fact pattern does not establish that there are six or more violations. The amount sought in fines is also inconsistent with comparable cases where physicians similarly charged with multiple violations of malpractice, failure to maintain proper medical records, and violations of standard of practice are assessed fines of less than \$5,000 in total.

3. The Assessed Costs is Arbitrary, Clearly Capricious and an Abuse of Discretion

Third, Dr. Houser will argue that the assessment of costs is arbitrary and capricious and characterized by abuse of discretion NRS 233B.135(3)(f). Here, the Board costs of \$40,000 is more than double the amount assessed in Gilman and the costs and expenses assessed in comparable cases (which are \$4,500 and \$6,800 respectively). In Gilman, the Court held that the expenses in disciplining a vet must by its nature be reasonable and hence the Board governing the Vets must show that its costs are both reasonable and actual. As applicable to Houser, the Board will need to show the basis with explanation of services provided to justify the hefty \$40,000 costs assessed against Dr. Houser.

4. The Board's Adjudication Violates the Due Process Protections under the Constitution NRS 233B.135(a)

Here, Dr. Houser will allege that the Board's adjudication fails to satisfy the constitutional requirements of due process due to actual bias that can be established under the Gilman test. A doctor's license to practice is a property interest protected by the Due Process Clause of the Fourteenth Amendment of the United States Constitution as well as by Article 1 Section 8 of the Nevada Constitution. Per Gilman, the Supreme Court has set forth standards for evaluating a tribunal's fairness under

the Due Process Clause. Not only must the tribunal harbor no actual bias against the person facing a deprivation of his property interests, but justice must satisfy the appearance of justice. Specifically, the Gilman tests looks to "whether the adjudicator's situation is one "which would offer a possible temptation for the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him to not hold the balance nice, clear and true between the State and the accused." While there is a presumption of honesty and integrity for the Board members who participated in the February 1 adjudication, Dr. Houser will overcome this presumption by showing an actual conflict of interest. Here, one member of the Board has adverse pecuniary interests against Dr. Houser, and is a competitor for a lucrative on-call contract at a local hospital. He has financial interest in the outcome of the case, namely the suspension and the probation of Dr. Houser, since Dr. Houser is an actual competitor for the lucrative on-call business. Unlike in Gilman, this pecuniary interest is omnipresent, rather than too remote.

***** NPT 1 ENDS HERE *****



**FEBRUARY 2024
EXAMINATION ANSWERS**

**SELECTED APPLICANT ANSWERS
NEVADA BOARD OF BAR EXAMINERS**

Nevada Performance Test - 2

Performance Test 2 - Selected Answer 1

To: Managing Partner Miller

From: Applicant

Date: February 29, 2024

Re: Johnson v. Johnson

Managing Partner Miller,

Please see below for the points and authorities to use for the motion for primary physical custody and permission to relocate the children on behalf of Mary Johnson.

Sincerely,
Applicant

III. Legal Argument

Plaintiff, who currently maintains joint physical custody of her two minor children seeks to relocate the children to Davis, California.

Consent Required

According to NRS 125C.0065, if joint physical custody has been established pursuant to a judgment and one parent intends to relocate his or her residence to a place outside of this State that is such a distance that would substantially impair the ability of the other parent to maintain a meaningful relationship with the child, and the relocating parent desires to take the child with them, the parent shall before relocating: (a) attempt to obtain the written consent of the non-relocating parent to relocate with the child; and (b) If the non-relocating parent refuses to give that consent, petition the court for primary physical custody

In any action in determining physical custody of a minor child, the sole consideration of the court is the best interest of the child (NRS 125C.005).

Here, Mary Johnson is seeking to move with the children from Reno, Nevada and live in Davis, California with her boyfriend Bob Smith. Her ex-husband David Johnson has refused to consent to this relation. Because both parents have joint physical custody from their divorce in 2016, Mary is seeking to petition the court to relocate with her child, despite David's refusal.

Plaintiff has satisfied the burden to sufficiently show that relocating with the children is in the best interest of the child.

Best Interest of the Child Factors

In determining the best interests of the child, the court shall consider and set forth its specific findings. Of factors, these are the most relevant factors in the case of Johnson v. Johnson according to NRS 125C.0035(4):

- (a) The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to her or her physical custody;
- (c) Which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent;
- (e) The ability of the parents to cooperate to meet the needs of the child;
- (g) The physical, developmental and emotional needs of the child; and
- (h) The nature of the child of the relationship with each parent

Plaintiff should prevail in a petition for physical custody of the children for purposes of relocation.

In *Eorio v. Eorio* (2022) ("*Eorio*"), the court held that a parent with joint physical custody must petition the court for primary physical custody for purpose of relocating and demonstrate relocating is in the best interests of the children by a preponderance of the evidence. The court therefore held that the court must make specific findings and tie those findings to its conclusion regarding which NRS 125C.0035(4) best interest factors, if any, support primary physical custody for the purposes of relocation, or any other relevant factors, then balance all factors by comparing each potential home.

Therefore, we must establish the best interest of the child factors in determining whether Mary should be entitled to primary custody.

Here, the children are 8 years older than when the divorce decree was decided in 2016. The children are aware of the move and are excited to move to Davis, California to live on the farm of Mary's Boyfriend Bob Smith. The boys have spent many weekends on the farm and the boys love it. Since they are older, 13 and 15 respectively, the wishes of the child should be taken into consideration.

Additionally, Mary has spoken with David about continuing the frequent associations and a continuing relationship. She has offered to allow the children to spend several weeks each summer and school break weeks with David, where they can alternate holidays. David will argue that this will not be sufficient that he won't get to see them very often. Currently, David sees them every other weekend from Friday afternoon until Tuesday morning and on the off week, on Monday night. However, Mary contends that David has dropped his Monday night visitation in the off week, and that he has only spent 2 weeks out of the possible six with the boys on summer vacation.

It seems as though Mary will be more than cooperative with David and that the change in the visitation schedule, although not weekly, will not hinder the developmental or emotional needs of the children.

David may also argue that the travel to visit the boys is too much of a burden and he won't be able to see the boy's sports and school events. However, *Gandee v. Gandee* (1995) ("Gandee") held that although the distance was six hours away, a reasonable visitation schedule was possible. Here, the distance is about the same, and having longer visitation in the summer will make up for that.

Mary has also agreed to pay for the transportation costs. This is consistent with the *Trent* decision where the parent agreed to pay for transportation costs, where the court allowed the custodial parent to move and is not inconsistent with NRS 125C.006 where the distance would not substantially impair the ability of the other parent to maintain a meaningful relationship with the child.

Therefore, the factors shown above, when balanced should favor the Plaintiff's request for physical custody.

Plaintiff meets the burden of showing the a valid permission to locate because there is a good-faith reason for the move, and the Plaintiff will also benefit as a result of the location.

NRS 125C.007 states that in every instance of a petition for permission to relocate with a child, that there be a (a) sensible, good-faith reason for the move, and the move is not intended to deprive the non-relocating parent of his or her parenting time; (b) the best interest of the child are served by allowing the relocating parent to relocate with the child; and (c) The child and the relocating parent will benefit from an actual advantage as a result of the relocation.

Section (b) above is satisfied by the best interest of the child factors as explained above.

With respect to section (a), *Schwartz v Schwartz* (1991) ("Schwartz") set out factors for the compelling interests of each member of the family that are accommodated: (1) the extent to which the move is likely to improve the quality of life for both the children and the custodial parent' (2) whether the custodial parent's motives are honorable; and not designed to frustrate or defeat visitation rights according to the noncustodial parent (3) whether, if permission to remove is granted, the custodial parent will comply with any substitute visitation orders issued by the court; (4) whether the non-custodian's motives are honorable in resisting the motion to remove; and (5) whether if removal is allowed, there will be a realistic opportunity for the noncustodial parent to maintain a visitation schedule that will adequately foster and preserve the parental relationship with the non-custodial parent.

Here, Mary is seeking to move her children in good-faith. She seeks a better opportunity for her children where there is a better school district than Reno, and a highly ranked charter school in the area for their eldest son. There are also more tutoring opportunities for their sons.

With respect to section (c), the court will also look at a number of sub-factors including whether there is positive family care and support including that of extended family; whether housing conditions will be improved; whether educational advantages for children will result; whether the custodial parent's employment and income will improve *Schwartz*.

Here, Mary is seeking to move not just to live with her boyfriend, but also because she will be working at a hospital with a slightly higher salary. While that may not mean much now, she will have an opportunity for advancement, as the new hospital she will be working at will want her to be a labor and delivery consultant. She can also obtain a master's degree to help advance her career. She will also have more income as she won't be paying rent.

They will also me living on a farm where the boys will offer more outdoor activities. Additionally, Mary will be closer to her cousins that live in the San Francisco Bay area, whereas David's extended family lives on the east coast.

In *Trent v. Trent* (1995) ("*Trent*"), the court found it disturbing that the decision in *Schwartz* are using NRS 125C006, 125C0065, and 125C.007 as a means to chain custodial parents, mostly women to the state of Nevada. These statutes should not be used to prevent the custodial parent from freely pursuing life outside of Nevada when reasonable alternative visitation is available. In *Trent*, the court held that the mother had a good-faith reason for moving, and that they had a reasonable alternative visitation plan.

Here, Mary is seeking a better opportunity for her career advancement, more money in income for her family, and a better life for her boys with better schooling and tutoring services, along with family nearby.

David may argue that the main reason she is leaving is to live with her boyfriend, which isn't setting a good example, and that Mary and her boyfriend have no plans on marrying, and that this is distinguishable from *Trent* because the mother was leaving to live with her husband.

However, that argument is flawed. Even if Mary didn't live with her boyfriend, she would have the advancement of a career opportunity in her field than that of Reno (where she states that nurses in Reno are only making \$2 per hour more with 20 years more experience), and that the boys would have better schooling options. As *Trent* indicates, Mary shouldn't be tied down to Nevada when there are reasonable alternatives available for visitation.

David may also contend that Mary and her boyfriend have not known each other long enough. Mary met Bob, her boyfriend in 2020 and were friends until they started dating in 2021, which has been almost for three years.

Therefore, Mary has shown by balancing all of the factors above, that she meets the burden for showing a valid permission to relocate because she has a good-faith reason to it, it is in the best interest of the children, and that she will financially benefit as a result of the relocation.

***** NPT 2 ENDS HERE *****

Performance Test 2 - Selected Answer 2

MOTION FOR PRIMARY PHYSICAL CUSTODY AND PERMISSION TO RELOCATE THE CHILDREN

POINTS AND AUTHORITIES

...

III. Legal Argument

A. THE COURT SHOULD AWARD MARY PRIMARY PHYSICAL CUSTODY OF THE PARTIES' MINOR CHILDREN FOR PURPOSES OF RELOCATION AS THE RELOCATION IS IN THE CHILDREN'S BEST INTERESTS DUE TO EDUCATIONAL AND FINANCIAL OPPORTUNITIES.

1. Child's best interest

Pursuant to NRS 125C.0035(1), in any action for determining physical custody of a minor child, the sole consideration of the court is the best interest of the child. If it appears that joint physical custody would be in the best interest of the child, the court may grant physical custody to the parties jointly. *Id.*

In determining the child's best interest, the court shall consider and set forth specific findings concerning, among other things: *Id.*

a) *The wishes of the child if the child is of sufficient age and capacity to form an intelligent preference as to his or her physical custody.*

The children are ages 12 and 14, as such they are of sufficient age. There are no facts that would indicate they are lacking capacity. Therefore, they are intelligent enough to make a decision as to their physical custody.

Also, Mary is seeking relocation to California where the children would be in a rural area. David acknowledged that the children really like the farm and are excited to live there.

Therefore, this factor favors Mary.

b) *Any nomination of a guardian for the child by a parent.*

Inapplicable.

c) *Which parent is more likely to allow the child to have frequent associations and a continuing relationship with the noncustodial parent.*

Mary has offered David several weeks in the summer, school breaks and alternate holidays, in addition to paying transportation costs. She also graciously offered him three-day weekends. There is no history of any parent denying time with the children to the other. Quite the contrary, David has voluntarily declined his custodial timeshare.

Therefore, this factor favors Mary.

d) *the level of conflict between the parents.*

This is a low conflict level case as the parents have had joint physical custody without issues and the communication exchanges between them are mostly amicable. Therefore, this factor is neutral.

e) *the ability of the parents to cooperate to meet the needs of the child.*

As stated above, Mary has offered extended visitation time with the children to David, if she is permitted to relocate, and transportation costs. However, because David has complained that he does not have money for daycare and only has two weeks off from work, he has not been as committed with the needs of the children. He has even said it is inconvenient to pick up the children on Monday nights.

Also, Mary communicates well with David and they have been amicable, so Mary is able to cooperate with David to meet the needs of the children.

This factor favors Mary.

f) *The mental and physical health of the parents.*

Both parties seem to be in good mental and physical health. This factor is neutral.

g) *The physical, developmental and emotional needs of the child.*

The children do not have any current physical or developmental or emotional needs, but David acknowledged they are excited to live in the farm. Also, Mary's relocation would result in living in an area with more tutoring, schools ranked higher than the current one and activities that would not only meet but improve the children's needs.

David has stated wishes to continue attending their sports and events, but has not mentioned any educational opportunities to meet developmental needs.

Also, if Mary is permitted to relocate, she has a job offer that offer a higher salary and career advancement, which would allow her to better meet the children's needs.

Therefore, this factor favors Mary.

h) the nature of the relationship of the child with each parent.

There are no facts to indicate the children do not have a good relationship with either parent. Therefore, this factor is neutral.

i) The ability of the child to maintain a relationship with any sibling.

The children do not have siblings other than each other, and they should remain together. This factor is inapplicable.

j) Any history of parental abuse or neglect of the child or a sibling of the child.

None. This factor is inapplicable.

k) Whether either parent or any other person seeking physical custody has engaged in any act of domestic violence against the child, a parent of the child or any other person residing with the child.

None. This factor is inapplicable.

l) Whether either parent or any person seeking physical custody has committed any act of abduction against the child or any other child.

None. This factor is inapplicable.

The burden is on the relocating parent and he or she is subject to the preponderance of the evidence. See *Eorio v. Eorio*, at 13. In *Eorio*, the parties had joint physical custody per their agreement and Dad sought to move to New Mexico alleging he would be more financially stable because he would live rent-free with his parents, and his job would allow him to make a later transfer. *Id.*

Mom testified that the children should remain in Las Vegas. *Id.* Dad prevailed; the court in *Eorio* reversed and remanded because the court failed to set forth adequate findings when most of the factors did not apply and others were equal to both parents, aside from the fact that Dad was able to spend more time with the children. *Id.* at 13-14.

Here, unlike in *Eorio* based on the above analysis, it is in the children's best interest for Mary to be awarded primary physical custody because no factor favors David and most factors favor Mary.

Moreover, because David cannot even pick up the children on Monday nights, and has not exercised his time in the summer per the current schedule, it is highly unlikely he can have primary physical custody of the children if Mary relocates without the children.

Therefore, the Court should enter an order awarding Mary primary physical custody, subject to David's visitation.

B. MARY SHOULD BE ALLOWED TO RELOCATE THE MINOR CHILDREN BECAUSE THE CHILDREN WOULD HAVE ACCESS TO HIGHER RANKED SCHOOLS, ACTIVITIES AND FAMILY SUPPORT, AND THAT REPRESENTS A GOOD FAITH REASON FOR THE RELOCATION IN THE CHILD'S BEST INTEREST.

1. Consent Required

Pursuant to NRS 125C.0065(1), if a joint physical custody order has been entered and one parent intends to relocate his or her residence to a place outside of this State, and the relocating desires to take the child with him or her, the relocating parent shall, before relocating, attempt to obtain the written consent of the other parent.

Should the non-relocating parent refuse to give consent, the relocating parent may petition the court for primary physical custody for the purposes of relocating. *Id.*

Here, Mary attempted to obtain consent from David when she sent him various emails and explained the reasons for relocating, as well as her intent to allow extended visitation. However, David refused to give consent.

Therefore, this Motion follows.

2. Good-faith reason to relocate.

Pursuant to NRS 125C.007(1), a parent filing a petition for permission to relocate with a child, pursuant to NRS 125C.0065, the relocating parent must demonstrate that:

a) there exists a sensible, good-faith reason for the move, and the move is not intended to deprive the non-relocating parent of his or her parenting time;

Here, Mary wishes to relocate because she is topped out in her job in Reno and there is no room for advancement, whereas in the new location, she was offered a job with the same hours and a slightly higher salary. She will also have opportunities for pay increases and advancement. In her current job, nurses working for 20 years longer than her are only making \$2 an hour more than her.

David is likely to argue that her reason to move is to go live with her boyfriend, and that she just met him for a short period of time. However, while it is true that she intends on moving with her boyfriend, she met him in 2020 and began dating him in 2021, the boys and him have been spending a lot of time together, and the couple has discussed getting married.

There is no history of Mary depriving David of his time and does not intend on doing that now.

Therefore, Mary has a good-faith reason to relocate and it is not intended to deprive David's parenting time.

b) the relocation is in the child's best interest; and

Mary incorporates her best interest analysis here, and adds that the children would have access to outdoor activities right outside the front door, such as fishing, hiking, horseback riding and farm activities.

Therefore, this factor favors Mary.

c) the child and the relocating parent will benefit from an actual advantage as a result of the relocation.

Mary incorporates her best interest analysis here, and adds that the children would benefit from an actual advantage because they would be in a school ranked higher than the one they are in now. They would have access to be enrolled in a charter school with computer science curriculum, and the parties' oldest son is interested in computer programming.

They would also be able to visit their aunt and Mary's family more easily. David's family is back East.

Mary would live rent-free if permitted to relocate, which would also add more financial advantage for the children in the form of disposable income.

Therefore, this factor favors Mary.

As shown above, Mary met the first prong of the requirements.

Under NRS 125C.007(2), if the parent demonstrates the above provisions, the court must then weigh the following factors and the impact of each on the child, the relocating parent and the non-relocating parent, including without limitation, the extent to which the compelling interests of the child, the relocating parent and the non-relocating parent are accommodated:

a) the extent to which the relocation is likely to improve the quality of life of the child and the relocating parent;

Mary incorporates her best interest analysis here, and adds that the children's quality of life would improve to the extent they would have educational opportunities in the form of better schools, more tutoring, and science programming. Mary's new income would improve their quality of life. David is concerned the children would not have their own bedroom, but they are both boys of similar ages and it is not detrimental if that is the case.

Therefore, this factor favors Mary.

b) whether the motives of the relocating parent are honorable and not designated to frustrate or defeat any visitation rights accorded to the non-relocating parent;

Mary incorporates her best interest analysis here, and adds that David's lack of exercising his current custodial timeshare shows he is frustrating his own rights.

Therefore, this factor favors Mary.

c) whether the relocating parent will comply with any substitute visitation orders;

In so far, there is no history of non-compliance from Mary's part, and she has set forth specific visitation arrangements for David showing her intent to abide by visitation orders.

Therefore, this factor favors Mary.

d) whether the motives of the non-relocating parent are honorable in resting the petition for permission to relocate or to what extent any opposition to the petition for permission to relocate is intended to secure a financial advantage in the form of ongoing support obligations or otherwise;

Mary's reasons are honorable because she has a better job offer that as shown above, is very likely to improve the children's lives. She would also give them a better family unit by living with her potentially future husband and living closer to other family of Mary's.

It is unlikely that David's opposition to the motion is intended to secure a financial advantage, but either way, seems unreasonable.

Therefore, this factor favors Mary.

e) whether there will be a realistic opportunity for the non-relocating parent to maintain a visitation schedule that will adequately foster and preserve the parental relocation between the child and the non-relocating parent if permission to relocate is granted; and

Mary is only seeking to relocate 2 1/2 hours away by car, but David could fly or take public transportation nearby Sacramento and Reno/Sparks. Mary is willing to pay for the transportation costs, so David has a continued relationship with the children, despite the distance.

Therefore, this factor favors Mary.

f) any other factor necessary to assist the court in determining whether to grant permission to relocate.

Mary has also offered David, in addition to regular visitation, to alternate the holidays.

As shown in the above analysis, the factors weigh in favor of Mary.

Where a parent has shown good faith reason for relocating, a parent has met the requirements in NRS 125C.007(1). See *Trent v. Trent*, at 19.

In *Trent*, Christi's Petition to relocate was denied when she wanted to live with her boyfriend and marry him, and her life would have improved drastically. *Id.* at 19-20. On appeal, the district court's order was reversed because it rested solely on the other parent's frequent contact with the child and there would not be a realistic opportunity for them to maintain the relationship if the relocation was allowed. *Id.* at 20.

However, the record showed that Kenneth could fly and Christi should be able to pay for airline tickets, so there was an adequate opportunity for Kenneth and the child to maintain their relationship. *Id.* Additionally, the other factors favored Christi. *Id.* Also see *Gandee v. Gandee* where the court abused its discretion by not considering alternative visitation schedules to maintain the relationship between the non-relocating parent and the child.

As in *Trent*, Mary has shown a good faith reason to relocate because she wishes to live with her boyfriend, who she may marry in the future, and due to her new job and family ties in California, her life would improve drastically. Also, like in *Trent*, she is able to pay transportation costs to offer David an adequate opportunity to maintain a relationship with the children despite the relocation. Lastly, as in *Trent*, other factors weigh in Mary's favor.

Based on the above, Mary met her legal burden, so the Court should grant her request to relocate with the minor children to California.

***** NPT 2 ENDS HERE *****