FEBRUARY 2025
EXAMINATION ANSWERS

SELECTED APPLICANT ANSWERS
NEVADA BOARD OF BAR EXAMINERS

QUESTION 1

Question 1 - Selected Answer 1

1. Ben's Contractual Rights Against NSU and Defenses

Governing Law
The UCC governs contracts for goods, while the common law governs contracts for services and real property. When a contract is made that involves both the sale of goods and services, the Court will use the predominant purpose test in order to determine what law governs the contract.

Here, the contract between Nevada Southern University (NSU) and Ben is for a head football coach position at NSU. Since a coaching position would be considered a service, the common law would govern the formation of the contract as well as equitable relief that Ben may claim if the court determines that a contact was formed.

Therefore, the common law would govern the contract.

Formation
In order to create a valid contract, there must be offer, acceptance, consideration, and no defenses to formation.

Offer
An offer is an objective manifestation of the offeror's willingness to enter into an agreement that gives the offeree the power to accept. Under the common law, terms must be certain and definite.

Here, the offer was initially made by NSU because Ben was the former University of Michigan (Michigan) assistant coach and had been contacted by NSU in order to be the head coach at NSU. While the preliminary phone call and negotiations in February did not constitute an offer because there were unclear terms to the employment, the subsequent meeting and phone call on August 1, 2023 outlined specific terms that would be considered definite under the common law.

Therefore, the phone call on August 1, 2023 was an offer from NSU that invited acceptance from Ben.

Acceptance
An acceptance is an objective manifestation by the offeree to be bound by the offers terms. Unlike the UCC, the common law requires that the acceptance be a mirror image of the initial offer.

Here, the offer was negotiated and accepted with the same terms of the offer. Ben and the president of NSU agreed to a three year contract that included the following terms i) an annual salary of $1,200,000 payable in equal monthly installments and ii) a severance payment in an amount equal to one year's salary if Ben was terminated for any reason within the first two years of the contract period.

Since there is no evidence in the contract that Ben continued to negotiated or attempted to accept with additional terms, the acceptance would be considered proper under the common law.

Consideration
Consideration in a contact exists if there is a legal determinate to the promisee that was bargained for in exchange for the promise to be bound by the terms of the contract.

Here, consideration exists because Ben had agreed to offer his services in exchange for $1,200,000. Additionally, there was consideration by NSU to pay Ben's salary for the specified term.

Therefore, consideration exists.

Defenses:

Statute of Frauds
Certain contracts are subject to the statute of frauds, which require a higher form of proof. In order to enforce a contract under the statute of frauds, there must be a signed writing by the party against whom enforcement is sought and contain the essential elements of the deal. One such instance a contract that is impossible to complete in under a year (such as a contract for employment over one year).

Here, Ben and NSU agreed to an employment contract of over one year, and such should have been signed by the party in which enforcement was sought. In this case, Ben is attempting to enforce the previous agreement after NSU had terminated him after one year. Ben will argue that his termination occurred less exactly a year after he had accepted the contract from NSU since he had moved from Michigan on August 2, 2023 and had later been terminated on August 2, 2024. However, this is not a defense of the statute of frauds because the contract for employment was for three years.

NSU will argue that because Ben had never signed the contract, he must accept the $200,000 severance payment as no valid contract was entered into. However, Ben will have additional equitable remedies even though NSU had not signed the contract.

Therefore, the Statute of Frauds is a potential defense NSU may assert but would likely be overcome by the equitable remedies discussed below.

Impracticability
Duties may be discharged due to impracticability. For this defense to be available, the following conditions must be met i) an unforeseeable event has occurred, ii) nonoccurence of the even was a basic assumption on which the contract was made, and iii) the party seeking discharge was not at fault.

Here, NSU may argue that the contract continuing is impracticable because the reason why they had hired Ben was to increase the school's profile and develop a more successful football program. Since the first season that Ben had coached ended up being unsuccessful, NSU will argue that the basic assumption of the contract fails and therefore they may discharge their duties due to impracticability. However, this defense would fail because the terms in the contract require that there is severance pay available to Ben if he is discharged for any reason within the first two years of the contract period, and this amount would be equal to one year's salary.

Therefore, impracticability is not a defense for NSU to discharge its duties under the contract.

2. Ben's Potential Equitable Claims Against NSU and Defenses

Promissory Estoppel
An offeror's power to revoke is limited by the doctrine of promissory estoppel. When the oferee reasonably and detremental reliance relies on the offerors promise prior to acceptance, the doctrine of promissory estoppel may make the offer irrevocable. It must have been reasonably foreseeable that such detrimental reliance would occur.

Here, NSU may argue that no initial acceptance occured because neither party signed a contract. However, they would be estopped from claiming no offer was accepted because it is clear that Ben detrimentally relied on the offer of employment. The facts indicate that he had given notice to Michigan that he was terminating his employment, and Ben signed an 18-month leas for a house in Las Vegas while he looked for a permanent residence. Additionally, NSU would have known that an offer with such definite terms would induce this type of reliance.

Therefore, if NSU attempts to argue that no offer was made that could be accepted since there was no signed contract, Ben will have a valid promissory estoppel defense because of his detrimental reliance on the contract.

Substantial Performance
When a party has almost completely performed his duties, but has breached in some minor way, the rule of substantial performance avoid forefieture of a return performance. However, express conditions must be complied with fully unless excused.

NSU may argue that discharge was proper because Ben had not subsantially informed under the contract. There argument will be based on the fact that Ben was hired to create a succesful football program, but he ended up having a "disastrous first season". However, this argument will not apply because the contract itself did not inlcude an express term on performance of the football program. Rather, it was implied that Ben may be terminated if he did not perform, but would still be entitled to severance pay.

Therefore, Ben had substantially performed under the contract for a year even though the team had a disastrous first season.

Defenses: Material Breach
Under the common law, a material breach allows the nonbreaching party to withhold its own performance. A breach is material when the nonbreaching party does not receive the substantial benefit of its bargain.

Here, NSU may attempt that not performing as the head coach constitutes a material breach that allows the contract severance term to be withheld. However, for the same reasons discussed above, the contract would not be considered to be materially breached because Ben had still coached the team as head coach.

Therefore, this defense would fail and Ben would still be able to collect his severance pay.

Remedies

Since a valid contract was formed and Ben had not materially breached the contract, he would be entitled to his severance pay under a detrimental reliance theory even though the contract was not signed by NSU. Therefore, the Court will order the $1,200,000 in severance to be paid to Ben as he did not materially breach the contract.

3. Michigan's Offer and Impact on NSU Breach

Mitigation - Reduction in Damages
When an employment contract is wrongfully terminated, the employee is required to mitigate expenses related to the termination of employment. However, in the event that the pay is regarded as a severance package rather than employment for salary, the Court may allow the additional salary acquired to not affect the amount of severance.

Here, Ben will argue that the severance package should not be affected by the additional salary offered by Michigan. Ben will argue that because the contract had provided for payment of a salary in the event he was terminated, the fact that he was subsequently rehired by Michigan should not reduce NSU's contract obligation.

NSU will argue that because Ben will be paid $500,000 after he was terminated, damages should be reduced and severance should only pay $700,000 in a severance package. However, this argument will likely fail because the contract had provided for a salary even if Ben works elsewhere.

Therefore, the severance package will not be reduced even though Ben was offered his position at Michigan for $500,000.

4. Legal Consequences of Accepting $200,000 Settlement

Accord and Satisfaction
An accord and satisfaction agreement allows the parties to discharge the contract and satisfy the liabilities by both parties. Typically, the agreement must state that the agreement is being made to satisfy all remaining debts and liabilities.

Here, the general counsel for NSU argues that because there was no written contract on file for Ben's employment, they will only offer $200,000 in exchange for a complete release of all claim against NSU.

Ben should not accept this accord agreement because even though there was no written contract, the oral contract that was entered into was substantially performed by Ben, and he had detrementally relied on their prior promises when had moved from Michigan, quit his prior job, and worked for a year as the NSU head coach.

Therefore, it is Ben's best interest if he rejects this settlement offer and sues NSU for his complete severance package. Since the agreement was made by both parties that Ben would be paid an amount equal to one year's salary if Ben was terminated for any reason (including having a disastrous season), he will be entitled to the agreed upon severance package.

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

Question 1 - Selected Answer 2

1) Ben's potential contractual claims against NSU, along with any defenses NSU may assert;

Governing Applicable Contract Law

In order to determine what available contractual claims Ben may have against NSU, it is important to first determine what contract law applies to Ben and NSU's agreement. The UCC applies to sales of movable goods with a value of $500 or more, while the common law applies to contracts involving services, property, and other various types of non-movable goods agreements. In this case, Ben and the NSU had a contractual agreement for Ben to work for the NSU as a coach, which is a standard employment contract agreement. The agreement was for a three-year period of Ben working for NSU as head football coach. Thus, the common law governs the contractual agreement between Ben and the NSU.

Contracts under the common law requires a contract to be composed of mutual assent, consideration, and an absence of valid defenses for the contract to be enforceable. In order for Ben to have any contractual claims against NSU, Ben must have an enforceable contractual agreement.

Enforceable Contract

A contract must be made up of certain and definite essential terms, or the contract will fail for indefiniteness. At the common law, which governs Ben and the NSU's contract, the essential terms are the parties, the subject matter, the payment, and quantity (if applicable). The contract must also express the present intent of a person to be legally bound by a contract. In this case, the essential terms appear to have been met. Ben and the NSU agreed on August 1, 2023 to a three year contract that included (1) an annual salary of $1,200,000 in equal monthly installments, (2) severance pay in an amount equal to one year's salary if Ben was terminated for any reason within the first two years of the contract. As such, the agreement during the phone call created on August 1 appears to cover the essential terms of Ben and the NSU's agreement.

Any contract must also have the essential elements of an offer and acceptance as well as consideration, which appears to have been met as well. Here, it appears we have mutual assent. NSU offered Ben a position as head football coach for a term of three years and compensation of $1,200,000, while Ben agreed to act as head football coach for NSU under the contract's terms in exchange. As such, there is an offer and acceptance in kind. Consideration is the bargained-for legal detriment that each side incurs in order to induce the other side's action, which here, is NSU's payment and employment of Ben as head football coach, and for Ben is his being NSU's head football coach. Therefore, the essential terms of a contract at common law have been met. The final consideration for an enforceable contract is whether the contract is barred from enforcement by any defenses to the contract.

Applicable Defenses

Statute of Frauds (SoF)

The Statute of Frauds is a legal principle which prevents certain contractual agreements from being enforced without a writing to support their existence. Under the SoF, a memorandum must (1) be in writing, (2) be signed by the party to be charged (which in this case would be the NSU for Ben's benefit, or possibly Ben himself), and (3) must contain the essential elements of the deal. The Statute of Frauds covers a variety of kinds of contracts, including marriage, suretyships, contracts that cannot be completely performed within one year of their creation, and UCC agreements.

Here, Ben and the NSU's employment contract is for a term of three years, meaning it is subject to the Statute of Frauds. Unfortunately for Ben, neither Ben nor the NSU signed the final contractual agreement for Ben's employment with NSU as head football coach. Thus, despite the fact that there is possibly a writing which contains the essential terms of Ben and NSU's deal, the NSU did not sign the contract, meaning the NSU may claim Ben may not enforce the contract due to a failure to satisfy the statute of frauds.

Despite this failure of the statute of frauds, however, the statute of frauds allows for the exceptions of promissory estoppel and judicial admissions to its application. If either of these legal principles apply to a contract, then the statute of frauds will not prevent the contract's enforcement under principles of fairness.

Promissory estoppel is the contractual principle that a promise is binding if (1) the promisor should reasonably expect the contract to induce action on the part of the promisee or a third person, (2) the promise does induce such action, and (3) injustice is only avoided by enforcement of the promise. In this case, because the contract failed to satisfy the Statute of Frauds, Ben seems to meet the applicable exception to the statute of frauds under promissory estoppel. According to the conduct of the parties, Ben moved to Las Vegas and underwent employment as head coach for NSU for one year, and in exchange, NSU paid him according to the contract's terms. As such, it appears the NSU and Ben's contractual agreement, though not able to satisfy the statute of frauds on its own, meets the promissory estoppel exception to the statute of frauds in this case. Under the above conditions, Ben appears to have a viable claim for breach of contract against NSU for violation of the contract's terms through promissory estoppel.

Quasi-Contract

In the alternative, Ben can also claim the contract is enforceable under the doctrine of quasi-contract. If a plaintiff confers a benefit on a defendant and the plaintiff has reasonable expectation of compensation, the court may imply a contract to prevent unjust enrichment. For a quasi-contract to exist, the plaintiff must have conferred a measurable benefit on the defendant, the plaintiff must not have acted without gratuitous intent, and it must be unfair for the defendant to retain the benefit conferred. In the alternative to a promissory estoppel enforcement, Ben appears to meet the requirements of a quasi-contract here as well, and could argue that a quasi-contract existed between Ben and NSU, and thus should be enforceable.

Contractual Claims against NSU

Breach

Once a duty to perform exists, nonperformance is a breach unless the duty is discharged. At the common law, a material breach, where a nonbreaching party does not receive the substantial benefit of the bargain, allows the nonbreaching party to withhold any promised performance and to pursue remedies for breach, including damages. Here, it appears NSU has materially breached its contractual agreement with Ben. Ben and NSU agreed to a three year term of employment, under which he would be compensated $1,200,000 for each year of the employment, and additionally, Ben would be compensated for one year's worth of pay ($1,200,000) if he were terminated for any reason within the first two years of the contract period. With only one year of performance, and a severance pay offer of $200,000, NSU has prevented Ben from receiving the benefit of his bargain with NSU as head football coach.

As described above, NSU will try and argue that the contract and the severance pay agreement are not enforceable. However, under the doctrines of quasi-contract and promissory estoppel, it is unlikely that the NSU will be able to claim that the contract is unenforceable. Outside evidence of contractual terms of agreement is allowed if the extrinsic evidence is offered for purposes of shedding light on the terms of a contractual agreement. Here, since the contract between NSU and Ben was not in a signed writing, Ben will likely be able to introduce the terms of the contractual agreement made on August 1 of 2023 to show he is entitled to severance pay of one year's salary since NSU's agreement with him guaranteed this.

NSU will likely argue that the severance pay stipulation would be unconscionable given Ben's apparently "disastrous" first year as head football coach. However, it is unlikely that this would bar the term from being applied to Ben. Ben likely fulfilled all of his contractual obligations under the contract and substantially performed, thus rendering Ben a nonbreaching party. As such, it is unlikely that NSU will be able to defend against Ben's recovery for the $1,200,000 severance payment term under the contractual agreement's terms, if Ben is to pursue damages against NSU.

However, Ben will be limited by the doctrine of mitigation in a damages claim. See further discussion at Number 3.

2) Ben's potential equitable claims against NSU, together with any defenses NSU may assert;

Specific Performance

An equitable remedy is possible when damages are an inadequate remedy for a party who has been affected by another party's breach of a contractual agreement. The courts consider a variety of factors in determining whether damages are adequate for a remedy, such as (1) the difficulty of proving damages with reasonable certainty, (2) hardship on the defendant, (3) wishes and understandings of the parties, (4) the practicability of enforcement, and (5) the mutuality of the agreement between the parties.

Here, we have a clear contractual agreement between NSU and contractual terms entitling Ben to 3 years of $1.2m payment, and early termination severance of a single payment of $1.2m for termination in the first two years. As such, there appears to be a great weight against specific performance in this case, since the damages are provable with reasonable certainty, enforcement would be practical, and both parties has a mutual understanding as to the initial agreement formed between them. Therefore, though specific performance is possible here, it is unlikely that Ben will be granted specific performance by the courts. Additionally, courts do not prefer to grant specific performance for employment contracts due to the constitutional bars against indentured servitude.

3) What impact Michigan's offer has on Ben's claims against NSU; and

Duty to Mitigate Damages

As referred to above, Ben's damages claim will be reduced in kind by the doctrine of mitigation. Parties to a contract must avoid or mitigate damages to the extent possible by taking steps that do not involve undue risk, expense, or inconvenience. The nonbreaching party is held to a standard of reasonable conduct in preventing loss. For services contracts, specifically, a party is generally not required to accept any type of employment, however they are required to accept employment of the same type as the party was contracted to perform. A failure to mitigate damages reduces the damages that may be recovered by the nonbreaching party.

Since Michigan has offered Ben a position as assistant football coach for $500,000 a year, there seems to be sufficient relation between the two positions that Ben has a duty to accept the position offered by Michigan in this situation. Thus, whether Ben takes the position offered by Michigan here or not, Ben's damages in his claim against NSU will likely be reduced by the amount he would have been paid by Michigan as an assistant football coach.

4) What would the legal consequences be if Ben accepted the $200,000 settlement from NSU?

Terms of Ben's Settlement

The settlement agreement NSU has offered Ben, a $200,000 severance payment in exchange for a complete release of all claims against NSU, will bar Ben from any recovery from NSU for the damages he is otherwise entitled to under his contractual agreement with NSU. A complete release of all claims would bar Ben from recovering through any contractual or equitable theory from NSU for his termination. Ben will not be able to receive any additional compensation aside from the $200,000 if he decides to opt for the settlement from NSU. However, opting for the settlement would likely allow Ben to regain his employment due to his open offer with Michigan, while not needing to incur the costs of litigation with NSU. Should Ben feel it strategically viable, a settlement with NSU would allow Ben to pursue his assistant coach position with Michigan while also not needing to focus on extensive litigation with NSU over the contract he had made with them.

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

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EXAMINATION ANSWERS

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QUESTION 2

Question 2 - Selected Answer 1

Nate will bring a claim for products liability, negligence, and negligent infliction of emotional distress.

Nate could bring a negligence claim against them, however, in Nevada this would bar the NIED claim, as only one such claim can be recoverable.

Under products liability Nate must show that the product was defective, defect existed when the product left the defendants control, and that the injury was caused when the product was used in foreseeable way.

First, in showing a product defect, Nate hires an expert. The expert opines that the chair failure as caused by screws in the base. The expert opinion would be one for the jury to weigh, but it seems Nate brings enough evidence to at least survive summary judgment. Therefore, because Nate offers expert testimony that may indicate the failure occurred as a result of a manufacturing defect, there is likely enough evidence to support that there was a product defect.

Next, Nate must show that the defect existed when the product left the defendant's control. Here, there are no facts that indicate that the screws were placed into the chair by reliable chairs or if they were added later as the chair was used before even newly received it. Therefore, it is unlikely that Nate will survive such a claim against Reliable, but he may against Nearly. Because at least one merchant defendant had control over the item with the defect, they may be liable.

Lastly, it must be shown that Nate used the chair in a foreseeable way. This must be a manner that the manufacture would expect a reasonable person to use the item. Here, a manufacturer would make a chair for people to sit in. The manufacturer also likely knew that people like swivel chairs and that removing the couple of screws would allow the chair to swivel. Because it was not unforeseeable that Nate would want the chair to swivel and to sit in the chair, it is likely that Nate has a claim against Nearly.

Nate must show that it was the consumer's expectation that the chair withstand the weight and activity in order to get to strict liability. Here it is certainly reasonable, to assume the chair withstand the weight of a toddler and an adult. However, it may not be reasonable that the consumer remove the screws. Most consumers that want a swivel would just shop until the found one. However, it seems like it was rather simple, and perhaps a consumer would believe that the screws were supposed to be removed before use. Because, there is a big what if and no facts to indicate the truth, it is unlikely, absent more facts, that the swiveling chair use would pass the consumer expectation test.

This would require him to prove negligence, which would bar the NEID claim. To show negligence a plaintiff must show duty, breach, causation, and damages.

Duty usually requires behavior of that of a reasonably prudent person. Here, Reliable was entrusted to manufacture chairs that could withstand normal activity. Nearly was expected to sell only chairs that could withstand the same activity. Therefore, each owed a duty to its consumers.

Breach is a breach of that duty. Here, Reliable was not careful when doing quality assurance checks on the chair and the screws. Because a reasonably prudent company would have examined this and maintains QA standards, it may have owed a duty. Nearly, is a used resaler. It is less clear if they would take these steps. Thus, there is a clear beach of duty owed by reliable.

Negligence per se removed the causation requirement. It says that if the injury was not the kind of a thing that happens but for negligence, the two can be assumed. Here, chairs don't just break randomly. However, there is expert opinions that may indicate a cause. Thus, negligence per se does not apply and Nate must show causation.

Causation is two factors, a actual cause and a legal cause. Actual cause requires the but-for test, that is the accident wouldn't have happened but-for the cause. Legal cause, or proximate cause, if is the injury that occurred was within the scope of foresee-ability. Here, there is some expert opinion that the chair would not have broken but for the use of inferior screws being used. Moreover, the use of inferior screws would result in the chair collapsing. Further, the chair collapsing may result in injury. Thus, there is some evidence of actual and legal cause.

Lastly, there must be damages. Here, Nate and his daughter were both injured when the chair collapsed. Because there is physical injuries, there are damages. Nate also had the chair break, which he paid for. This is another type of damages.

Nevada allows for jointly and strict liability only in a select few circumstances. One such circumstance is products liability. Thus, Nate would have grounds to hold the defendants jointly and severally liable under Nevada law. However, this is broken if there is a comparative negligence issue raised.

Both Nearly and Reliable would have defenses of comparative fault, product misuse, and a substantial change in the product.

Nevada is a partial comparative fault jurisdiction. This means that if Nate's actions are judged by the jury to be more at fault than the defendant's actions, Nate's claim will be precluded. Here, the defendant would be asserting that Nate's removal of screws resulted in the damages. There is conflicting expert testimony as to the cause of the collapse. Weighing credibility and determine facts is for the fact finder to determine. There would be a large risk to Nate that they may determine that he was more at fault than the defendants. Accordingly, there may be a successful bar to the claims by Nate, it would also remove the joint liability from the two businesses and require that they be held severally liable.

They will also claim that Nate's use of the chair was product misuse. This rule is meant to protect manufactures and retailers of any claims resulting from the product being used in an unintended way. Here, the allegation would be that Nate using the chair to swivel qualifies as product misuse. However, the actual use of the chair was to sit in Nate's home office. At the time

of the incident, that is what Nate and the toddler were doing. There are no facts to indicate if they were even swiveling. Thus, this allegation is not the best fit for product misuse, but is likely a better fit for substantial change in the product.

Lastly, they will assert that Nate changed the product in a substantial way resulting in the defect. The chair was seemingly manufactured not to swivel. Nate took it upon himself to remove the screws and make the chair swivel. This structural may have alter the structure enough to cause the damages. Thus, they may succeed under the theory that Nate altered the product.

Newly and Reliable may bring a products liability claim against Fail safe as a third party defendant.

A defendant may bring in a third party defendant, if they are the parties actually responsible or the claim is based on the same nucleus of facts. Here, the claims would be that Failsafe actually caused the damages that Newly and reliable are being held responsible for. Further, in assessing any liability of Failsafe the fact finders would be assessing the same exact facts as they would in the initial suit. Therefore, they would be properly brought in as a third party defendant.

There is some evidence being put on that Failsafe's screws contained a manufacturing defect that caused the chair to collapse. This claim is supported by expert testimony and if believed would likely result in a successful products liability claim. Thus, by the same standards as above against Newly and Reliable, Failsafe would be responsible and liable for the damages.

Reliable would have a claim for defamation and libel, Nearly does not have any claims, against Nate.

Nate made defamatory statements against Reliable. Defamation requires defamatory statements, concerning the plaintiff, published to a third party who understands the defamatory nature, resulting in damage to reputation.

Nate's statements are defamatory if they are lies meant to harm reputation of Reliable. Here, Nate stated that the company uses child labor and the chairs are deadly. It is unclear if Nate had any facts to support those claims. Thus, they are likely defamatory, absent other facts.

Nate published the information to many parties. Nate posed the email on social media and emails. It is unclear who received the messages, but it can be presumed that at least someone did. They should understand that the child labor comment is meant to deter anyone from buying from reliable. Thus, they understand the defamatory nature.

Lastly, there must be some resulting damage to the reputation. Here, there are no facts to tell us that the damage actually occurred. It is uncertain if Reliable could show damages that would amount to a claim.

These defamatory statements were written. Written defamation is libel. Therefore, Nate's actions of writing defamatory statements would be considered libel.

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

Question 2 - Selected Answer 2

Question 1: Nate v. Nearly New and Reliable Chairs

Strict Liability

For a plaintiff to succeed on a strict liability ("SL") claim, the plaintiff must prove that there was an absolute duty to make something safe, breach of that duty, actual and proximate cause of the plaintiff's injury, and damages to the plaintiff's person or property.

Here, Nate will want to bring a claim for Products SL based on the defective screws contained within the the chair.

Strict Products Liability

Products SL requires a proper plaintiff, proper defendant, and a defective product. a product will be defective if it has a design defect, manufacturing defect, or a warning defect.

Proper Plaintiff -- Here the facts indicate that Nate was the purchaser of the chair, was on the chair when it broke, and was injured as a result. Therefore, he is a proper plaintiff.

Proper Defendant -- Nate must show that Nearly New ("NN") and Reliable Chairs ("RC") are proper defendants to a SL claim. A proper defendant is any commercial seller within the chain of distribution. Here, Nate will be able to prove that NN as the seller of the chair, and RC as the manufacture of the chair are proper defendants as they are within the chain of distribution.

Defective Product -- A product will be deemed defective when there is either a design defect, manufacturing defect, or a warning defect.

Design Defect -- A design defect will be found when all products within the same line are dangerous. A defendant has a duty to use an alternative design if it is safer, economical and practical. Here, no facts indicate that the chair Nate bought was from a line of dangerous products. However, he may be able to make a claim that because the screws are defective from FailSafe Metals ("FSM"), that RC manufactured all the chairs from the same line with the same screws from FSM. However, this argument is a long shot as there are no facts that indicate that there even similar chairs in existence. Therefore, Nate will likely lose on this theory.

Manufacturing Defect -- A manufacturing defect is found when the specific product differs from other off the assembly line, and failed to perform as safely as an ordinary consumer would expect. Here, Nate's best argument for Products SL is a manufacturing defect, because according to his expert, the "chair collapsed due to manufacturing defects in the remaining screws in the chair's base." Therefore, although he may have removed some screws, the screws that caused the fall were defective. Nate will argue that a reasonable consumer would expect a chair manufacture to use quality screws that can support an adult with a minor or pet. Therefore, Nate will likely have a claim for a manufacturing defect.

Warning Defect -- A warning defect occurs when a product fails to have adequate warnings about dangerous conditions of the product. Here, no facts indicate that the chair did not have adequate warning, however, Nate may argue that the chair should have had a warning regarding weight limit if it could not uphold him and his daughter. Since no facts rise to the level of a warning defect, Nate will not likely have a successful claim here.

Negligent Products Liability

Negligent PL requires duty, breach, causation (actual and proximate) and damages (as referenced above). The duty is of a reasonable manufacture.

Here, Nate will argue that RC had the duty of a reasonable manufacture to create a chair that can withhold certain weights and will not give out on adults with minors in their laps. He will argue that duty was breached when RC did not use quality screws in the manufacturing of its chairs. Nate will also argue that but for the defective screws, the chair would not have collapsed and he nor Katie would have been injured, that their injuries are reasonably foreseeable because using poor quality screws in the base of a chair can lead to the chair collapsing, and that he and Katie were actually harmed as Katie suffered head trauma and Nate with a spine injury.

Therefore, Nate may have a claim for negligent products liability.

Implied Warranty of Merchantability

This warranty requires that goods are of average acceptable quality and generally fit for the ordinary purpose for which the goods are used.

Here, Nate may bring this claim for breach of this warranty against NN because he purchased the chair from NN and used it for the ordinary purpose of sitting it the chair. NN may try to ague that there was no warranty because NN is a "used furniture store," however, this argument will likely fails because being a used furniture store does not negate the responsibility of providing customers average acceptable quality of their products.

Therefore, Nate may have a claim for breach of this warranty.

Negligent Infliction of Emotional Distress ("NIED")

For a plaintiff to bring a claim for NIED, the plaintiff must prove that he was in the zone of danger and threatened with injury by the defendant;s negligence and endured subsequent physical manifestations due to the negligence of that defendant.

Here, Nate may want to bring a claim for NIED based on the fact that he suffered "panic attacks and sleepless nights" as he was worried for his daughter. As the facts indicate, Nate was holding his daughter when the chair collapsed, and therefore was in the zone of danger. Not only was he threatened with injury, he was also injured in the accident. Further, Nate is a close relative of Katie as he is her father, so they have a close relationship. Also, Nate will argue that he had physical

manifestations as he had several panic attacks and sleepless nights. All Nate will have to prove left is NN and/or RC's negligence (as discussed above), in order to be successful.

Therefore, Nate may have a claim for NIED.

Question 2: Nearly New and Reliable Chair's Defenses

Misuse

This defense arises when the Defendant can show that the plaintiff used the product in a way that was neither intended nor foreseeable. A manufacture is not responsible for injuries from foreseeable substantial alterations or modifications of a product by a third party.

Here NN and RC will want to argue that Nate's action of removing the screws is sufficient to constitute as a misused. Especially as their experts are opining on the fact that this was the cause of the collapse, not the screws that were left in place. Nate may try to argue that his misuse is foreseeable, as many people who purchase office chairs will want their chairs to swivel. However, this argument will likely fail if NN and RC are able to prove that the chair was never intended to swivel, and by removing the screws for it to do so substantially altered the product. RC may even be able to be protected by the fact that this char was purchased at a used store, and that chair/screws may have been substantially altered by the original owner.

Therefore, NN and RC will likely be successful on their defense of misuse if the Court finds that Nates removal of the screws was the cause, or substantial factor, of the chair collapsing.

Comparative Fault/Contributory Negligence

When the plaintiff shares fault in causing the accident, a defendant may be able to raise comparative fault of contributory negligence as a defense to the plaintiff's claim.

Here, NN and RC will raise this defense as Nate's removal of the screws constitutes misuse and shares in the fault of the chair collapsing.

However, Nevada does not provide this defense to products liability claims, so this defense will not be available.

Assumption of the Risk

This defense is available when the plaintiff is able to understand and appreciate the danger of some activity or some thing, takes on the risk and then suffers damages. By taking on the risk of injury, the plaintiff has essentially "assumed the risk."

Here, NN and RC will argue that Nate assumed the risk of the chair collapsing when he removed the screws from it. This argument is strong as they can argue that a plaintiff who removes screws from the base of the chair can reasonable appreciate that they are altering the structural design of the chair and creating a substantial risk that it may collapse.

Therefore, this defense may be available for them to raise.

Question 3: NN & RC Claims

Defamation

To prove a prima facie case for defamation, the plaintiff must show that the defendant made a defamatory statement, of or concerning the plaintiff, published by the defendant to a third party, and that the plaintiff suffered damages. Defamation can be done either by slander, words spoken, or by libel, words written. Slander/Libel per se make damages presumed when the defamatory statement concerns a disease or the plaintiff's character for business.

Here, RC will want to bring a claim for defamation based on Nate's email and his posting to social media.

Defamatory Statement -- Here, RC will argue that Nate's email is a defamatory statement because he explicitly writes that RC "uses illegal child labor to manufacture your deadly chairs." That state is arguably false, and can damage RC's reputation. Therefore, this element is satisfied.

Published by D to a third party -- Here, RC will have a strong argument that the defamatory statement was published to a third party as the facts indicate that "Nate posted a copy of the email to his social media accounts." Posting on those platforms is more than enough to satisfy this element.

Of or concerning P -- Here, RC will have a strong argument that the email concerns RC as Nate sent the email to the president of RC. Therefore, this element is satisfied.

Damages -- RC will argue that damages are presumed because this is libel per say, as the statement by Nate concerns RC's business reputation. If successful in proving, damages will be presumed. If not, RC will have to prove harm to their reputation/business.

Constitutional Defamation -- If the defective screws are found to be a matter of public concerns, RC will also have to prove that the statement was actuall false, and there is no fault on D. RC will argue that the statement is fault as they do not use child labor nor are their chairs deadly. Further, they have no fault in this as Nate misused the chairs by taking out the screws.

Therefore, RC will likely have a successful claim against Nate for Defamation.

Joint and Several Liability -- Contribution/Indemnity

Two or more negligent actors who are the actual and proximate cause of the injury will be jointly and severally liable for the plaintiff's injuries. If a plaintiff sues only one defendant, they may go after the complete value of the harm and then the defendant can go after other defendants for contribution based on proportion of fault.

Here, if NN and RC are found liable for Nate and Katie's injuries, they will want to seek contribution and indemnification from FSM for their defective screws. NN and RC will argue that their negligence is producing defective screws is an actual and

proximate cause of the injuries, and there fore FSM is also jointly and severally liable for the injuries, even though Nate only brought the claim against NN and RC.

Therefore, NN and RC will likely have a successful claim for contribution and indemnification against FSM as FSM is likely jointly and severally liable for Nate and Katie's injuries.

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

FEBRUARY 2025
EXAMINATION ANSWERS

SELECTED APPLICANT ANSWERS
NEVADA BOARD OF BAR EXAMINERS

QUESTION 3

Question 3 - Selected Answer 1

Essay #3

Larry is a lawyer in the State of Nevada and thus is governed by the Nevada Rules of Professional Responsibility. Duty of Competence

The Rules require lawyers to be reasonably competent in order to take a case. If a lawyer is not competent to handle the representation, they may either decline the representation, become competent or associate with competent counsel.

In this case, the facts indicate that Larry branched out in family law. The facts previously indicated that he did adminstrative law work. The facts don't indicte that he had any prior family law experience Furthermore, there are no facts to suggest that he underwent studies to get competent in the field. He then took a family law case and provided legal advice to a client. He furthermore didn't speak with another attorney that was experienced in family law matters to assist.

Based on this analysis, it is likely that Larry violated the Rules of Professional Responsibility.

Partnership between Larry and Chuck

A lawyer may not go into legal business with a non-lawyer and be partners in the business if they plan to engage in the practice of law.

In this case, Chuck is not a lawyer. He is an accountant and the facts indicate that he and Larry (who is a lawyer) went into business together to own equal parts of the firm. This is a firm for legal services where the practice of law happens.

This is not allowed and thus Larry would be in violation of the Nevada Rules of Professional Responsibility.

Client Funds

A lawyer must not commingle funds with those of his clients. Client funds should be kept in a separate trust account and distrubuted accordingly back to client when they are used or refunded. The only attorney funds that should be in a client trust account is the funds used to pay necessary bank service charges.

In this case, the facts indicate that deposited refunded amounts into his general operating account and didn't promptly reimubuse the client. He should have promptly returned the funds to his client and at no point should client funds have entered the general operating account. They are now commingled funds.

Based on this conduct, Larry has violated the Rules of Professional Responsiiblity.

Client $5000 Fee

A lawyer's fees may not be unreasonable. There are a few factors a court looks at to determine the reasonablness of the fee. This includes, the time and labor required, the fee customarily charged in the locality for similar legal services, the nature and length of professional relationship with client, skill requisite to perform the legal service properly. A lawyer must also explain the fee to the client and how it is calculated.

Here, the facts indicate that Larry accepted a $5,000 retainder for expenses at the outset of each case. It didn't matter the kind of case, the difficulty of the case, etc. The fee was the same for all clients. He further didn't explain his fee to any of his clients.

It is likely that this would be unreasonable and be a violation of the Nevada Rules of Professional Responsibility.

Poppy Unauthorized Practice of Law

A non-lawyer can assist a lawyer in drafting certain legal documentation but under no circumstances can a non-lawyer give legal advice. A person engaged in unauthorized practice of law can face action by the state bar.

In this case, Poppy is a paralegal. She is not a lawyer. She was making recommendations to clients about the appropriate legal entity to use for liability protection and tax benefits. This would be considered providing legal advice and thus the unauthorized practice of law.

Based on this analysis, Poppy is subject to state bar violations and other possible penalties for her conduct.

Chuck Unauthorized Practice of Law

Same rules as previously discussed for Poppy regarding a non-lawyer's unauthorized practice of law.

For Chuck (who is a non-lawyer), he wasn't rendering legal advice, he was just filing documentation. He wasn't meeting with clients or offering opinions. If Larry had been supervising and had approved Chuck filing these documents, then this conduct wouldn't likely be a violation.

In conclusion we need a few more facts to determine if Chuck was engaging in the unauthorized practice of law.

Larry Lack of Review of Poppy's Work

A lawyer may delegate tasks to those who are non-lawyers so long as the lawyer carefully reviews and supervises the non-lawyers work and retains responsibility for the finished product.

In this case, the facts indicate that Larry's position was that Poppy (who is a non-lawyer) is no effective that he doesn't need to take any time away from his litigation cases to review her work or go to client meetings with her. This statement shows that Larry didn't review her work at all. He just trusted that everything she did was correct.

Based on this analysis, Larry has violated the Nevada Rules of Professional Responsibility

Relationship between Destiny and Larry

An attorney and client may start to engage in sexual conduct with each other after representation has already begun between the attorney and the client.

In this case, the facts indicate that Larry spent the night at Destiny's house several times a week. Although the facts do not specifically come out and say it, it would be implied that Larry and Destiny were engaging in an inappropriate lawyer client relationship. There are also no facts to indicate that this relationship started before the representation begun.

Based on this conduct, Larry would be deemed to have violated the Nevada Rules of Professional Repsonsibility.

Duty to Avoid Frivillous Claims

Lawyers shall not bring or defend a proceeding, or assert or controvert an issue unless there is a non-frivilous basis for doing so. A claim is frivilous if a lawyer is unable to make a good faith arguement in support thereof.

In this case, the facts indicate that Destiny told Larry that Grant was a good parent. Larry then went ahead though and filed claims which assrted that Grant was engaging in child abuse and neglect. This is the exact opposite of what his client initially told him. These would be considered frivilous claims.

Based on this analysis, Larry has violated the Rules of Professional responsibility.

Larry Lying to Court

A lawyer shall not knowingly lie to a Judge regarding material facts or law. Lawyers owe a duty of candor to the tribunal.

In this case, the Court asked Larry if it was true that he was sleeping with his client. He said no. The next statement says he denied the claim to save her reputation. The facts don't indicate that he was telling the truth to the Court.

Larry is deemed to have violated the Rules of Professional Responsibility.

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

Question 3 - Selected Answer 2

Duty of Competence.

A lawyer must act competently, meaning with legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. If a lawyer doesn't know the law they must decline to represent a client unless they can: consult with a competent attorney or learn the area of law without undue expense or delay to the client.

Here, Larry's inexperience does not necessarily mean he violated the duty. As long as he took the time to learn the law that supported his litigation and corporate practice, he did not violate the rule. It is unclear whether Larry acted competently, but his successful practice suggests that Larry took the time to learn the area in which he was practicing. However, if he did not, even despite his success, Larry may have violated the rule. Likewise, when Larry began practicing family law he had the same duty of competence. If he took the time to learn the area, without undue expense or delay to his client, then he did not violate the rule.

Duty of Diligence.

A lawyer must also act with reasonable diligence and promptness in representing a client. The lawyer must control their workload so that each matter can be adequately handled. Although Larry is busy, it appears that he has satisfied his duty of diligence. Again, assuming he has taken care to ensure he can learn the various areas of practice and allowed time for each client's case, he has not violated this rule (subject to the other violations discussed).

Professional Independence.

A lawyer can't form a partnership with a nonlawyer is any of the organization's activities consist of the practice of law. Nor can a nonlawyer own an interest in the firm. Here, Larry violated this rule when he allowed Chuck to be a partner in the firm. Chuck is an accountant, not an attorney, so Larry was prohibited from entering into a partnership or allowing Chuck to own an interest in the firm. Larry gave him an equal interest, violating the rule.

Settlement Offers.

A lawyer must inform client of any offer to settle unless the client has previously indicated that the proposal would be acceptable or unacceptable. Here, more facts are needed to determine whether Larry promptly notified his clients. However, because the clients were all happy, it seems likely that Larry did not unreasonably notify them of the offers.

Sharing Fees.

A lawyer must not share fees with a nonlawyer unless: it is a death or disability benefit, a retirement, or a nonprofit organization. Here, because Chuck owns an interest in the firm, it is highly likely Larry is violating this rule. Chuck is likely receiving profits from his interest in the firm, and no exception applies, therefore, Larry is violating the rule. In addition, if he shares any fees with Poppy, that would also violate the rule.

Fees.

All fees must be reasonable. The factors included in the determination are: time and labor required, novelty and difficulty of the work, whether the lawyer is precluded from other work, the customary fee within the locality, the amount at stake, time limitations imposed by the client, the nature and length of the relationship between the client and the lawyer, and the experience and reputation and ability of the lawyer.

Here, a $5,000 retainer is likely to be reasonable in most cases. It is a reasonable amount one might expect a relatively new attorney to charge for an average case. However, each fee must be reasonable to the specific case. Without more facts, it is not certain that Larry's fee is reasonable. Some cases may be simply, require little effort, and a $5,000 fee may be extremely high in the locality for that type of case, which would make it unreasonable. Larry may be violating the rule by charging the same retainer fee for each case.

Writing. Fees schedules are preferred to be in writing but they are not required unless it is a contingency fee. Here, Larry had fixed fees and no contingency cases, therefore, he did not violate the rule if the fee schedule was not in writing.

Notice. A lawyer must give a client notice of the fee schedule before, or within a reasonable time after, representation begins unless the lawyer regularly represents the client and is charging the same fee. Assuming Larry gave notice to his clients as to how he was conducting his fees, he did not violate this rule.

Collecting Fees. A lawyer can require payments in advance but they must refund any unearned part if they are fired or withdraw, except a lawyer may keep a true retainer fee. Here, Larry kept jury deposit fees that he paid out of he retainer funds after deducting his retainer fee from the settlement proceeds. Larry is essentially double dipping, he is collecting his retainer fee from the settlement proceeds and keeping the jury deposit money which he paid from the retainer fee funds. He was required to refund the money to his client.

Client Funds. All money in connection with a representation must be promptly placed in a client trust account, separate from the lawyer's own personal and business accounts. Advance payments must be placed in a trust account to be withdrawn only as fees are earned or expenses are incurred. They must be refunded if they are unearned. Here, instead of refunding his client's money, as discussed above, Larry placed the money into his general operating account. Larry should have placed it into a client trust account, therefore he violated this rule.

Safekeeping of Property. A lawyer must promptly notify the client when they receive funds in which the client has an interest, promptly deliver, and render an accounting regarding the funds when requested. Here, it appears Larry promptly notified

clients of his receipt of settlement proceeds. However, he failed to notify them on the refund of the jury deposit. Larry violated this rule with respect to those funds.

Court Costs.

A lawyer must not provide financial assistance to a client in connection with a pending or contemplated litigation. There is an exception allowing a lawyer to advance court costs and litigation expenses. Here, Larry paid the court costs in advance from the retainer fee, which is permitted. However, as discussed, he should have notified the client and refunded them upon receipt from the clerk.

Unauthorized Practice of Law.

A lawyer must not engage in the unauthorized practice of law or assist another in doing so. This duty extends to supervising attorneys and their paralegals. Larry violated this duty by allowing Poppy to advice clients on the appropriate legal entity for tax benefits. She was offering legal advice, thereby practicing law, without a license. Larry violated the rule by allowing his subordinate to do so.

Failure to Supervise.

A partner, or managing lawyer, must make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all members of the firm conform to the RPC. A direct supervisor has the same duty for their subordinates. A lawyer has the same duties for nonlawyers working on matters for the firm.

Here, Larry has completely failed to supervise his paralegal, which violates the rule. In addition, as discussed, she has offered legal advice to clients, which is the unauthorized practice of law. Larry's violation of his duty to supervise resulted in a violation of the unauthorized practice of law.

Nuisance Suit.

A lawyer must advice a client that they can't bring a claim for an improper purpose, such as harassment. Here, it sounds like Destiny only intends to bring the suit because she is angry with Grant. Larry should have advised her that he can't bring suit for that reason. Larry likely violated this rule.

Duty of Candor to Tribunal.

A lawyer has a duty to present the law and facts to the tribunal in a truthful manner. A lawyer must correct false statements of material fact or law. If the lawyer knows it is false, the lawyer must refuse to offer the evidence. If the lawyer reasonably believes it's false, a lawyer may refuse to offer the evidence in a civil case. If the lawyer later learns it was false, a lawyer must take remedial steps. The lawyer must urge the client to reconsider or cooperate with withdrawing the evidence. If that is unsuccessful, the lawyer should seek withdrawal and notify the judge if necessary.

Here, it is unclear whether Destiny's statement is false. However, it appears that it is likely to be false. If Larry didn't know that it was false, he did not violate the rules by filing the petition. However, if Larry learns it to be false, he must take the remedial steps above. In addition, Larry's lie to the court to "save Destiny's reputation" violated this duty.

Relationship with Client.

A lawyer must not have sex with a current client unless the sex predated the lawyer-client relationship. Here, it is likely that Larry is violating this rule. Given that he is spending the night with Destiny it is likely that Larry is having sex with Destiny. Therefore, he is violating this rule.

Reporting Misconduct.

A lawyer must report a known violation of the RPC if the violation raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer. Here, Oscar learned that Larry was likely sleeping with his client in a custody case. It is highly likely that that conduct raises a substantial question as to Larry's fitness as a lawyer. Therefore, Oscar was required to report the violation.

Withdrawal.

A lawyer must withdraw when the representation will result in a violation of the RPC. Here, Larry must withdraw from his representation of Destiny because he is having sex with her, which is a violation of the rules. He must take steps to the extent reasonably practicable to protect Destiny's interests, such as, reasonable notice, allow time for another counsel to be hired, and surrender any paper or property she is entitled to, as well as any unearned payments.

Gifts.

A lawyer may not solicit a substantial gift from a client. Here, Larry did not solicit the dinner, nor would it likely be a substantial gift, however Larry violated the rules when he engaged in a sexual relationship with Destiny.

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

FEBRUARY 2025
EXAMINATION ANSWERS

SELECTED APPLICANT ANSWERS
NEVADA BOARD OF BAR EXAMINERS

QUESTION 4

Question 4 - Selected Answer 1

1. Drew's conviction for attempted murder

Attempt is an inchoate crime requiring specific intent. Attempted murder occurs when the defendant had the intent to unlawfully kill another human but did not complete the crime. In Nevada, attempt crimes are considered complete when there is "dangerous proximity" in addition to intent, which is similar to the "substantial step" under the model penal code.

In order for Drew to be convicted, the prosecution must present evidence beyond a reasonable doubt of both Drew's intent as well as the "dangerous proximity."

Drew can argue that he lacked the intent element because he did not intend to kill Victor. Drew had pulled out the firearm and aimed it at Victor intending to scare him. While intent is inherently subjective, the outwardly expression may be judged by an objective standard. Drew said to Victor "I will kill you if you don't give me back my phone." Pointing a firearm at someone and telling them "I will kill you" is an objective expression of the subjective intent to kill. Drew was in "dangerous proximity" because he took the actions of pointing a gun at Victor, yelling at him and then accidentally pulling the trigger.

When the gun discharged and the bullet hit Victor in the stomach, Drew tried to render aid. But when the shirt became covered in blood, Drew got scared and fled.

In this moment, Drew had created a life-threatening situation for Victor (shooting him in the stomach) and knew or should reasonably know that Victor would die of his wound if not treated immediately. Instead of calling for help, Drew left Victor alone. This act shows that Drew had the intent of letting Victor die due to a circumstance of Drew's creation. Therefore, this act of leaving Victor with a gunshot to the stomach can satisfy Drew's mens rea intent of causing an unlawful killing.

Therefore, because Drew was in the "zone of danger" and had the intent of letting Victor die, he is likely to be convicted of attempted murder.

2. Drew's conviction for burglary

At common law, burglary required the breaking and entering at night into the dwelling of another with the intent of committing a felony. In Nevada, follows the model penal code where burglary is committed upon breaking and entering into the property of another with the intent of committing a felony.

Here, Drew pushed open a slightly ajar window and crawled into Victor's home. This action is adequate to satisfy the act of 'breaking and entering' - actual destruction of the window is not required. However, Drew's intent for breaking into Victor's home was to retrieve his own phone because he believed Victor had taken the phone.

Drew might argue that he lacked the intent to commit a felony because he was only going to take what was his own property. However, burglary is a general intent crime, i.e., Drew had the intent to commit any felony. Here, Drew had the intent to "confront" Victor and did assault Victor by inflicting fear of harm. Although Drew might have done so to retrieve his own phone, that does not give him a defense against having the intent of committing assault, which is a felony.

Again, for a conviction, prosecution has to show beyond a reasonable doubt the elements of burglary. Here, all the elements appear to be met, therefore Drew should be convicted of burglary.

3. Legal basis for Drew to argue suppression of the bloody shirt; court ruling

The Fourth Amendment of the US Constitution provides protections against unlawful searches and seizures. A seizure occurs when a person is given the reasonable impression that they cannot leave, either by force or by show of authority. Normally, searches require arrest warrants unless an exception to the warrant requirement arises.

Here, Oliver saw Drew's vehicle in a parking lot in a closed park, and this park was known as a common location for people to use illegal substances.

Officer Oliver ordered Drew out of his car, handcuffed him and searched Drew's vehicle. Therefore, Drew can argue that the search was unconstitutional because the shirt was the fruit of an illegal warrantless search.

Automobile exception - one exception to a search warrant is the search of an automobile for contraband when there is reasonable belief that there is contraband in the vehicle. here, Oliver found Drew in a location well known for us of illegal substances in his car which was in a closed parking lot. In addition, when Oliver called police dispatch, he learned that Drew had a prior conviction on an count of possession of a controlled substance. Therefore, based on the location he found Drew and the fact that Drew had a prior drug conviction, Oliver had probable cause to believe that Drew's car had contraband. Officer Oliver also found the shirt in the type of location where contraband is likely to be found - underneath the passenger seat of the car.

Therefore, Officer Oliver's search is likely to satisfy the automobile exception for a warrantless search. The court should rule to allow the evidence of the shirt.

4. Legal basis for Drew to suppress his statements to Officer Oliver; court ruling

The Fifth Amendment provides protection against self incrimination and requires that any custodial interrogation must be preceded with *Miranda* warnings.

Drew can argue that Oliver's questioning of him was in violation of his fifth amendment rights. Questioning by the police is considered a "custodial interrogation" when the defendant is in "custody" meaning he cannot voluntarily leave, and also

when he is "interrogated" which requires that the police knows or should reasonably know that the questions will result in an incriminating response.

Here, Drew was clearly in Oliver's custody because he was handcuffed and later put into Oliver's car. Oliver can argue though the questioning was not an "interrogation" because Drew knew he didn't have to tell him anything - something which Drew also said. The fact that Drew may have known he did not have to answer Oliver is not dispositive, however. The key is that Oliver's continuing to question Drew while going back to the police station constituted a custodial interrogation. Oliver knew he was trying to incite an incriminating response from Drew becuase he even told him "I promise you will not get into any trouble."

Because this was a situation of custodial interrogation and Drew was not given any Miranda warnings by Oliver, Drew's confession to Oliver is in violation of his fifth amendment rights.

Therefore, the court should rule to suppress Drew's confession.

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

Question 4 - Selected Answer 2

1. Should Drew be Convicted of Attempted Murder

Attempt

A criminal attempt is an act that, although done with the intention of committing a crime, falls short of completing the crime. Attempt requires specific intent to complete the crime and an overt act in furtherance of the crime. Nevada follows the common law proximity test for attempt; the overt act must go beyond mere preparation and tend to accomplish the crime.

Common Law Murder and Murder in Nevada

Common law murder is the unlawful killing of a human being with malice aforethought. Malice aforethought exists when there are no attendant circumstances to reduce the killing to voluntary manslaughter or excusing it and it was committed with intent to kill, intent to inflict great bodily harm, reckless indifference to an unjustifiably high risk to human life, or the intent to commit a felony.

In Nevada, murders are generally second degree murder unless specific circumstances exist (such as killing by means of poison, lying in wait, torture, or any other willful, deliberate, and premeditated killing). Deliberate means that the defendant made the decision to kill in a cool and dispassionate manner. Premeditated means the defendant actually reflected on the idea of killing, however brief. Intentional use of a deadly weapon creates an inference of intent to kill.

Under second degree murder in Nevada, all killings that do not rise to first degree are second degree. It requires malice aforethought which can be implied if no considerable provocation appears or when all circumstances together show an abandoned and malignant heart.

Further, in Nevada, felony murder is when a killing occurs during the perpetration or attempted perpetration of a burglary, among other crimes. The defendant must intend to commit the underlying felony before or at the time the killing occurred.

Here, Drew went to Victor's home to "confront him" and "take back his phone." In doing so, Drew "pushed open a window that was slightly ajar so he could crawl inside." When inside, Drew and Victor got into a verbal altercation, during which Drew "pulled out a firearm from his back pocket and aimed it at Victor *to scare him*." Drew, however, then told Victor that he would kill him if he did not return the phone.

The facts indicate that Drew "accidentally" pulled the trigger and shot Victor in the stomach. After being unable to render aid, he fled.

Based on these facts, Drew should not be convicted of attempted murder, but that will depend on what the jury believes with respect to his intent.

The facts indicate that Drew did not go to Victor's house with the specific intent to kill him, but just to get his phone back. However, the fact that he brought and used the gun might be indicative of intent to kill, as noted above. If Drew was found to possess the intent to kill, then he will be found guilty of attempted murder. If, on the other hand, the jury believes Drew's testimony that he did not possess an intent to kill and only accidentally fired the gun, then attendant circumstances, including the heat of passion during the argument, might not warrant an attempted murder conviction.

2. Should Drew be Convicted of Burglary

Under Common Law, burglary is the breaking and entering into the dwelling house of another at night with the intent to commit a felony therein. Nevada has modified or dispensed with several elements, such that a person commits burglary when they unlawfully enter or remain unlawfully in any dwelling, building, or structure, with the intent to commit grand or petit larceny, assault, battery, or any felony, regardless of the time of day. Unlawful entry includes false pretenses. Intent must exist at the time of breaking and entering.

Here, Drew went into Victor's home with the intent to confront him and, in doing so, intentionally broke into Victor's home when he climbed through a window without Victor's permission. A breaking requires some force to gain entry, but minimal force is sufficient--thus Drew's minimal force in opening the slightly ajar window would be sufficient force.

The facts indicate that Drew entered Victor's home unlawfully and remained there unlawfully with the intent to take back his phone which Drew believed Victor stole. The possession of a handgun to take back the phone, which Drew had when he entered Victor's home, and which was then used to assault Victor by pointing the gun at Victor in such a way as to create a reasonable apprehension in Victor's mind of imminent bodily harm (which is the definition of assault in Nevada), indicates that Drew had the intent to commit the assault at the time he unalawfully entered. At minimum, Drew might have had the attempt to commit larceny in that he planned to take away tangible person property of another with the intent to permanently deprive the person of that property (the phone), assuming the phone was not, in fact, Drew's phone, as Victor contended.

Thus, if the facts above are established at trial, unless the jury believes that Drew did not possess any intent to commit larceny, assault, or battery or any other felony at the time of entering--which is not generally supported by the facts for the reasons set forth above--then Drew should be convicted of burglary.

3. Legal Basis for Suppression of Bloody Shirt and Court Ruling

Fourth Amendment

The 4th Amendment, applicable to the states through the due process clause of the fourteenth amendment, broadly prohibits unreasonable searches and seizures. A search is defined as a governmental intrusion into an area where a person has a reasonable expectation of privacy, and a seizure is the exercise of control by the government over a person or thing.

The Bill of RIghts gives rights free from certain governmental conduct, but no remedies, so the Supreme Court created remedies through the exclusionary rule. Under this rule, if the government obtaines evidence in violation of a defendant's 4th, 5th, or 6th amendment rights, the evidence must be excluded (suppressed) as well as any evidence that was the fruit of the poisonous tree (derived from that evidence). It is meant to deter unconstitutional governmental conduct.

Here, we must determine if there was government conduct, a reasonable expectation of privacy (REOP) by defendant, whether a warrant was obtained and, if not, whether an exception to the warrant requirement exists to determine if the search and seizure of evidence was constitutional.

A police officer is a government actor. A person has a lesser right to privacy in their vehicle, but nevertheless does have a REOP. A valid warrant to conduct a search may not be required in certain circumstances, such as when the search is incidental to a lawful arrest or contraband is seen in plain view or the defendant gives consent or probable cause exists to search an entire vehicle, including trunk.

Regarding an automobile search, the polcie must have probable cause, the PC must have arisen prior to the search beginning, and the police can search passengers and belongings.

Terry Stops
Under the 4th amendment, police can also detain a person for investigatory purposes if there is a reasonable suspcision of criminal activity supported by an articulable basis (not merely a hunch). This is a lower standard than probable cause required for an arrest. The stop must be brief and last only as long as needed for officer to dispel his belief or confirm same. In Nevada, this has translated into no more than 60 minutes, but not longer than reasonably necessary. after 60 minutes, the detention becomes unreasonable per se.

Here, Officer Oliver "thought Drew looked suspicious." The facts do not articulate any further basis for the suspicion, other than the location (not Drew) being common for people to use illegal substances and being high crime. The conclusion that Drew looked suspicious without any further articulable basis as to why Drew, in particular, warranted that suspicion, means that an investigatory stop was not proper. If there is no reasonable suspicion, there is no probable cause, which is a greater requirement.

Nevertheless, here, Officer Oliver did stop and detain Drew based on his suspicion, ordering him to step out of his vehicle and then handcuffing him "for safety." The Officer then proceeded to search Drew's vehicle. The facts do not indicate that Drew consented. Thus, without probable cause and without the search of the vehicle being incidental to a valid arrest, the Officer's search of the vehicle was unreasonable and unconstitutional.

During the unconstitutional search, Officer Oliver found Drew's bloody shirt. Because the shirt was found as a result of an unconstitutional search of Drew's vehicle, the evidence that was not lawfully obtained should be suppressed.

Court Ruling
Drew has a basis to suppress the evidence of the bloody shirt as "fruit of the poisonous tree"--being the product of an uncosntitutional search of his vehicle. Thus, if Drew's counsel files a motion to suppress in advance of his criminal trial, based on the above facts and the absence of reasonable suspicion or probable cause by the Officer and lack of consent to search Drew's vehicle, the evidence should be suppressed and the motion granted.

4. Legal Basis for Suppression of Statements to Officer Oliver and Court Ruling

5th Amendment Miranda Warnings
Under the 14th amendment, for a self-incriminating statement to be admissible under the due process clause, it must be voluntary, as determined by a totality of the circumstances. A statement is involuntary if there is some official compulsion. The confession is subject to the harmless error test if admitted into evidence at trial.

The Fifth Amendment, applicable to states under the 14th amendment, protects individuals from being compelled to give self-incriminating testijmony. *Miranda v. Arizona* requires that a person in custody must be advised of their right to remain silent and right to have assistance of counsel prior to any police questioning. For an admission or confession to be admissible, a person "in custody" must, prior to "interrogation," be informed of their rights under Miranda (not verbatim but in substance).

Miranda warnings are thus required when a defendant is in custodial interrogation. Custody is determined by whether a reasonable person would feel free to terminate the interrogation and leave (freedom of movement test). If the detainee's freedom of movement was curtailed, then the court must consider whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning in Miranda.

An interrogation is words or conduct by police that they should know would likely elicit an incriminating response from the detainee. The detainee must know he is being interrogated by a police officer/government agent.

After being Mirandized, the detainee has the right to do nothing (waiver will not be presumed but neither will the right to remain silent or consult wiht an attorney), waive rights, invoke the right to remain silent (explicitly, unequivocally, and unambiguously), or invoke the right to counsel (unambiguously).

If a statement has been obtained in violation of Miranda, then the evidence is generally inadmissible at trial unless it is used to impeach defendant's testimony (not evidence of guilt) or unless it was obtained due to a public safety exception.

Here, Drew was handcuffed and, thus, his freedom of movement was curtailed. A reasonable person would not feel free to leave if they are handcuffed. Thus, he will likely be found to be "in custody" for purposes of administering Miranda rights.

Next, the Officer told Drew, "You are in a lot of trouble. I know you are hiding something. Tell me what happened." These questions by the Officer were clearly likely to elicit an incriminating response; the Officer was anticipating same. This type of interrogation is extremely oppressive and coercive, as being told by an Officer that you are in trouble and being asked to tell the truth while handcuffed are tantamount to station house pressures.

Thus, Drew was in a custodial interrogation here. In order for Drew's statements to the officer to be admissible, he must have been given his Miranda rights first. Notably, even if Drew had been Mirandized, Drew's statements sitting that he "doesn't have to tell the officer anything" are not an invocation of his right to remain silent, but it is not a waiver of same either. (The officer would have to show by a preponderance of the evidence that a waiver was made knowingly and voluntarily based on the totality of the circumstances and, here, there is no indication that Drew knew he had a right to

remain silent that he then chose to waive by speaking.)

The custodial interrogation continued when the officer "continued to ask Drew questions" while was in the back of the police car. Again, Drew must have been Mirandized prior to the officer coercing him to talk. The officer promising Drew he won't get into trouble if he tells him what happened is an interrogation clearly likely to elicit an incriminating response. Thus, Drew's reply that he "killed Victor" is a confession that was obtained unconstitutionally and without Drew having been properly Mirandized.

Thus, the legal basis that Drew has to suppress the statements to Officer Oliver are that his confession was not voluntary, becuase it was clearly obtained as a rsult of official compulsion by Officer Oliver (coaxing him to tell him or he'll be in trouble and then tell him and he won't be in trouble) and was obtained in violation of his 5th Amendment rights to remain silent.

Court Ruling
As above, if counsel for Drew files a motion to suppress the statements/confession made by Drew at trial, the court should grant the motion on the basis that the exclusionary rule renders the statements inadmissible based on being procured in violation of Drew's 5th amendment rights.

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

FEBRUARY 2025
EXAMINATION ANSWERS

SELECTED APPLICANT ANSWERS
NEVADA BOARD OF BAR EXAMINERS

QUESTION 5

Question 5 - Selected Answer 1

1. Bobs Claims against City of Las Vegas - distribution of materials

State Action
In order for Bob to sue the City of Las Vegas, there must be State Action. State Action requires government conduct. Here the City has passed an ordinance restricting the distribution of promotional materials, such as pamphlets, brochures, or flyers, between the hours of 8am-5pm within 50 feet of a business that holds an alcoholic beverage license. Since the City passed the ordinance, this is sufficient for government action.

Bob must have Standing to bring a challenge to the lawsuit.
Standing
Standing requires Injury in Fact, Causation, and Redressability.

Injury in fact can be shown by the decrease in sales, by directly coorelating it to not being able to handout any distrubution materials from 8-5pm. Bobs Barn (BB) is open from 10 am to 10pm, and therefore will only be able to distrubute materials from 5pm-10pm. BB has a strong argument for injury in fact.

Causation can be directly attributed in a decrease in sales, as BB has become a tourist attraction and the materials were being passed out as advertising. With an 8 hour reduction in advertising, they can show causation.

Redressability can be shown that if the ordinance is modified or removed, they would have an increase in sales.

Therefore, BB has standing.

Freedom of Expression - Time, place, and manner restriction
Restrictions on time, place and manner of expression or speech depends on what type of forum is used for speech. In order for the govt to restrict speech in a traditional public forum requires it to be (1) content neutral (2) narrowly tailored to serve a significant govt interest (i.e. to promote interest that would be achieved less effectively absent the regulation and (3) leave open ample alternative channel for communication.

Here, Traditional public forums historically associated with expression is considered streets, sidewalks, and parks. Here the ordinance is restricting the distribution of promotional materials, such as pamphlets, brochures, or flyers, between the hours of 8am-5pm within 50 feet of a business that holds an alcoholic beverage license.

Here, re (1) the speech restricted is content neutral, as it bans ALL promotional materials that can be distrubted, not based on the language. As such, the speech restricted is content neutral.

Therefore this element is met.

Here, re (2) after recieving complaints about increased pedestrian and vehicular traffic, crowding along the sidewalk in front of the mural, and litter from BB handouts, the City enacted the ordinance. The City has an interest in keeping the flow of traffic moving, especially in the city. The interest is significant because there have been multiple complaints filed in the city. Further, the ordinance is narrowly tailored to reduce traffic and litter by restricting all promotional mateirals, such as pamplets, flyers and brochurs, which are causing trash buildup. There is not an easier way to reduce trash buildup in front of BB's shop.

Therefore, this element is met.

Here, re (3) the ordinance did not restrict placing signs, or other forms of communications such as billbords. As such, other forms of communcation are still left open.

Therefore, this element is met.

As such, elements 1 2 3 are met, and this ordinance is a valid time place and manner restriction. The standard should be used is narrowly tailored to serve a significant govt interest.

Regulation of Commercial Speech
Restrictions on commercial speech are subject to (1) the commercial speech must concern a lawful activity and be neither false nor misleading (2) the asserted govt interest must be substantial (3) the asserted regulation must directly advance the asserted interest, and the regulation must be narrowly tailored to serve the interest. ("reasonable fit").

Here, re (1) the pamphlets, brochures and flyers relate to promotional speech for BBs business and was a lawful activity. BB Is an all-aged restaurant and bar. Therefore this concerns a lawful activity.

This element is met.

Here, re (2) The City has an interest in keeping the flow of traffic moving, especially in the city. The interest is substantial because there have been multiple complaints filed in the city. It is imporant for a city like Las Vegas to have the flow of traffic not impeded. Therefore, the govt interest is substantial

This element is met.

Here re (3) after recieving complaints about increased pedestrian and vehicular traffic, crowding along the sidewalk in front of the mural, and litter from BB handouts, the City enacted the ordinance. The City has an interest in keeping the flow of

traffic moving, especially in the city. The interest is significant because there have been multiple complaints filed in the city. Further, the ordinance is narrowly tailored to reduce traffic and litter by restricting all promotional mateirals, such as pamplets, flyers and brochurs, which are causing trash buildup. There is not an easier way to reduce trash buildup in front of BB's shop.

This element is met.

As such, elements 1 2 and 3 are met. This is a valid restriction on commerical speech. The Standard the court should use is he asserted govt interest must be substantial, the asserted regulation must directly advance the asserted interest, and the regulation must be narrowly tailored to serve the interest.

In conclusion, Bob can attempt to claim that the ordinance restricted his Freedom of Expression - (Time, place, and manner restriction) and was an invalid Regulation of Commercial Speech. This City will successfully argue that it did not infringe on his freedom of expression, and was a valid regulation of commercial speech.

2. Bobs Claims against City of Las Vegas - Selling of merchandise

The ordinance that prohibits the selling of merchandise is : "Any business that holds an alcoholic beverage and which has a separate restaurant area that allows persons under age of 21 shall not sell merchandise that contains vulgar and offensive gestures or language."

Overbreadth
A law that burdens a substantial amount of speech or other conduct constitutionally protected by the first amendment is "overbroad" and thereafter void (does not apply to commercial speech). Overbroad statutes may be challenged if "facially invalid" to prevent a chilling effect on protected speech.

Here, the ordinance restricts selling merchandise that contains vulgar and offensive gestures or language. It does not contain language that gives examples of vulgar and offensive gestures or language. This would lead police officers and other enforcers to their own unfettered discretion on what is vulgar and offensive.

Therefore, this ordinance is overbroad and should be struck down as unconstitutional.

Vagueness
a statute void for vagueness if it fails to provide a person of ordinary intelligence with fair notice of what is prohibited.

Here, as mentioned above, the ordinance restricts selling merchandise that contains vulgar and offensive gestures or language. It does not contain language that gives examples of vulgar and offensive gestures or language. It fails to provide guidance or fair notice on what is considered vulgar and offensive.

Therefore, this ordinance is void for vagueness and should be struck down as unconstitutional.

Regulation of Symbolic Speech
Expressive conduct is subject to a lesser degree of protection than speech. A regulation of expressive conduct is upheld if the (1) regulation is within govts power to enact (2) furthers a important govt interest, (3) the interest in unrelated to the suppression of ideas and (4) the burden on speech is no greater than necessary.

Here, the govt is attempting to restrict vulgar and offensive gestures. The City sent BB a notice for selling vulgar and offensive merchandise, specifically the merch with Samantha, a featured singer, that has her posing next to the mural using a gesture representing a curse word with the slogan "Im a mean Beach until I eat at Bobs Barn". Thus the ordinance is attempting to restrict her representing a curse word with her finger.

Here, r (1) the regulation is not within the govts power to enact by restricting merchandise that contains vulgar and offensive gestures without justification. The definition, as mentioned above is free for broad interpretation and vague.

Therefore this element is not met.

Here, re (2) the government has an important interest in protecting children from being exposed to vulgar and offensive gestures or language. However, this ordinance affects businesses that have alcoholic beverages, and minors are not likely to be around this area. As such, this ordinance does not further an important government interest.

Therefore, this element is not met.

Here, re (3) the ordinance is related to the suppression of ideas, as it was attacking the gesture of Samantha, and it seeks to suppress "all vulgar or offensive gestures".

Therefore, this element is not met.

Here, re (4), the burden on speech is overbroad and void for vagueness. It encompasses more speech than necessary for the protection of kids.

Therefore, this element is not met.

All elements fail to meet this restriction on Symbolic Speech.

In Conclusion, Bob can claim the ordinance prohibiting the selling of merchandise is overbroad, void for vagueness, and is an improper Regulation of Symbolic Speech. The court should apply the standard: "furthering a important govt interest, the interest in unrelated to the suppression of ideas and the burden on speech is no greater than necessary.".

******* Question 5 END HERE *******

Question 5 - Selected Answer 2

Standing:
Bob must have standing to bring any claims against the government in regard to the ordinance. Standing happens when there is a direct injury, causation, and redressability. Bob will have standing here because he has been charged with violating the ordinance, so he has been directly injured, and the violation would not have occurred but for the ordinances being enacted, and a determination of the constitutionality of each ordinance may bring Bob relief if they are found to be unconstitutional.

1. Bob's claims regarding distribution of promotional materials:
The Las Vegas ordinance that prohibits the distribution of promotional pamphlets, brochures, or flyers will likely be subject to attacks by Bob under the free speech clause of the First Amendment to the US Constitution. The First Amendment prohibits Congress from abridging the freedom of speech of citizens. The First Amendment is made applicable to the states and to municipal governments through the fourteenth amendment. As such, the First Amendment applies to ordinances passed by the City of Las Vegas.

Here, Bob is challenging a Las Vegas city ordinance which means that the restriction is coming from the government itself. The way in which a court will analyze a free speech claim first depends on the purpose of the ordinance or law and whether it prohibits speech based on its content. A content-based restriction will be subject to strict scrutiny which means that the government will have the burden of showing that the regulation is necessary to achieve a compelling government purpose. A speech restraint that is content-neutral must pass an intermediate level of scrutiny. Under this level, the court must show that the restriction is substantially related to an important government purpose. If a law is content-neutral, but restricts the time, place, or manner of the speech, the level of scrutiny will depend on the forum that is being regulated.

Here, the LV ordinance is restricting the the distribution of materials by limiting it to the hours of 8am and 5pm within 50 feet of a business that holds a liquor license. As such, this is a time, place, and manner restriction. Thus the constitutionality of the regulation will depend on the type of forum (public, designated public, nonpublic, or limited public) and whether the appropriate level of scrutiny is met.

A public forum is a forum that has been historically left open for free speech activities. Public forums include sidewalks, streets, and public parks. Public property that has not historically been open for free speech activities, but becomes open for such activities on a permanent or temporary basis, becomes a designated public forum. A law regulating speech in either forum will avoid strict scrutiny if the government can show that the law is content neutral, narrowly tailored to serve an important government interest, meaning it does not burden more speech than is necessary to further the interest, and leaves open alternative channels of communications.

A nonpublic forum is government property that can and does close to speech, while a limited public forum is government property that is limited to certain groups' speech or dedicated to discussion of limited topics. The level of scrutiny for such forums is a rational basis review, meaning the challenger of the ordinance must show that the restriction is not reasonably related to a legitimate government purpose. The regulations, however, must still be viewpoint neutral.

Here, the ordinance is regulating the distribution of materials on a sidewalk which would make this a regulation of a public forum. This is a viewpoint and content neutral restriction because it does not regulate any content of the materials, only when and where they may be distributed. The purpose of this law is to eliminate increased pedestrian and vehicular traffic, crowding along the sidewalk, and litter. Bob will argue that prohibiting distribution between 8am and 5pm is likely not narrowly tailored to achieve these interests because the regulation starts at 8am, but Bob's Barn does not open until 10am. Thus, there is no reason to prohibit the distribution of materials to eliminate foot traffic when the restaurant is not open. However, the foot traffic is caused by the tourist attraction that is the painted mural which is present at all hours of the day, and 8am to 5pm are likely normal business hours for the rest of the community so it would be beneficial to decrease traffic during this time. The ordinance leaves open adequate other channels of communication because the materials can be distributed outside the hours of 8 and 5 or in front of a business without a liquor license.

It is likely that this ordinance is constitutional as a valid time place and manner regulation and avoids strict scrutiny review.

2. Bob's claims regarding the prohibition of selling merchandise
Free Speech
Bob's claims regarding the ordinance prohibiting the selling of merchandise will also likely be brought under the First Amendment free speech clause.

The City provides that any business with an alcoholic beverage license, that has a separate restaurant area that allows people under the age of 21, cannot sell merchandise with vulgar or offensive gestures or language. Bob will likely argue that this violates his free speech rights because it is regulating the content of the shirts sold. It directly pertains to what is being printed on the shirt rather than to where or when the shirts are being sold. Thus, it would be subject to strict scrutiny. As such, the government must show the law is necessary to achieve a compelling government purpose. The regulation also cannot be vague or overbroad. Bob may also argue that this is a prohibition on commercial speech because the language is being used on merchandise that is being sold.

Vagueness:
A speech regulation must adequately inform citizens what exactly is being prohibited.

Here, Bob can argue that the regulation is vague because it prohibits merchandise that contains "vulgar or offensive" gestures or language, but it does not explain or define what vulgar or offensive means. The term vulgar or offensive gestures or language does not give citizens direct notice of what the can or cannot print on a shirt.

Overbroad:

A regulation on speech will not be upheld if it is overbroad, meaning it regulates substantially more speech than necessary. The challenger of the staute has the burden of showing overbreadth.

Here, the regulation likely is overbroad insofar as it prohibits merchandise with vulgar or offensive gestures or language. Protecting children from vulgar curse words does not need to include the prohibition of gestures that are offensive. Further, it prohibits the sale to any business that serves people under the age of 21, rather than limiting the prohibition to patrons under the age of 18.

Strict Scrutiny:
As stated above, the regulation must also pass strict scrutiny. It is unlikely that the government will be able to prove that protecting minors from vulgar language is a sufficient basis for the prohibition of speech here. The city has not articulated a purpose for the ordinance and there is no evidence from the city that the word "beach" on a shirt has caused any harm to minors who have been present around the merchandise. The burden is on the government to support its ordinance and it has not done so.

Commercial Speech:
Because Bob is selling these t-shirts, he can argue that this is a restriction on commercial speech. Commercial speech that is false or misleading is not protected. If the commercial speech is not false or misleading, the regulation will be subject to a form of intermediate scrutiny. The ordinance or law must serve a substantial government interest, directly advance that interest, and be narrowly tailored to serve that interest. The regulation does not need to be the least restrictive means of accomplishing the legislative goal, but complete bans are usually invalid.

Here, as stated above, the government has not a articulated a purpose for its regulation, but it can be assumed its purpose is to protect children from exposure to vulgar speech. Prohibiting the sale of a one specific medium that vulgar speech could be on likely does not directly advance that interest because children can still be subject to vulgar speech in all other facets of life. The regulation is not narrowly tailored because it prohibits any business that happens to allow people under 21 rather than prohibiting businesses that only have patrons under the age of 18.

It is likely that this is an invalid commercial speech regulation.

Obscenity:
Here, the government may try to argue that this is a regulation of obscenity and is thus not protected speech under the First Amendment. Obscenity is speech that appeals to the prurient interest in sex (judged by a community standard), is patently offensive (judged by a community standard), and lacks serious literary, political, or scientific value (judged by a national standard).

It is unlikely that vulgar language on a shirt would rise to the level of obscene. The shirts do not portray sex in any way and merely allude to a curse word. Vulgar or offensive language does not automatically implicate sex or porn. The statute only prohibits offensive or vulgar gestures or language rather than prohibiting language that rises to the level of obscenity. Profane and indecent language are generally protected except when it is in the form of broadcast media or in schools. Neither of these situations are at issue here, so it is unlikely that this falls under the unprotected category of speech.

In conclusion, it is likely that this ordinance is unconstitutional under the First Amendment free speech clause.

Equal Protection
The Equal Protection Clause of the 14th amendment, as applied to the states, prohibits states from discriminating among citizens based on certain classifications. Classifications based on race or national origin will be subject to strict scrutiny - necessary to achieve a compelling government purpose. Classifications based on sex, illegitimacy, or undocumented alien children are subect to intermediate scrutiny - the law must be substantially related to an important government purpose. All other classifications are subject to rational basis scrutiny - rationally related to a legitimate government purpose.

Here, Bob may argue that this ordinance unfairly discriminates against his restaurant because it draws a line between restaurants who serve alcohol and who serve customers under the age of 21 and those that do not. This is not a suspect classification, and thus will be subject to rational basis scrutiny. Bob will have to show that there is no rational basis for the law, meaning it is not rationally related to a legitimate government purpose. This is a standard the government most always wins because it is an easy standard to meet. Here, the government can argue that they have an interest in protecting children from vulgar language and prohibiting the sale of merchandise in a location where children are allowed to be, accomplishes this purpose. If the merchandise is not sold, then the children will not read it.

It is unlikely that Bob will be successful in an equal protection claim, but the law will likely nevertheless fail under the first amendment.

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

FEBRUARY 2025
EXAMINATION ANSWERS

SELECTED APPLICANT ANSWERS
NEVADA BOARD OF BAR EXAMINERS

QUESTION 6

Question 6 - Selected Answer 1

1. Tom's testimony

Relevance

Evidence is relevant if it has any tendency to make the fact more or less probable and is of consequence. The court is likely to consider evidence inadmissible if its probative value is substantially outweighed by the dangers of unfair prejudice.

Here, the testimony is likely to be relevant as it goes toward showing whether Daniel speeds.

Actual Knowledge

For a witness to testify, the witess must have actual knowledge of the events. Here, Tom likely has actual knowledge of Daniel's driving tendencies because he has driving with him frequently.

Lay Witness

A lay witness may generally not testify unless the witness' testimony is based on personal perception, the testimony aids in assisting the jury in finding fact, and the testimony is not based on scientific, technical, or specialized knowledge. Here, Tom's testimony is likely based on his personal experiences with Daniel and his perception. Furthermore, his testimony will likely assist the jury in finding whether Daniel was speeding and the degree of damages to award Patty. Lastly, Tom's testimony is based on his perception which does not include any scientific, technical, or specialized knowledge.

Character Evidence

Generally, evidence of a person's general behavior or past acts is inadmissible to prove conforming conduct, unless it is an essential element or used via opinion testimony to impeach a witness. Here, Tom is likely going to testify as to previous times Daniel sped, which attacks his general behavior. This would constitute impermissible character evidence, however, Tom may be allowed to testify if there are other purposes available.

Other Purpose

Prior bad acts may be admissible for other purposes: motive, intent, mistake of fact, identity, or common scheme or plan; however they are subject to Petrocelli hearings. Here, there is likely no other purpose available.

Habit

A witness may testify if it is part of someone's particular routine. This evidence is admissible to prove the person acted in accordance with the habit on a particular occasion.

Patty is likely to argue that Tom should be allowed to testify as he will testify as to Daniel's habit of speeding when he drives. However, Daniel is likely to contend that Tom's testimony lacks the proper knowledge to determine whether he "always" drives over the speed limit. The court could go either way, however, it is seemingly more likely that Tom will be allowed to testify and have his testimony be admissible as habit evidence.

Conclusion: Tom's testimony is likely admissible as habit evidence.

2. Daniel's Roommate

Relevance

Evidence is relevant if it has any tendency to make the fact more or less probable and is of consequence. The court is likely to consider evidence inadmissible if its probative value is substantially outweighed by the dangers of unfair prejudice.

Here, the testimony is likely to be relevant as it goes toward showing whether Daniel speeds and caused the accident.

Actual Knowledge

For a witness to testify, the witness must have actual knowledge of the events. Here, Daniel's roommate likely has actual knowledge of Daniel's car accident and the circumstances surrounding it.

Lay Witness

A lay witness may generally not testify unless the witness' testimony is based on personal perception, the testimony aids in assisting the jury in finding fact, and the testimony is not based on scientific, technical, or specialized knowledge. Here, Daniel's roommate's testimony is based on his knowledge of Daniel and the car accident. Furthermore, his testimony will likely assist the jury in finding whether Daniel was speeding and the degree of damages to award Patty. Lastly, Tom's testimony is based on his perception which does not include any scientific, technical, or specialized knowledge.

Character Evidence

Generally, evidence of a person's general behavior or past acts is inadmissible to prove conforming conduct, unless it is an essential element or used via opinion testimony to impeach a witness. Here, Daniel's roommate is going to testify that Daniel was previously in a car accident in which he was speeding. This would likely constitute impermissible character evidence of Tom's past behavior.

Other Purpose

Prior bad acts may be admissible for other purposes: motive, intent, mistake of fact, identity, or common scheme or plan; however they are subject to Petrocelli hearings. Here, there is likely no other purpose available.

Conclusion: Daniel's roommate will likely not be able to testify.

3. 911 Recording

Relevance

Evidence is relevant if it has any tendency to make the fact more or less probable and is of consequence. The court is likely to consider evidence inadmissible if its probative value is substantially outweighed by the dangers of unfair prejudice. Here, the evidence is likely relevant as it deals with a motorist reporting on the incident.

Hearsay

Hearsay is an out of court statement being used to prove the truth of the matter asserted. Here, the motorist's statement on the 911 recording is hearsay because it is an out of court statement being used to prove that Daniel hit Patty. It is inadmissible unless a hearsay exception applies.

Hearsay within Hearsay

Hearsay within hearsay may be admissible if each part of the combined statement conforms to hearsay exceptions.

Here, the 911 recording is likely to be hearsay, as well as the declaration by the motorist in the recording claiming to have witnessed the accident. As a result, the recording and the motorist's statement must conform to a hearsay exception.

Recordings

Generally statement automatically recorded by computers are not typically hearsay due to the fact that they do not rely on human recollection or recording. As such, the 911 recording is seemingly recorded by a computer, and is exempt from being labeled as hearsay. For the motorists' statement to be admissible, the statement must conform to a hearsay exception.

Hearsay Exceptions - Excited Utterance

An excited utterance occurs when a statement is made while the declarant is still under the shock or excitement caused by a startling or exciting event or condition.

Here, Patty is likely to argue that the motorists' statement is likely an excited utterance because the motorist was under the shock and excitement of witnessing the crash. Patty will claim that the motorist "hysterically yelling" on the recording is evidence that the declarant is still under shock of the event. The motorist being yelling hysterically and recounting the events of the crash are indicative of someone making a statement while excited or shocked.

As such, the statement is likely an excited utterance.

Hearsay Exception - Present Sense Impression

A present sense impression is a statement made by the declarant during or immediately after the declarant observed an event.

Here, Patty is likely to argue that the motorist's statement is a present sense impression because the motorist is claiming they "just" saw the car crash. Although the motorist was not on the phone with 911 the moment it happened, evidence rules allow for the statement immediately following the incident. There is no indication that the motorist waited an unreasonable amount of time before calling 911. Contrarily, the fact of calling 911 seemingly indicates that the motorist called 911 immediately after the accident because of the need for medical attention.

As such, the motorist's statement is likely a present sense impression.

Conclusion: The motorist's statement is likely admissible under two hearsay exceptions.

4. Patty

Relevance

Evidence is relevant if it has any tendency to make the fact more or less probable and is of consequence. The court is likely to consider evidence inadmissible if its probative value is substantially outweighed by the dangers of unfair prejudice. Here, the evidence of Patty's communication with Daniel could be relevant in ascertaining fault in the action.

Hearsay

Hearsay within hearsay may be admissible if each part of the combined statement conforms to hearsay exceptions. Here, Daniel's statement to Patty is likely to be considered hearsay because it is an out of court statement from Daniel to Patty. It is also likely being offered to prove the truth of the matter asserted in regards to whether Daniel was culpable in hitting Patty. It is not admissible unless there is an exception.

Hearsay Exception - Opposing-Party Statement

An opposing party statement is a statement made by another party, and it must be brought against the party who made the statement.

Here, Patty is attempting to bring Daniel's statement into court. Furthermore, Patty is attempting to use the statement against Daniel, an opposing party who made the statement. As such, this is likely a proper opposing-party statement, however, public policy exclusion in evidence likely make this inadmissible, as discussed below.

Settlement offers or Negotiations

Settlement offers made by any party is not admissible to prove liability, culpability, or the amount of a disputed claim.

Here, Daniel's statement to Patty is likely to be considered a settlement offer because he offered her money after the accident in exchange for not calling an ambulance and "forgetting this ever happened." Daniel's statement arises to that of a settlement offer because he tried to get resolve the issue between him and Patty so as for it to not get to court. As a result, this will likely be considered a settlement offer and will be inadmissible.

Conclusion: Daniel's settlement offer is likely not admissible, regardless of hearsay exceptions.

5. Insurance Policy

Relevance

Evidence is relevant if it has any tendency to make the fact more or less probable and is of consequence. The court is likely to consider evidence inadmissible if its probative value is substantially outweighed by the dangers of unfair prejudice. Here, the insurance policy is likely relevant as it is relevant for damages.

Liability Insurance

Existence of liability insurance is not admissible to prove fault or increase damages. However, under Nevada law, it is admissible if the defendant introduces evidnce of their inability to pay a judgment.

Here, Daniel's $2 million insurance policy is liability insurance that is not admissible. Furthermore, Patty is not bringing this evidence into court on the basis that Daniel has stated he cannot pay a judgment. As such, Daniel's $2 million policy is inadmissible.

6. Mechanic's Assessment

Relevance

Evidence is relevant if it has any tendency to make the fact more or less probable and is of consequence. The court is likely to consider evidence inadmissible if its probative value is substantially outweighed by the dangers of unfair prejudice. Here, the Mechanic's assessment and receipts are relevant because it goes at whether Daniel could have been negligent in the maintenance of his car, which could impact Patty's case and recovery.

Subsequent Remedial Measures

Subsequent remedial measures for repairs after an accident is not admissible to prove negligence, culpability, or liability.

Daniel Replacing 1 Brake Before Accident

Here, the mechanic's receipts indicating that Daniel replaced the brakes is admissible because they were repaired before the accident. As such, this is admissible into evidence.

Daniel Replacing 3 Brakes After Accident

Here, the mechanic's receipts that indicate that Daniel replaced the three remaining brakes after the accident are inadmissible because it is a subsequent remedial measure taken by Daniel after the accident. Patty is likely introducing the evidence against Daniel to show that Daniel was negligent in the maintenance of his car, which is not allowed under the Rules of evidence.

Conclusion: Only the receipts repaired brake before the accident is admissible. The 3 repaired brakes after the accident are inadmissible.

7. Accident Re-constructionist

Relevance

Evidence is relevant if it has any tendency to make the fact more or less probable and is of consequence. The court is likely to consider evidence inadmissible if its probative value is substantially outweighed by the dangers of unfair prejudice. Here, the evidence is likely to be admissible because it deals with whether Patty is exacerbating her injuries/pain.

Expert Witness

Expert witness testimony is admissible if it is based on scientific, technical, or specialized knowledge and it helps the tried of fact understand the evidence or determine a fact at issue.

Here, the accident reconstructionist is likely an expert witness. The re-constructionist's testimony is likely to be based on scientific, technical, or specialized knowledge because of the preparation, experimentation, and analysis that goes into administering a review of an accident. The knowledge and expertise the reconstructionist has is likely not going to be found

in a lay witness. Furthermore, the reconstrutionist's testimony is likely going to help the tried of fact in ascertaining the length of Patty's injuries because of the classification of the accident. Understanding that the accident was a minor accident rather than a major accident could help determine the damages Patty receives or the liability of Daniel

Conclusion: The reconstructionist's testimony is likely to be admissible.

8. Patty's Former Neighbor's Testimony

Relevance

Evidence is relevant if it has any tendency to make the fact more or less probable and is of consequence. The court is likely to consider evidence inadmissible if its probative value is substantially outweighed by the dangers of unfair prejudice.

Here, the neighbor's testimony is likely to be relevant as it pertains to whether Patty is truthful about her previous injuries.

Actual Knowledge

For a witness to testify, the witness must have actual knowledge of the events. Here, Patty's neighbor likely has actual knowledge of Patty's tendencies to exacerbate her injuries.

Lay Witness

A lay witness may generally not testify unless the witness' testimony is based on personal perception, the testimony aids in assisting the jury in finding fact, and the testimony is not based on scientific, technical, or specialized knowledge.

Here, Patty's neighbor testimony is likely based on her personal knowledge of Patty and her perception of Patty as an individual. Furthermore, her testimony will likely assist the jury in finding whether Patty is being truthful about the degree of her injuries, consequently affecting the amount of damages to award Patty. Lastly, Patty's neighbor's testimony is based on his knowledge which does not include any scientific, technical, or specialized knowledge.

Character Evidence

Generally, evidence of a person's general behavior or past acts is inadmissible to prove conforming conduct, unless it is an essential element or used via opinion testimony to impeach a witness.

Here, Patty's neighbor testifying would likely be inadmissible because she is testifying about Patty's previous instances of lying about previous injuries and that she never tells the truth. Testifying about prior events is inadmissible under the rules of evidence, and as such will likely be inadmissible.

Conclusion: Patty's neighbor's testimony is likely inadmissible.

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

Question 6 - Selected Answer 2

1. Testimony of Tom

Evidence must be relevant to be admissible. Relevant evidence is evidence that tends to prove or disprove a fact in consequence. In Nevada, relevant evidence may nonetheless be excluded if its probative value is substantially outweighed by (1) the danger of unfair prejudice, (2) confusion of the issues; or (3) misleading the jury.

In civil cases, character evidence is generally inadmissible to prove conduct in conformity with that character unless proof of that character is an essential element of the claim. However, evidence of a person's routine or habit may be admissible. A habit is a regular response to specific circumstances whereas character evidence is otherwise a person's general disposition or propensity.

Here, Tom's testimony is to show that he drives with Daniel all the time and that Daniel always drives above the speed limit. While this has some relevant value because it might tend to make it more likely than not that Daniel was speeding on this occasion, it is not likely specific enough to show that Daniel has a habit - that he always drives above the speed limit. Rather, it is more akin to evidence that Daniel has a propensity to drive above the speed limit, which is inadmissible character evidence. As such, this statement should be excluded.

2. Testimony of Daniel's Roommate of Daniel's prior car accident.

Relevance: (see rule above) - Daniel's prior car accident is only slightly relevant to show that he was speeding on this occasion and its probative value is likely outweighed by its prejudicial effect.

Generally, evidence of prior bad acts is only admissible if it is used to show a a non-character purpose such as motive, intent, mistake, identify, or common scheme or plan. There is no evidence here that Daniel's roommate's testimony is being presented for a non-character purpose. Rather, it seems that the statement is only being proferred to show that Daniel acted in accordance with his character for speeding, which is inadmissible. As such, Daniel's roommate's testimony about Daniel's prior accident should be excluded.

3. Audio recording of passing motorist

Relevance (see rule above) - the 911 call recording is relevant because it would tend to prove that Daniel caused the accident, which is a fact of consequence in the case.

Hearsay - Hearsay is a statement, other than one made by the declarant while testifying at the current trial or hearing, offered in evidence to prove the truth of the matter asserted. Hearsay evidence will be excluded unless an exception or exemption applies. One exception is an excited utterance which is a statement about a startling event that was made while the declarant was under the stress of excitement from the event. Another exception is a present sense impression, which is a statement that describes or explains an event or condition made while or immediately after the declarant perceives the event or condition.

This witness's 911 call is an out of court statement and being used to prove the truth of the matter asserted (that Daniel caused the accident), thus it is a hearsay statement. However, it was made after passing the accident and right after the accident. The caller was hysterical, indicating the witness was still under the stress of excitement from the event. The statement was about the accident and describes the event. Thus, it meets the requirements of both an excited utterance and a present sense impression and should be admitted into evidence.

4. Testimony from Patty that Daniel said, "Please don't call an ambulance, just let me give you this money and we can forget this ever happened."

Relevance (see rule above) - this statement is relevant because it tends to prove that Daniel admitted being at fault, which goes to a fact of consequence in the case.

Hearsay - it is an out of court statement so on its face is hearsay. However, one of the exemptions to the hearsay requirement is a statements by a party opponent, which are considered nonhearsay.

Public Policy Exceptions - The rules of evidence also protect, for public policy reasons, certain otherwise admissible statements from coming into evidence. One of those public policy exceptions is payment or offer to pay medical expenses. However, admissions of fact that accompany an offer to pay are admisisble. Another is settlement negotiation or offer to compromise, which cannot be used to prove fault or the validity or amount of a claim.

Here, Patty is offering an out of court statement made by Daniel. Because Daniel is a party opponent, the statement is nonhearsay and otherwise admissible. However, the statement is a request to not call an ambulance along with an offer to pay money in exchange for forgetting it ever happened. This can be construed as both an offer to pay medical expenses (presumably in lieu of calling an ambulance) and also an offer to settle or compromise (to take money in exchange for not pursuing any claims against Daniel). As such, it will likely be excluded. It's possible that the statement "Please don't call an ambulance" would be admitted since it is separate from the offer to pay, but that on its own my have little probative value. Overall, the court will likely exclude this statement on public policy grounds.

5. Evidence of Daniel's insurance.

Relevance - it has limited probative value because it doesn't really make a fact of consequence more or less likelly.

Public Policy Exclusions - evidence of liability insurance or lack of is inadmissible to prove fault or absence of fault. It is

allowed to show ownership/control or for impeachment. Here, it's not clearly for what purpose this evidence is being offered, but to the extent that it is being offered to show Daniel was more likely at fault, it should be excluded.

6(a). Diagnostic Assesment of Daniel's car

Relevance - this is relevant to show whether Daniel was negligent in maintaining his car.

Hearsay (see rule above) - this is an out of court statement being offered to prove the truth (that Daniel's car need all of his brakes replaced) and as such is hearsay.
However, there is an exception to hearsay for records of regularly conducted activities (business records). A document is admissible as a business record if it (1) is a record of an act, event, condition, opinoin or diagnosis, (2) was made in the regular course of business and the business regularly keeps such records, (3) made at or near the time of the recorded event, (4) consistes of matters within the personal knowledge of the person making the record, and (5) is authenticated by a custodian of the record.

Here, the car diagnostic will likely be admitted. It is likely a record kept in the regular course of the auto mechanic's business. As long as the mechanic can authenticate it and show that he keeps such records in the regular course of his business, it will likely be admissible.

6(b) Receipt showing only one brake was fixed.

Relevance - relevant to show whether Daniel was negligent in failing to maintain his vehicle.

Hearsay and business record (see rule above) - this is also likely a business record for the above reasons and is admissible.

6.(c) Testimony from mechanic that Daniel brought in his car after the accident and fixed his other brakes.

Relevance - slightly relevant to show that Daniel knew his brakes needed to be fixed. However, this could also be a consequence of the accident itself so it has very little relevant value.

Public Policy - courts exclude evidence of subsequent remedial measures as evidence of fault or an admission of fault. The reason is that courts don't want to dissuade people from taking remedial measure if they believe it will be used against them. Because Daniel's subsequent repairs are subsequent remedial measures, the court will likely exclude them.

7. Admissibility of the accident reconstructionist

Relevance (see rule above) - the testimony that this was a low impact event is highly relevant to the issue of the plaintiff's damages.

Expert testimony is admissible under certain circumstances. For expert testimony to be admissible: (1) the subject matter bust be one where scinetific, technical, or other specialized knowledge would assist the trier of fract; (2) the opinion must be based on sufficient facts or data: (3) the opinion must be the product of reliable principles and methods; and (4) the expert must have reliably applied the principles and methods to the facts of the case. Once qualified as an expert, the expert's opinion must be based on her own personal observations, facts made known at trial, or facts supplied to the expert outside the courtroom of the type reasonably relied upon by other experts in the field.

Here, if Daniel can provide a foundation that his expert is qualified to testify as stated above, then this testimony will be admissible. It is based on examining the vehicles in the accident, which is a personal observation and sufficient to base an expert opinion on.

8. Testimony from Patty's former neighbor.

Relevance - this testimony goes to Patty's credibility as a witness. The credibility of witnesses is always relevant.

Impeachment Evidence - a witness's character for truthfulness can be impeached by the opposing party, but only with opinion or reputation evidence, not with evidence of specific instances.

Prior bad acts for non-character purposes (see rule above) - can be used to show motive, intent, mistake, identify, or common plan or scheme.

Here, the testimony about Patty lying about previous injuries from car accidents refers to specific incidents and thus cannot be used to impeach her character for truthfulness. However, if it is being proferred to show a common plan or scheme of faking injuries and/or causing accidents, then it can be admitted for that purpose.

The former neighbor's testimony that Patty never tells the truth about anything is opinion evidence of Patty's truthfulness and is admissible to impeach Patty's character for truthfulness.

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

FEBRUARY 2025
EXAMINATION ANSWERS

SELECTED APPLICANT ANSWERS
NEVADA BOARD OF BAR EXAMINERS

Nevada Performance Test – 1

NPT 1 - Selected Answer 1

To: Senior Firm Partner
From: Examinee
Date: Feburary 28, 2025
Re: *Johnson v. Quickie Mart*- Potential Counterclaims and Defenses

Question Presented: Does Mr. Johnson have valid counter-claims and defenses that would allow him to maintain both the Dog Run and the Dirt Road under Nevada law?

Answer: Most likely yes. Under Nevada law, Mr. Johnson will be able to contend any claim that Quickie Mart may bring based on adverse possession through the predecessor period in regard to the Dog Run, or potentially a comprehensive prescitpive easem,ent. Furhter, the dirt road will likely be a presctive easement.

Discussion

I. Mr. Johnson Will Have Strong Arguments That The Dog Run Area Was Claimed By Adverse Possesion, And May Also Argue A Comprehsenive Prescitpive Easement.

There must be a determination as to whether Mr. Johnson will be able to claim the three feet that encroaches Quickie Mart's ("QM") land is within the purview of adverse possession. Nevada's scope of adverse possession is statutorily cemented, stating that "where it appears that ther has been an actual continued occuoaiton of premsies, under a claim of title, exclusive of any other irght, but not found upon a written instrument . . . the premsies so actualyl occupied . . . shall be deemed to have been held adversely." Nev. Rev. Stat. 11.130. Adverse possession is allowed with is allowed under Nevad law in the following situations: 1) where it has been protected by a siubstantial encolusre; or 2) where it has been usually cultivated or improved. NRS 11.140. Further, there is a required that adverse possession can only be granted through a perioid of 5 years, where it is "conitnuous" and "the persons or persons, their predecessors and grantors have **paid all taxes**, state, county and minicapl, which mayu have been leived and assessed against the land for the period mentioned . . . ." NRS 11.150.

The Dog Run is a concrete structure that is walled in, extending the entirety of the length of the kennel provided for Mr. Johnson to allow his ability to breed to Goldendoodles. *See Summary of Client Interview ("Summary").* The enclosure is within the scope of the Nevada statute defining which aspects are to be available for adverse possession. *See NRS 11.140 generally.* Thus, the primary concerns to which Mr. Johnson's counterclaims and defenses will hinge upon is whether he has substantially paid the taxes regarding the portion of the land of which the Dog Run is located, and whether the other elements regarding adverse possesion are met pursuant to Nevada case law.

A. Mr. Johnson Will Have Met The Elements of Adverse Possession Under Nevada Law, To Which His Defenses and Counterclaims Under Adverse Possession May Hinge On The Taxes Paid.

Nevada recognizes adverse as a doctrine of which a person in possession of real property owned by someone else may acquire valid title. *Jones.* Through this, the holder of this title is gratned property rights, including the ability to maintian exclusive control of the property. *Id.* For there to be valid adverse possesion, Mr. Johnson will need to show, alongside a showing of the taxes that were paid on the property and the required statutory period, the following notions: 1) hositility; 2) actual possession; 3) peacable possesion; 4) open posession; 5) possession is notorious; and 6) posession was uninterrupted. *Id.*

1. *Mr. Johnson Will Have Likely Met The Required Statutory Period*.

Mr. Johnson will have met the five year period under Nevada. He intially constructed the dog kennnel on the Johsn on lot in 2005, being 13 years from the time that the Dog Run was constructed to the time that QM is seeking to bring legal action against him. *Summary*. Thus, Mr. Johnson will have met the statutory period.

2. *Mr. Johnson Will Have Met The Hostility Requirement As Shown Through Mr. Smith's Request To Remove The Dog Run*.

In 2018, Mr. Smith obtained a survery that showed the encroachment of the Dog Run, to which Mr. Smith subsequently asked Mr. Johnson to remove the Dog Run as he was attempting to sell the land. *Summary*. There is no question that this is within the scope of hostility, as the time of the notice of the encroachment will likely not defeat of hostility since the Dog Run has been hostile throughout the entire period of its existence. Mr. Smith explcitily sting that the Dog Run must be removed shows that there was no permission or no granting of the Dog Run being able to be constructed and encroached onto Mr. Smith's land, therefore hostility is met.

3. *Mr. Johnson Will Have Met The Peaceable Possession Requirement*.

There is nothing indicated that Mr. Johnson encroached through any manner that would be considered violent, fraudulent, or any other manner of which would not be considered peaceful. Mr. Smith and Mr. Johnson maintained a good relationship through the period of that Mr. Smith owned the Developer Land, thus the peaceable possession element is met.

4. *Mr. Johnson Openly and Notoriously Possessed The Land*

There is no question that Mr. Johnson openly and notoriously possessed the land, particularly shown through the fact that Dog Run was 30 feet by 10 feet, being a massive structure of which Mr. Smith would have substantial knowledge regarding its existence. Thus, these elements are also met.

5. *Mr. Johnson Will Have Possessed The Land Uninterrupted From The Period of 2005 to 2025.*

As stated before, the Dog Run has been constructed in 2005, to which there has not been substantail change or a demolition of the structure since its inception. *Summary*. Thus, there is uninterrupted use.

B. The Elements of Adverse Possession Are Met, But The Period of Which He Adversely Possessed Will Likely Deem That Mr. Smith Paid The Portion Of The Property Taxes, Therefore This Claim May Fail.

Ultimately, Mr. Johnson has a strong argument that he adversely possessed the land of which QM is seeking to regain back pursuant to the survery obtained by Mr. Smith in 2018. QM may try to argue that in 2018, Mr. Smith effectively attempted to eject Mr. Johnson from the land, therefore the ability to claim adverse possession is not available. *Id.* However, the adverse possession was successful from the period of which the Dog Run was constructed to the five year requirement of the statute. Thus, Mr. Johnson has a strong defense that he adversely possessed the land, upon a showing that he paid the taxes on the property. NRS 11.150.

Paralegal stated that Mr. Smith or Quickie Mart paid the portion of the property taxes of the Developer Land where the Dog Run is located during this period. *See Exhibit C.* Thus, this is Mr. Johnson's weakest area regarding adverse possesion, so he will need to try to claim that the land was adversely possesed from teh period of 2018 to 2025. This is within the scope of the time that is requried by adverse posession, and there is a likelihood that Mr. Johnson will be able to argue the elements of adverse possession. The possesion was hoostile because Mr. Smith and QM asked for Mr. Johnson to leave the land. *Jones.* It was also actual posesssion because there was no manner in which the Dog Run was removed, relocated, or otherwise destroyed during this period. Mr. Johnson will be able to argue that it was also peaceable, even though QM and Mr. Smith asked Mr. Johnson to leave, because there was no violence or any other manner tha twould otherqise be construed as non-peaceful. *Id.* It was notorious, continuous, and uninterrupted, thus Mr. Johnson does have a claim that there was sufficeint adverse possession at the moment that QM took the property. *Id.*

Ultimately, Mr. Johnson's claim of adverse possesson is strongest regarding the period that Mr. Smith owned the land. However, there is a weakness regarding the payment of the taxes of that land. *See Exhibit C.* If Mr. Johnson is able to show that he did pay the taxes for the 2018 to 2025 period of which QM owned the land, he will have a strong arugment that it was within the scope of adverse possession. *Id.*

C. If Adverse Possession Cannot Be Found, Comprehensive Presctipive Easemetn May Be Found

Mr. Johnson may try to aruge that he has a comphresnive easement if the argument regarding adverse possession fails, whether it be through the taxes paid during the 2005-2018 period or whether it be due to issues regarding the elements of adverse possession within the 2018-2025. *See Jones, see also Exhibit C, and see Summary*. A comprehensive prescriptive easement would allow Mr. Johnson to evade the tax requireements of the 2005 to 2018 period because it "subverts the tax reuqirement for adverse possesion." *Jones*. However, these types of easements are only available in exceptional circumtynaces. *Id.* A determiantion of exceptional circumtances is a fact-intensive question, but if found, Mr. Johnson can claim a comprehsenive presecriptive easement of the Dog Run through the 2005-2018 period. *Id.*

Nevada's decision in *Jones* regarding a comprehensive prescriptive easement rendered exceptional cirumtances to be "socially improtant duty of utliatity ot present an essential serice, such as water or electiricty." *Jones*. While this is not an exhaustive list, there needs to be a determination as to whether the Dog Run, which is providing shelter for the puppies, is substantial to be withiin the pruview of an exceptional circuimstance. In *Boyd*, Nevada Supreme Court recognizsed a comprehsnive easement when a nonmovable buidlign encorached by a mere 2.6 feet and resutled in a de minimus loss of usuable proeprty fo rthe serivient estate. *Id; see also Boyd*. Thus, there is an argument that a comphrensive prescriptive easement may be afforded because the Dog Run is only three feet onto the land of QM.

Utliamtaly, Mr. Johnson's strongest arugemnt should under the purview of *Boyd* where the enroachment is merely 3 feet, and it is an exceptional cirucsmtance because it is providing shelter to the puppies of which he is breeding. The de minus aspect of this arguemnt is Mr. Johnson's strongest argument, while the "exceptional circumtance" may be more diffuclt. Utliamtely, if the court can be persuaded that the de minumus encroachment is an exceptional circumtance regarding the ability to raise the puppies, Mr. Johnson has a strong chance of receiving a comprehensive prescritpive easement.

II. There Is A Strong Argument That There Is A Presctipive Easement If Mr. Johnson Can Show That It Is Adverse

The Dirt Road will likely need to be within the purivew of an easement by prescription. A presctipve easement requreis there to be an adverse, continuous, open and peaceable use for five-year period. *Jones.* An easement differs from adverse possession, beucase it is a right to use the land, which is distrinct from the ownership of the land that is afforded to someone through adverse possesion. *Id.* The main difference is the acquision of title versus the limited use of the property. *Id.* Further, there must be clea rand convincing evidence needed to the creation of a prescriptive easement. *Jordan.*

A. *There May Be An Issue Regarding The Adverse of the Land, Which May Be Mr. Johnson's Weakest Arguement In a Prescriptive Easement.*

As stated, there needs to be adverse use of the land, which is establsihed by asserting a right to use the land. *Jordan v. Bailey.* Mr. Joihnson will need be able to establish that the dirt road is merely an inconvience, to whcih would save him approximately 45 minutes wroth of travel to be able to use the land. *Id.; see also Summary.*

Within the purview of the 2005-2018 period, it is likely that the adverse portion of the requirement is in question because Mr. Smith granted Mr. Johnson the ability to keep an eye on things while he is not there since he lives in Reno. *See Exibit A.* However, Mr. Johnson may be able to try to aruge that this permission is not necessarily permission to use the now created dirt road, but rather just to merely check on teh property.

With regarding to the 2005 to 2018 period, the dirt road is clearly adverse. QM sent a letter stating that it wishes for Mr. Johnson to not use the dirt road, showing that it is adverse to the ownerhsip rights of QM. Thus, if Mr. Johnson is able to show that the permission to check on the land is not sufficeint to qualify as permission, which may be shown through Mr. Smith's request that he does not use the land anymore following the sale to QM, Mr. Johnsons may be able to aruge that it is adverse.

B. *There Is No Question That The Use of The Dirt Road Is Continuous.*

Mr. Johnson will be able to successfully argue that the use of the dirt road is continuous. QM may try to aruge that there are periods of whcih Mr. Johnson did not use the dirt road, specifically when it rained and flooded the road. *Summary.* However, there is no authority of which that brief interruptions negated the requisite element of continuity for purposes of acquyiring an easement by prescription. *Jordan*. Mr. Johnson has continuosly used the dirt road to access the ability to get to town, thus there this element is likely met.

C. There Is Clear Peaceable Use For Five Years.

Mr. Johnson will be able to argue that there was a peaceable use for five years from the period of 2005 to 2018. *Summary*. QM put uop a gate blciokign the dirt road in 2024, which means that there is a possibility that the period of which it was used peaceably was still five years. *See Summary; see also Exhibit B.* Thus, Mr. Johnson will ahve a strong arguemtn regarding the peaceble use for five years.

D. Mr. Johnson's Weakes Argument Will Pertain To The Adversity.

Mr. Johnson will be able to show that ther eis a strong arugment that a easement by prescitpion has been created. Howver, the adversity requirement may be the most difficutl to aruge, giving QM the best chance of successsful litgiaiton in terms of this element. Under Nevada law, "the mere use of a passage over another's land for long time with his knowledge is not necessarily an adverse use . . . the cirumstances may be such as to authroizie an ifnerence tha thte use is adverse but they may also be such as to intimate that the use was by permission." *Wilfon; see also Howard.*

Mr. Smith's permission to allow Mr. Johnson to come onto the land to make sure that there is no problems wiht the land may destroy the adverse requirement of a prescitpive easement. Mr. Johnson will need to argue that the permisison was only to come onto the land for a brief period, the permission was not to use the dirt road to which Mr. Smith asked Mr. Johnson to stop in 2018,. thereby creating adversity. Under Nevada law., "where a roadway is etablsihed or maitnained by a landowner for his own use, the fact that his neighrbor also makes use of it, under the cimtruamnces which in no way interfere with the use of the landowner hiomself does not create a rpreusmtpioon of adverseness." *Wilfon* Therefore, Mr. Johsnon will need to aruge adversity.

III. Conclusion

Ultiamtely, Mr. Johnson has strong argumetns for the Dog Run and Dirt Road.

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

NPT 1 - Selected Answer 2

To: Senior Firm Partner
From: Applicant
Re: Memorandum on Quickie Mart claims against Mr. Johnson
Date: Feb 27, 2025

Question Presented: You have asked me to research the viability of Quickie Mart's claims against Mr. Johnson regarding his use of a dirt road on their property, and construction of a dog run which encroaches on their property.

Brief Answer: Mr. Johnson may have a viable claim for adverse possession to the dog run area, but must show he paid taxes on the disputed portion for the last five years to prevail. Mr. Johnson may have a claim for a comprehensive prescriptive easement for the area including the dog run. Mr. Johnson will likely not be able to claim a prescriptive easement over the road, because he will not be able to show adverse use.

Mr. Johnson may have a viable adverse possession or comprehensive prescriptive easement over the dog run:

Mr. Johnson may have an adverse possession claim, or a claim for a comprehensive prescriptive easement which would entitle him to use of the land where the dog run is located.

Mr Johnson's adverse possession claim depends on whether he paid taxes on the portion of the property under the dog run:

"Adverse possession is a doctrine under which a person in possession of real property owned by someone else may acquire valid title." *Jones v. Ghadiri*. "[A]n adverse possessor is required to show that the occupation of the property is hostile, actual, peaceable, open, notorious, continuous, and uninterrupted." *Id.* (alteration in original). Additionally, statute requires the period of possession be at least five years, and the occupying party have paid all taxes, state, county, and municipal levied against the disputed property. NRS 11.150.

Actual possession:

To be actual, the possession must be usually cultivated or improved, or improved by a substantial enclosure. NRS 11.140. The statute is disjunctive, so meeting either condition will mean Mr. Johnson has actually possessed the disputed property. Here, Mr. Johnson's dog run in walled-in, covered, and constructed with concrete. This is both a substantial enclosure, because the run is enclosed, apparently with concrete. This is also an improvement to the land, though case law is currently silent as to what constitutes "usual" improvement. Nevertheless, because the dog run is enclosed, Mr. Johnson has actually possessed the land.

Hostile:

The use was likely hostile. While a dearth of case law defines "hostility," the Nevada Supreme Court has considered the adversity of a prescriptive easement, which is similar. The court held that constructing a paved road on another's property was a definite assertion of hostility. *Wilfon*. Here, constructing a concrete, enclosed dog run is similar to constructing a paved road, and likely will serve to fulfill the hostility requirement of adverse possession. His use certainly became hostile in 2018, when Mr. Smith told Mr. Johnson to remove the dog run.

Peaceable:

There is relatively little case law on the definition of "peaceable." But nothing in the facts indicates the construction and maintenance of the dog run has been anything other than peaceable, non-tortious use, excepting that it would constitute a trespass.

Open and notorious:

Mr. Johnson's dog run seems to be a fairly visible and large concrete structure. Mr. Johnson in no way concealed the dog run. The presence and location of the run was easily revealed by a survey. Thus his use appears to be open and notorious.

Continuous and uninterrupted for five-years:

The possession must be continuous and uninterrupted for at least five years. Here, Mr. Johnson built the dog run and kennel in 2005, the run seems to have remained in place since then. Thus Mr. Johnson's possession of the disputed land under the dog run has been continuous for 20 years.

Taxation requirement:

An adverse possessor must have paid taxes, liens or judgments on the disputed land continuously for at least the last five years. NRS 11.150. Here, Mr. Smith paid all taxes on the developer lot until at least 2018. It is unclear from the records whether Mr. Johnson, or Mr. Smith and Quickie Mart have paid taxes on the portion of the properties where the dog run is located from 2018 to present. Mr. Johnson must have paid the taxes on this portion since at least 2020 to have a valid adverse possession claim, shown by clear and convincing evidence. Because Mr. Johnson has likely met all other elements of adverse possession, this will be dispositive to his adverse possession claim, and he will likely prevail if he paid taxes on this portion for the requisite amount of time.

Mr Johnson may have a comprehensive prescriptive easement:

First, it is important to distinguish a comprehensive easement, from a non-comprehensive easement. A non-comprehensive prescriptive easement operates similar to adverse possession, but only grants the "legal right to use land," not a possessory interest. *Jones*. It results only in the "right to a limited use of the property." *Jones* (citing *Boyd v. McDonald*).

Mr. Johnson has constructed an concrete dog run on the contested property, and therefore has essentially excluded Quickie Mart from using the property. The Nevada Supreme Court "will not lightly allow the long-recognized distinction between adverse possession, and prescriptive easements to collapse." *Jones*. Because Mr. Johnson's dog run effectively excludes Quickie Mart from a portion of their property, a normal prescriptive easement will not be available, however a comprehensive prescriptive easement may be available.

Unlike a normal prescriptive easement, a comprehensive prescriptive easement effectively excludes the servient estate from accessing the part of the property where the easement runs. "Comprehensive prescriptive easements are available only in exceptional circumstances." *Jones.* Exceptional circumstances may include "a 'socially important duty of a utility to provide an essential service, such as water or electricity.'" *Id.* Otherwise the elements are similar to adverse possession minus the taxation requirement: "adverse, continuous, open and peaceable use for a five-year period are the requisite elements for claiming an easement by prescription." *Jordan v. Bailey*. Therefore, if Mr. Johnson can has already met the elements of such an easement, if he can show exceptional circumstances entitling him to such an easement.

The Nevada Supreme Court has recognized a prescriptive easement for a supporting wall, and overhanging roof from a motel that extended only 2.6 feet onto a neighboring property. *Boyd.* The court reasoned that a when there is only a de minimis loss of usable property for the servient estate, a comprehensive prescriptive easement may be permissible. On the other hand, the much more recent *Jones* court held that a comprehensive prescriptive easement was inappropriate where the trespasser had "merely made improvements to an RV parking space and the grant of a comprehensive prescriptive easement would deprive [the owner] of nearly 600 square feet of usable space." *Jones.*

The question then, is whether Mr. Johnson's case is more like *Boyd*, or more like *Jones*. In essence, the court considered two factors in whether to permit a comprehensive prescriptive easement: the size of the encroachment, and the improvements made by the encroaching party.

Mr. Johnson's encroachment is relatively small, which weighs in his favor.
Beginning with size, the dog run encroaches only three feet onto Quickie Mart's property. Exhibit C. Given that the dog run is only 30 feet long, per Mr. Johnson, it is likely the dog run covers no more than 90 square feet of Quickie Mart's property. This places Mr. Johnson's case more squarely in line with *Boyd*. The extension into the adjoining property is three feet, similar to the 2.6 feet in *Boyd*. And distinguishing from *Jones*, the the total encroachment is only 90 square feet, rather than 591. On the other hand, Quickie Mart alleges that due to zoning setbacks and parking, they will require the entire use of the property. *Boyd* is non-specific as to the harm to the encroached party. So while the overall encroachment here is relatively small, and militates towards a likelihood of success on a comprehensive easement claim, it is unclear how the court would address the fact that Quickie Mart has stated as use which would require the entire property, right up to the true border line.

Mr. Johnson's dog run is a permanent commercial structure, which weighs in his favor unless the court narrows the circumstances for comprehensive easements
Turning to the use of the property, in *Jones*, the court considered "mere improvements" to a parking space to be insufficient to acquire a comprehensive easement by prescription. On the other hand, in *Boyd*, a supporting wall and overhanging roof of a motel were sufficient to grant an prescriptive comprehensive easement. Again, Mr. Johnson's use is more like *Boyd*. He did not merely clear away an area to park a vehicle, but, more like the motel in *Boyd*, constructed a permanent commercial structure that is critical to his business. Unknown is whether the court may choose to further restrict the "special circumstances" under which a prescriptive easement may be granted. While the court in *Jones* viewed *Boyd* with approval, only in *Jones* did the court formally adopt "special circumstances" as a requirement for a prescriptive easement. Given that other jurisdictions seem to limit special circumstances to utility easements, it is possible the court going forward would not look favorably on granting a comprehensive easement for a use that does not provide some broad public benefit, and Mr. Johnson will unlikely be able to show that goldendoodle breeding is an important social good.

Last, and worth considering is the posture of *Jones.* In *Jones*, the encroaching retaining wall had already been destroyed. Thus denying a comprehensive easement did not require any destruction of property. Here, denying such an easement would require Mr. Johnson to relocate his kennel and dog run. This may be a factor the court would consider as a general principle of fairness.

Ultimately, it is possible that Mr. Johnson could claim a comprehensive prescriptive easement for the area containing the dog run. It may hinge on unknown factors, such as how the court would consider the burden of tearing down the dog run, how the court will define special circumstances moving forward, and the potential burden on Quickie Mart with regards to constructing their property while complying with zoning requirements.

Mr. Johnson may have an easement for use of the dirt road depending on when his use became hostile:

As a preliminary matter, Mr. Johnson will not be able to make an adverse possession claim for the dirt road. As stated above, NRS 11.150 requires the occupier to have paid taxes and liens on the disputed property continuously for five years. Our researcher has concluded that Mr. Smith and Quickie Mart have paid the taxes on the portion of the lot containing the road since 2000. Exhibit C. This memorandum now turns to whether Mr. Johnson has a prescriptive easement allowing his use of the road.

Prescriptive easement:

As stated earlier, "adverse, continuous, open and peaceable use for a five-year period are the requisite elements for claiming an easement by prescription." *Jordan v. Bailey*. Exclusivity is not required. *Id.* The standard of proof is clear and convincing evidence. *Id.* Here, the dispositive element is whether Mr. Johnson's use was adverse.

Adverse use:

Where a landowner creates a road and allows others to use it "[*t*]*he presumption is that the neighbor's use is not adverse, but is permissive and the result of neighborly accommodation on the part of the landowner.*" *Wilfon*. Here, the road did not seem to exist when Mr. Johnson and Smith bought the land, and Mr. Johnson seems to have created the road by continuously driving over the Smith property, so this presumption will not apply.

Where a "claimant creates or establishes a roadway on another's property, a hostile or adverse use may be inferred." *Wilfon*. In *Chollar-Potosi*, surveying and grading a road were sufficient to infer the claimant's use was hostile. In *Wilfon*, the court concluded that hostility only commenced when the road in question was paved, because while people may have crossed over a corner of the property in question, the paving was the first hostile assertion of a definitive right of way. " [m]ere use of a passage over another's land for a long time with his knowledge is not necessarily an adverse use. Courts are especially "reluctant to find prescriptive easements over open and unclosed land since such use tends to be permissive in nature."

Here, several factors weigh against Mr. Johnson. First, the land is open land, and courts generally presume the crossing over of open and undeveloped land to be permissive. Second, Mr. Johnson has apparently not made any conclusive improvements to the road. It merely settled in through his continued crossing of the Smith tract. Third, In 2000, Mr. Smith told Mr. Johnson he was "free to drive around [Mr. Smith's] lot and check on things, since [he] didn't plan to be down there for now." Exhibit B. He also expressed that he thought he and Mr. Johnson would be great neighbors. *Id.* This indicates a lack of adversity, because Mr. Smith expressly agreed to let Mr. Johnson on his land in a general spirit of neighborliness.

Mr. Johnson's best argument, that would allow him to prevail, is that his use became hostile in 2018, when Mr. Smith requested Mr. Johnson no longer use the road "unless there was an emergency." It is somewhat ambiguous what Mr. Smith meant. It was a "request" and not a demand, or the putting up of a gate which would certainly indicate adverse use, as in *Jordan*. It is also unclear what constitutes "an emergency." If Mr. Smith said something along the lines of "it would be nice if you didn't use the road unless you really need to" it is possible the use remained non-adverse. The language in Mr. Smith's certified letter to Mr. Johnson would likely be determinative of whether the use became hostile in 2018, and we should ask Mr. Johnson for the letter.

The use certainly became hostile in 2024, when Quickie Mart installed a gate through which Mr. Johnson trespassed. But this would not be long enough ago to establish a prescriptive easement, and so is not relevant for Mr. Johnson's claims at this time.

Continuous for five years:

Brief interruptions may not break the continuity of use. In *Jordan*, the court held that several-day blockages of the contested use from floods were insufficient to break the continuity of use of prescriptive easements.

Here, Mr Johnson has been driving across the property continuously since at least 2005, and if his use became hostile, it did so in 2018, and any minor interruptions to his route because of weather will not break the continuity of his use. Thus the continuous use is satisfied.

Open:

The use was likely open. While the court has previously held use not to be open when a title search would not have shown the easement, as it would not have here, the fact that Quickie Mart inspected the property, and obtained a survey including the road should have likely put it on notice that Mr. Johnson was using the road. This is especially so given that it was a full sized-road, on a mere 2.5 acres. *Cf. Jordan* (holding a footpath, with no recorded easement was not open, but that a dirt road was).

Peaceable:

There is relatively little case law on the definition of "peaceable." But nothing in the facts indicates the use of the road has been anything other than peaceable, non-tortious use, excepting that it would constitute a trespass.

The convenience of the prescriptive easement is immaterial:

In *Jordan v. Bailey*, the court held that a party "may not bootstrap a prescriptive easement . . . simply by claiming inconvenience. This is especially true when in light of the fact that there is a . . . convenient route." The inconvenience of using a non-disputed path in *Jordan* included arduous climbing, and wasting time.

Here, the fact Mr. Johnson can drive off his property without an easement, even though it may take an additional 45 minutes is immaterial.

Conclusion: Mr. Johnson may have viable adverse possession, and comprehensive prescriptive easement claims for the dog run, and a prescriptive easement claim for the use of the road. We must conclusively determine whether Mr. Johnson has paid any taxes on the property under the dog run. Mr. Johnson's comprehensive prescriptive easement claim for the dog run will hinge on how the court chooses to define the special circumstances required moving forward. He will likely fail to show adversity of use of the road, and thus likely will fail on a prescriptive easement claim for use of the road.

I am happy to follow up with any additional research, or answer further questions.

Sincerely,
Applicant

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

FEBRUARY 2025
EXAMINATION ANSWERS

SELECTED APPLICANT ANSWERS
NEVADA BOARD OF BAR EXAMINERS

Nevada Performance Test – 2

NPT 2 - Selected Answer 1

To: Partner
From: Applicant
RE: Client First Nevada Bank
Dated: February 27, 2025

This memorandum concerns a summary of rights and suggested course of action to be taken from our Client First Nevada Bank (FNB) concerning the loan default by Lakeshore. We explore in particular what actions can be taken against Lakeshore (purchaser) and against SNB and with regard to the account held with TNB

Summary of Assets at stake are as follows:
- 1 million loan from FNB, collateral for the loan pursuant to financing statement is " inventory, accounts and equipment now held or after aquired", Financing statement filed February 1, 2022.
- Power washer, 25K original purchase price, now sold, financed with proceeds from Second Nevada Bank ("SNB"), financial statement in "equipment" filed March 25, 2024. This is a purchase money security interest and the washer is purchase money collateral.
- Third Nevada Bank ("TNB") holds bank account of Lakeshore, with 15K proceeds from the commercial power washer. Washer was sold and cash funds to third party buyer Boulder City Boatworks and proceeds from the sale were deposited in to this bank account October 1, 2024.

Applicable Law
NRS 104 governs transactions that create security interest in personal property or fixtures by contract. See NRS 104.9209.

Some other selected applicable authority is copied here below and also may be found throughout the analysis portion of this memorandum. :

Except as otherwise provided in the UCC, a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors. NRS 104.9201

A security agreement may create or provide for a security interest in after-aquired collateral. NRS 104.9204.

Law of the location of the collateral controls in terms of applicable law governing security interest perfection, and priority of security intrests. NRS 104.9301 (2) see also Id at (1).

We note that governing law in both of the loan contracts are state of Nevada. State of nevada is also the site where the account funds are being kept.

Other relevant provisions of law are stated as part of the analysis below.

Analysis
Default of Loan:
Our loan terms are unambiguous that a default occurs. Our loan agreement contains an acceleration clause that allows us to accelerate the balance of the loan due upon default of the periodic payments. Here we have been devised those defaults occurred, we have grounds to accelerate our loan.

We will need to make sure appropriate default noticing procedures are being filed with notifying the buyer that we will be accelerating the loan and pursuing other remedies.

There is also a secondary ground of loan default in the purchaser selling the washer which was also secured as collateral under our loan as equipment.

What is the nature of our client's security interests?

Our client has a valid, perfected security interest in stated collateral of "equipment" of the purchaser and likely also in the assets and inventory of the purchaser provided that "assets and inventory" are sufficiently defined.

Our client FNB has an enforceable security interest. It became enforceable upon the debtor and third parties given that that all requisite elements have been satisfied. 1) value has been given in the amount of 1 million, 2) the debtor has rights in the collateral in that it listed as collateral its inventory, accounts and equipment, all items that are personal property items to which the debtor has rights, and 3) given that a security agreement providing for the description of the collateral has been signed on February 1, 2022. NRS 104.9203.

NRS 104.9310 provides that filing a financing statement is required to perfect a security interest. Our security interest became perfected upon the filing of a financing statement on February 1, 2022.

There is a possible issue subject to dispute in whether FNB defined our collateral with sufficient particularity in the note. NRS 104.9108 provides that collateral must be defined with some level of particularity. it is sufficient if we define it using a category of collateral defined in the UCC. Id. at (c). It is also sufficiently defined if defined by specific listing, category, quantity, computational for allocational formula. Here FNB defined the collateral as "inventory, accounts and equipment now held or after acquired". We can argue it is defined according to category. Otherwise "equipment" is a specifically defined category in the UCC which is defined to mean "goods other than inventory, farm products or consumer goods". I believe "Inventory" is also defined elsewhere in the UCC though that will need to be confirmed.

What is the priority of our interest?

In terms of priority of the assets we encounter a problem because even though SNB filed junior to our client FNB, SNB may take priority to FNB because it is a purchase money security interest. NRS 104.9324. It is a purchase money security interest because the loan proceeds themselves were used to purchase the power washer which is collateral of SNB's loan. We see this from the the Delivery Certificate as well as the SNB loan agreement, as well as their financing statement filed on March 25, 2024.

the Buyer also took possession of the washer at or around the time of loan signing on March 1, 2024 which was within 20 days. NRS 104.9324.

SNB properly filed its financing statement which included required elements of debtor name, creditor name and collateral covered. Our financing statement also meets this requirement. See NRS 104.9502.

The SNB transaction does not lose its interest as a purchase money security transaction because the washer is also secured by an obligation (such as ours) that is not a purchase money obligation. Here the fact that the power washer is collateral of our loan as well given that it is equipment of the purchaser does not lessen the status of the SNB transaction as not a purchase money trasnaction.

I see from our memo that we also arguably have a purchase money security interest because the one million dollar loan was used to purchase inventory and for operating capital of the business. However, there is no delivery receipt in the file connected to the purchase of these items. It does not appear they are sufficiently connected to the loan enough to constitute a Purchase money security interest.

The fact that the loan funds were used to finance operating capital for the business also takes it outside of being a purchase money security interest.

What parties have access to the bank account funds and in what priority?
A related question arises on whether we or SNB is entitled to the purchaser's bank account funds currently held with TNB and if so, does it take priority over FNB's access to this asset?

SNB will argue that the 15K proceeds should be treated is collateral and thus it should have claim to these particular funds in the account. FNB would argue that we perfected our interest first and our interest includes expressly "accounts" of the purchaser business. We would point to NRS 104.9322 in showing that when there are interests in conflict the first to record prevails. Accordingly, the position is that FNB should have first priority over the cash proceeds.

SNB would point out in rebuttal that NRS 104.9315 provides that a security interest attaches to any identifiable proceeds of collateral. This appears to be the most applicable statute on point. Thereafter the proceeds would be perfected for at least a period of 21 days, unless other conditions were satsified. Id. The proceeds could also be perfected if they were easily identifiable in the bank account. NRS 104.9315. The fact that they were deposited via check here appears to satisfy that requirement.

The fact that we may have to stand behind the interest of SNB in terms of the 25K loan is not a major one. (They can collect only 15K of this 25K from the bank account given that the washer was converted to 15K in sale). This loan value is deminimus according to ours. Our time is probably better spent in searching for other assets and focusing on collecting our other secured assets from the company than arguing the priority on this particular transaction.

We can also explore to collaborate with SNB to see what if any asset searches they may have performed or what more up to date information they may have about the purchaser that we can use in a collection action to finds alternate assets that may be subject to attachment or otherwise collection.

The fact that we now are aware of this bank account with the TBN is helpful overall to the case and our ability to collect. We do have a security interest in this funds, assuming they are not payroll fund we should be able to secure them in, at least, a procedure to obtain an attachment and or execution of the attachment in the appropriate court.

(also there is authority to suggest that the interest of SNB becomes unperfected after 21 days)

Current interest in the washer and ther matters:
We note it may have been relevant and not clear from the facts where the power washer collateral is currently located. Law of the location of the collateral controls in terms of applicable law governing security interest perfection, and priority of security intrests. NRS 104.9301 (2) see also Id at (1). The washer is currently in the possession of Boulder City Boatworks, it is unclear if this is located in Nevada or a different state such as Colorado.
If located in a different state their law governing priority would control instead.

Notwithstanding the above, it does not appear a viable option for us or SNB to seek satisfaction by repossession or getting replevin for the washer.
NRS provides a buyer in the ordinary course of business i.e. a bonafide purchaser takes free of the security interest even if the security interest is perfected and the buyer knows of its existence. NRS 104.9320.
Also Boulder City Boat works appears to be a bonafide purchaser of the power washer as they paid fair value of 15K for it in October 2024. Notwithstanding this fact a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors. NRS 104.9201

We also note that even if we did have an ability to attach or seek replevin or repossession of the washer, doing so may end up being more costly than it would be worth for the client. We would need to go through the process to repossess it then pay additional costs for storing it and finding a substitute buyer outside our client's industry of expertise which is loan financing not boat sales and related commerce.

Damages

Pursuant to the loan agreement we are entitled to repossess our collateral (potentially in a replevin action), principal and interest as provided for in the loan, reasonable attorney's fees as specified in the agreement, plus all other reasonable expenses incurred by the lender (our client) in the enforcement of its rights. See security agreement, VIII. As a matter of equity, we may not be able to recover duplicative damages in that if the collateral was received the cash monies owed to us from the outstanding loan proceeds would be reduced accordingly.

Conclusion

In conclusion we have a clear and unambiguous default of our loan terms. We have a perfected security interest in many assets of the company. We can do additional research to see what if any other tangible assets are available that may be subject to attachment or replevin. We should pursue any non excepted funds in the buyer's bank account from Third Bank of Nevada, after SNB of nevada takes its 15K share of the proceeds.

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

NPT 2- Selected Answer 2

To: Senior Partner

From: Applicant

Re: Memorandum ICO First Nevada Bank v Lakeshore Boat Sales

This memorandum is in response to the case of our client, First Nevada Bank, in the matter of a loan to Lakeshore Boat Sales (Lakeshore) in the amount of $1 million. On February 1, 2022, an agreement was executed loaning the above amount between our client and Lakeshore. The agreement was proper in its terms, and expressly created a security interest in all inventory, accounts and equipment held at the time of the execution of the agreement or acquired thereafter. A UCC financing statement was properly filed with the Nevada Secretary of State the same day.

On March 1, 2024, Lakeshore purchased a power washer, serial number 012345678, from Power Washer Sales. A delivery certificate shows Lakeshore took delivery of the power washer the same day, March 1, 2024. Records also show the purchase of the power washer was financed by Second Nevada Bank, which provided a loan in the amount of $25,000, secured by a note, signed by Lakeshore. A UCC financing statement for the security interest in the power washer was also filed with the Nevada Secretary of State on March 25, 2024.

On October 1, 2024, Lakeshore sold the power washer to Boulder City Boatworks (Boatworks) for $15,000. That amount was deposited in cash to Third Nevada Bank on the same day.

This memorandum will discuss our clients rights and claims against Second Nevada Bank, Third Nevada Bank, and Boulder City Boatworks as it relates to the sale of the power washer. The analysis of each entity will be done separately.

Prior to analyzing the relationships between the other entities, we must analyze the relationship between our client and Lakeshore as it relates to the loan made and any security interests. There are several legal analyses which can be done. Nevada Law provides several statues which govern the security interests of goods. Since the goods in question are a power washer, used for the cleaning of boats and not for general sale by Lakeshore, this is defined as "collateral" and "equipment" under NRS 104.9102(m) and (ii). Under section VI of the loan agreement between Lakeshore and our client, a security agreement is created against any collateral, including equipment.

NRS 104.9201 Specifically provides that a security agreement is effective according to its terms between parties, against the purchasers of such collateral, and against creditors. NRS 104.9204 also allows for the attachment of such security agreements to after-acquired collateral.

Under these statutes, it is clear that our client, First Nevada Bank, does have a valid claim of a security interest against the power washer, serial number 012345678). However, prior to further action, we must analyze the relationships between the other parties in question.

First, regarding Second Nevada Bank, we must again look at Nevada Law. The funds used to purchase the power washer specifically came from a loan from Second Nevada Bank. Specifically, a loan agreement was made between Lakeshore and Second Nevada Bank to provide $25,000 exclusively for the purchase of the power washer, creating a purchase-money security interest (PMSI). PMSI's are governed specifically under NRS 104.9103, which define a PMSI as goods that secure a purchase-money obligation incurred with respect to that collateral. In essence, money loaned for the specific purpose to purchase specific, identifiable goods is a PMSI. NRS 104.9108 defines and regulates the sufficiency of descriptions, which is not highly relevant here, since the power washer is readily identifiable by model and serial number.

The issue between First and Second Nevada Banks is the issue of priority. There is no dispute that both lenders have proper, perfected security interests in the power washer--First Nevada Bank because of the loan agreement executed on February 1, 2022, further perfected by the financing statement filed the same day, and Second Nevada Bank because of the loan agreement executed on March 1, 2024, further perfected by the financing statement filed on March 25, 2024.

The most important statute to this issue is NRS 104.9322, which governs priorities among conflicting security interests. NRS 104.9322 states, in relevant part:

> 5. [A] perfected purchase-money secuirty interest in goods other than inventory or livestock has priority over a conflicting security interest in the same goods, and, . . . a perfected security interest in its identifiable proceeds also has prioarty, if the purchase-money security interest is perffected when the debtor receives possession of the collateral or within 20 days thereafter.

The loan agreement between Second Nevada Bank and Lakeshore was executed on the same day as the purchase and delivery of the power washer. However, the UCC filing of the financing statement with the Secretary of State was not until March 25, twenty-five (25) days later. This is past the twenty (20) days statutorily allowed by NRS 104.9322(5) in order for this PMSI to take priority over the security interest held by First Nevada Bank. As such, Second Nevada Bank's security interest does not have priority over First Nevada Bank.

Second, regarding the issue between Lakehore and Boatworks. The power washer was sold on October 1, 2024 for an amount of $15,000, paid in cash. Although we have established there was a perfected senior security interest by First Nevada Bank (and a junior security interest by Second Nevada Bank), the bill of sale from Boatworks to Lakeshore states that the power washer was sold "as-is" and that Lakeshore had full seller rights and is legally allowed to sell the equipment. We know this is not correct, however, there is no indication that the buyer, Boatworks, knew this was not the case. Therefore, we must assume Boatworks bought this powerwasher believing it was purchasing it with free and clear title.

Nevada Law does have a providing protecting buyers in this situation. NRS 104.9320 states:

1. [With certain exceptions], a buyer in the ordinary course of business, other than a person buying farm products from a person engaged in farming operations, takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of it's interest.
2. [With certain exceptions], a buyer of goods from a person who used or bought the goods for use primarily for personal, family, or household purposes takes free of a security interest, even if perfected, if the buyer buys:
    (a) without knowledge of the security interest;
    (b) for value;
    (c) Primarily for his or her personal, family or household purposes; and,
    (d) Before the filing of a financing statement covering the goods.

Both sections of this provide provisions protecting a buyer from receiving goods with a security interest. However, in this case, neither section of NRS 104.9320 will protect Boatworks from taking the power washer free from a security interest. This is because the NRS 104.9320(1) specifically refers to a security interest created by the buyer's seller, which would be Lakeshore in this case. Lakeshore created no security interest, hence none exists. NRS 104.9320(2) refers to goods bought and sold explicitly for personal, family or household use. Boatworks is a business, and there is no indication this power washer will or would be used for personal use, therefore NRS 104.9320(2) does not apply.

Because of the above facts, we must conclude that a the security interest held by First Nevada Bank still exists against the power washer, even after the sale from Lakeshore to Boatworks.

Third, regarding the issue of Third Nevada Bank. Since we have established the security interest still exists, we look again to Nevada Law. NRS 104.9315 which governs the secured party's rights on proceeds of disposed collateral. The statute states, in relevant part:

1 [With certain exceptions}:
    (a) A security interest . . . continues in collateral notwithstanding sale, lease, license exchange or other disposition thereof unless the secured party authorized the disposition free of the security interest . . . ; and
    (b) A security interest attaches to any identifiable proceeds of collateral.
3. A security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected.
4. A perfected security interest in proceeds becomes perfected on the 21st day after the security interest attaches to the proceeds unless:
    (a) the following conditions are satisfied:
        (1) a filed financing statement covers the original collateral;
        (2) the proceeds are collateral in which a security interest may be perfected by filing in the office in which the financing statement has been filed; and
        (3) the proceeds are not acquired with cash proceeds;
    (b) The proceeds are identifiable cash proceeds; or
    (c) the security interest in the proceeds is perfected when the security interest attaches to the proceeds or within 20 days thereafter.
5. if a filed financing statement covers the original collateral, a security interest in proceeds which remained perfected under paragraph (a) of subsection 4 becomes perfected at the later if:
    (a) ***; or
    (b) the 21st day after the security interest attaches to the proceeds.

This statute shows, with certainty, that the proceeds from the sale of the power washer to Boatworks, deposited into Lakeshore's account with Third Nevada Bank, continue to have a security interest held by First Nevada Bank. As NRS 104.9315 clearly lays out, the sale of the power washer does not affect the security interest. In fact, the security interest transfers to the proceeds of the sale, the proceeds being $15,000 cash deposited into an account at Third Nevada Bank. Further, all of the elements in this case meet the requirement in NRS 104.9315 to keep and maintain the security interest in the cash proceeds from the sale of the power washer: there was an original, filed security interest on the original collateral, the proceeds were not acquired with cash (they were acquired with the sale of a power washer), they are identifiable (as $15,000 cash exactly).

As the security interest continued uninterrupted from the power washer, though the sale, into the cash proceeds, First Nevada Bank continues to have a priority right to the $15,000 cash within Lakeshore's account at Third Nevada Bank.

As stated earlier, though, as we have established that the security interest in power washer still exists, and has continued though to the proceeds of the sale, this does not imply that there is no security interest still on the power washer. Although the power washer was sold for $15,000, we do not know if this is the market value for this equipment. If this value represents a below-market value, it is possible that re-sale of the equipment might yield a higher sale price. If that is the case, a security interest might still exist on both the power washer and the proceeds from the sale to Boatworks.

Further analysis is required to determine the value of the power washer. Important to note, as we have already established there is a security interest on the $15,000 proceeds of the sale of the power washer, any remaining security interest on the power washer itself would be limited to any value over $15,000. If any action to reposes or in any way deprive the power washer from Boatworks without compensation for the $15,000 paid to Lakehsore, this would represent unjust enrichment.

In conclusion, First Nevada Bank is not without rights. In fact, First Nevada Bank has retained all its rights to a specific piece of equipment, a power washer with serial number 012345678, despite a Purchase-Money Security Interest by Second Nevada Bank which is statutorily barred from priority due to late filing of the financing statement, sale to Boatworks, and deposit of cash proceeds into an account at Third Nevada Bank. If First Nevada Bank desires, it would be advisable to initiate action to recover the $15,000 representing the cash proceeds of the sale of the power washer. Also, further analysis to determine of the power washer's actual cash value is higher than the $15,000 actual sale price to Boatworks might yield a better payout.

Respectfully,

Applicant

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