FEBRUARY 2014

EXAMINATION QUESTIONS AND MODEL ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

FEBRUARY 2014
EXAMINATION QUESTIONS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

- EXAM 1, QUESTION 1 -

FEBRUARY 2014

EXAMINATION NO. 1;

QUESTION NO. 1: ANSWER IN LIGHT BLUE BOOKLET

Husband and Wife own their home in Nevada as joint tenants. Husband and Wife also have a checking account in both their names. Wife owns a rental property in Ely, Nevada, in her name alone that Wife inherited from her mother. The rental income from the Ely property is deposited into an investment account in Wife's name alone. The beneficiaries named on Wife's investment account are Adam and Bob, the children of Husband and Wife.

Husband and Wife hire a Nevada-licensed attorney to prepare their wills. Husband's will states that upon his death, Husband's estate is to be distributed to Wife, if she survives him. If Wife fails to survive Husband, then Husband's will provides that his estate is to be distributed equally between their two sons. Wife's will contains reciprocal provisions.

Subsequent to the valid creation and execution of their wills, Husband and Wife have a daughter, Chloe. Husband and Wife do not update their wills to reflect the birth of Chloe.

Several years later, Wife comes across her will and notices that it does not mention Chloe. Wife, concerned that the will does not mention Chloe, tears it up and discards it. Wife leaves Husband's will untouched. Shortly thereafter, Husband and Wife die together in a car accident.

Fully discuss the rights of Adam, Bob, and Chloe with respect to distribution of the following assets:

a. Home in Nevada;

b. Checking account;

c. Rental property; and

d. Investment account.

1)

======== Start of Answer #1 (1097 words) ========

Wills:A valid will in Nevada requires a writing, testamentary intent, signed by the testator in the presence of, or acknowledged by, two witnesses who must also sign in the testator's presence. The facts here indicate that Husband (H) and Wife (W) hired a NV licensed attorney to prepare their wills and there is nothing in the facts that indicate the wills were not validly executed. Thus the wills are valid.

Revocation: Revocation of a will or a provision of a will requires intent and a physical act that includes tearing up a will. Here W noticed that her will did not mention her daughter Chloe and therefore she intentionally destroyed the will by the physical act of tearing it up and discarding it. Therefore W revoked her will. H's will, however, remains untouched. H did not express any intent nor did he engage in any physical act to destroy his will. Therefore Hs will is still valid.

Dependent Related Revocation: A Nevada court will set aside a revocation if it was made because of a mistake of fact or law and but for the mistake, the testator would not have revoked the will. Here W revoked her will but she leftH's will untouched. The facts indicate that shortly after she destroyed her will she died in a car accident. She may have destroyed the will with the intention of later executing a new will prepared by her lawyer but there are not enough facts to draw such a conclusion. Because there is no indication from the facts that she revoked her will based on a mistake of fact or law, a court will likely not disregard her revocation and instead willtreather as having died intestate.

Pretermitted Child: In Nevada, if a child is born after a will of their parent is executed they are a pretermitted child and will be entitled to receive an intestate share unless it is clear from the will that the omission of the child was intentional. Chloe was born after the wills of her parents were executed and thus she is a pretermitted child. There is not evidence to indicate that her omission from her parents' wills was intentional. In fact, when W discovered Chloe was not provided for in her will, W revoked the will. Therefore Chloe will be entitled to take an intestate share of her parents' estates.

Simultaneous Death Act: In Nevada where the disposition of property depends on the order of death of two people, and the order of their death cannot be determined, the beneficiary will be treated as predeceasing the testator. Here, W and H dies together in a car accident. Unless it can be established which of them died first, the simultaneous death act will apply. With respect to disposition of H's estate, W will be treated as having predeceased H. And with respect to the disposition of W's estate, H will be treated as predeceasing W.

Distribution under Hs will: H's estate will be distributed according to his will and W will be treated as predeceasing H. However, because Chloe is a pretermitted child, she will receive an intestate share. Therefore H's three children will share equally in his estate.

Distribution of W's estate by intestacy: W's share will be distributed by the rules of intestacy. As discussed above H will be treated as having predeceased W. If a person dies without a spouse and

with lineal descendants, that person's estate is distributed to the lineal diescendants. In NV the estate is distributed according to right of representation, which means that equal relatives are treated equally, and thereforeeach child will take an equal share of W's estate.

Nevada is a community property state. All property acquired during the marriage is presumed to be community property (CP). All property acquired by a spouse before the marriage is that spouse's seperate property (SP). In addition, property acquired by a spouse during the marriage by will, devise or inheritance is SP. If an item is SP, a change in form will not change its characterization as SP unless the item is transmuted or gifted to the estate. A court will trace back to the source of the funds used to acquire the property to determine how to characterize the property. If a spouse claims an item is SP, the burden of proof is on the spouse to prove by clear and convincing evidence that the item is SP.

Home in Nevada: The home in Nevada is owned by H and W as joint tenants. The facts do not indicate that H and W hold the home as joint tenants w ith right of survivorship therefore they are likely tenants in common and the home is community property. Typically on a spouse's death, his community property share passes to his spouse. However, here, as mentioned above, under the simultaneous death act H and W will be treated as predeceasing each other and therefore their estate passes to the kids. The kids will each take a a 1/3 share of the Nevada home.

Checking Account: The checking account is held in both H and Ws names. There is nothing in

the facts to indicate that the account is SP and therefore it is presumed to be CP. The kids will each take a 1/3 share of the money in the checking account.

Rental Property: As mentioned above, property acquired by a spouse during marriage by inheritance is SP. W inherited the rental property in Ely, Nevada from her mother and it is owned by W in her name alone. Therefore the rental property is SP and is part of W's estate. It will pass by intestacy to the three children in equal shares.

Investment Account: The rental income from the Ely property was placed in an investment account in W's name, which named Adam and Bob as the beneficiaries. Typically, wages and income earned during the marriage belong to the community and are therefore CP. Here, the investment account contained rental income from the Ely rental property, which propertyis W's SP. However, because income earned by a spouse belongs to the community, the rental income is characterized as CP. The name on the account is W's alone however the name on a bank account does not determined the characterization of the account.Here, the investment account is akin to a Totten trust because it designated W's two sons as beneficiarie s. In Nevada, designation of beneficiaries of a totten trust cannot be revoked by will. Therefore, Adam and Bob will take the money in the investment account in equal shares.

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

FEBRUARY 2014
EXAMINATION QUESTIONS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

- EXAM 1, QUESTION 2 -

FEBRUARY 2014

EXAMINATION NO. 1;

QUESTION NO. 2: ANSWER IN RED BOOKLET

Andy, a Nevada resident, and Bill, an Oregon resident, form an Oregon corporation, Rad-Ski, to provide guided heli-skiing tours throughout Nevada and Oregon. Andy guides the tours in Nevada while Bill guides the tours in Oregon. The company's helicopters are warehoused in Oregon but are used in both Oregon and Nevada. Rad-Ski's office is located at Bill's house in Oregon. Rad-Ski advertises in adventure magazines distributed throughout the West.

Rad-Ski secured a $100,000 loan from Arizona-based Desert Bank to assist with start-up costs for the business. Bill signed a personal guaranty on the loan. The loan documents include a forum selection clause authorizing Desert Bank to bring suit in Arizona or Nevada.

After two bad years, Rad-Ski had drawn down nearly the entire amount of the loan and was unable to make payments. Desert Bank filed suit against Rad-Ski in Nevada state court for breach of contract. Desert Bank's complaint does not specify the amount of damages except to state that "damages are sought in excess of $10,000."

Desert Bank's lawyer sent a summons and copy of the complaint to Andy by certified mail and email. Andy was out of the country and did not have access to his email or mail. Twenty-one days after its lawyer sent the summons and complaint and after not receiving any response, Desert Bank requested the court clerk to enter default against Rad-Ski and the clerk did so. Ten days after filing the notice of entry of default, Desert Bank filed an amended complaint adding Bill as a party and bringing claims for breach of the personal guaranty against him.

After being personally served in Oregon with a summons and copy of the amended complaint, Bill hired a Nevada lawyer who removed the action to the United States District Court for the District of Nevada. Bill's lawyer subsequently filed a motion to dismiss or transfer, arguing that the court lacked personal jurisdiction over Bill and alternatively arguing that the action should be transferred to federal court in Oregon.

Two days later, Rad-Ski joined in the notice of removal and moved to set aside the default against it, arguing that it was not properly served.

Fully discuss the following:

1. **Should the court grant Rad-Ski's motion to set aside the default?**

2. **Was it permissible for Bill to remove the action to federal court?**

3. **How should the court rule on Bill's motion to dismiss and the alternative request to transfer?**

4. **Was it proper for Desert Bank to file an amended complaint adding Bill as a party?**

2)

======== Start of Answer #2 (1448 words) ========

QUESTION 2

MOTION TO SET ASIDE

A motion to set aside a default judgment may be granted in Nevada within six months of the entry of the judgment upon good cause, which includes improper service, mistake, unfair surprise or such other appropriate grounds. In this case, the suit against Rad-Ski was served by certified mail and e-mail at Andy's home. However, there is no indication that Andy is the registered agent for Rad-Ski and, in any event, Rad-Ski is an Oregon corporation so it most likely must have a registered agent with an address in Oregon. If Rad-ski had qualified as a foreign corporation in Nevada, then it would have to designate a registered agent in Nevada for the receipt of service of process in Nevada but these facts do not indicate whether that has occurred.

In any event, service by certified mail and e-mail upon Andy was improper service. In, Nevada service of process may be effecutated by personal delivery by anyone, not a part to the litigation, who is over the age of 18. It may also be effected through substitute service by leaving a copy of the summons with a person of suitable age and discretion who resides at the defendant's residence (perhaps here on Andy as an officer of the company). That did not occur on these facts

and the service by certified mail was thus improper. Alternatively, if service was deemed to be proper for any reason, Rad-Ski may still be allowed to set aside the judgment simply on the basis of unfair suprise. If Andy was on vacation and was thus not able to sign for the certified mail, it would be an unfair suprise to enter judgment against Rad-Ski on that basis, especially since Rad-Ski now stands ready to defend the action. Consequently, the court should grant Rad-Ski's motion to set aside the judgment since it has been filed on proper grounds within six months of the entry of the default judgment.

REMOVAL

It is permissible for a defendant to remove an action to federal court if (i) the matter could have originally been brought in federal court, (ii) all of the defendants agree, and (iii) the motion to remove is made within 30 days of the service of process on the last defendant.

Analyzing each element in turn we come first to the subject matter jurisdiction question. Since this action involves a breach of contract action against Rad-Ski, and a simple enforcement of a personal guaranty against Bill, no federal question is involved. Accordingly, in order to place the matter in federal court, the basis for subject matter jurisdiction must be based on diversity of citizenship.

If subject matter jurisdiction is based on diversity of citizenship, there must be complete diversity of all plaintiffs against all defendants and an amount in controversy in excess of

$75,000. Diversity of citizenship is determined by the domicile of the person or the corporation. An individual is domiciled in whatever state he or she is physically present with an intent to remain. A corporation is domiciled in its state of incorporation and the state where its principal place of business is located. On these facts, the plaintiff, Desert Bank, is an Arizona based corporation and is thus domiciled in Arizona. Rad-Ski is an Oregon corporation with its principal place of business located at Bill's house in Oregon. Also Bill, is an Oregon resident. Consequently, there is complete diversity between the plaintiff, Desert Bank, an Arizona corporation, and Rad-Ski and Bill who are both domiciled in Oregon. Additionally, the amount in controversy must exceed $75,000. Here, the plaintiff's complaint indicates that the amount in controversy "is in excess of $10,000" but that is all that is required to be plead in Nevada. Since, the action involves a loan for an amount of $100,000 (both directly as to Rad-Ski and personally as to Bill), the amount in controversy requirement has been met, the defendants may plead the additional amount in controversy in their motion to remove and subject matter jurisdiction is proper.

The second requirement is that all defendants agree on the motion. It appears that Bill's motion to remove was not made jointly with Rad-Ski's motion since Rad-Ski joined the motion later and thus the initial motion to remove was improper. However, since Rad-Ski has now joined the motion the court may entertain the motion to remove.

Finally, the motion must be made within thirty days of service of process. If service of process was proper on Rad-Ski, then it has been more than 30 days since process was served on Rad-Ski.

However, the clock starts over with each defendant and the motion to remove appears to have been timely made by Bill. As a final note, the fact that Andy is a Nevada resident is irrelevant for purposes of determining whether removal was proper. Under the removal rules, a plaintiff may not remove a matter to federal court if one of the defendants is litigating in his or her home state. However, it is the domiciles of Rad-Ski and Bill that are the relevant inquiry and since they are both domiciled in Oregon removal is proper.

MOTION TO DISMISS

Bill's lawyer has filed a motion to dismiss based on lack of personal jurisdiction. Nevada's long-arm statute reaches the constitutional limit so the only relevant inquiry is whether Nevada has sufficient minimum contacts with Bill such that jurisdiction in Nevada does not offend traditional notions of fair play and substantial justice. Bill was not personally served in Nevada (Oregon rather) and is not domiciled in Nevada. Consequently, the personal jurisdiction analysis falls into a three-prong test that looks at (i) contacts, (ii) relatedness, and (iii) fairness. Each will be discussed in turn below.

Contacts

The contacts prong is broken into two parts: (i) purposeful availment and (ii) foreseeability. Here, Bill has clearly purposefully availed himself of the benefits of Nevada. The loan was taken out for a business that operates regularly in Nevada and his business partner is located in Nevada.

Furthermore, given Bill's regular business contacts with Nevada it is foreseeable that Bill would be subject to suit in Nevada.

Relatedness

The relatedness prong is more difficult here. A matter is related to Nevada if the claim arose in Nevada, thus giving rise to specific jurisdiction, or if the defendant is "essentially at home in the jurisdiction." It is arguable that Bill's claim arose in Nevada given the connection of the loan to Nevada activities and the presence of the Nevada forum selection clause. There does not appear to be general jurisdiction here, however, since Bill is domiciled in Oregon.

Fairness

The fairness element is typically broken into three parts: (i) convenience to the defendant, (ii) the state's interest in providing a fourm for its litigants, and (iii) honoring the plaintiff's selected forum. Given Bill's regular contacts with Nevada it would be difficult for Bill to argue that litigating in Nevada is an inconvenient forum for him. Furthermore, Bill's execution of loan documentation with a forum selection clause in Nevada, it is certainly not unfair to Bill to litigate in Nevada.

On balance, the court should deny Bill's motion to dismiss for lack of personal jurisdiction.

REQUEST TO TRANSFER

Assuming the court has has subject matter jurisdiction, the court may transfer the matter to any venue where the action could have originally been brought. For venue purposes, a matter may be brought in any federal district where all the defendants reside. For an individual, that is the district where the defendant is domiciled. For a corporation, that is where the corporation is subject to personal jurisdiction. Here both Bill and Rad-Ski are domiciled in Oregon, thus the matter could have originally been brought in Oregon. However, unless the plaintiff consents, the court is not obligated to transfer the matter. Given the fact that Rad-Ski chose Nevada to sue, plus the Nevada forum selection clause located in the loan documents, the court should deny Bill's motion to transfer venue.

AMENDED COMPLAINT

A party is permitted to file an amended complaint once as of right within 21 days after service of its initial pleading or within 21 days of the receipt of a responsive pleading. Here, more than 21 days have elapsed and no responsive pleading was filed so the court may deny the motion to amend the complaint. However, the court has discretion to allow for the amendment of a pleading. In this instance, and for efficiency's sake, it would be proper to allow Desert Bank to amend since Bill's claims on the personal guaranty and the claims related to the underlying loan are so intertwined. On these facts, allowing the amended complaint was proper.

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

FEBRUARY 2014
EXAMINATION QUESTIONS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

- EXAM 1, QUESTION 3 -

FEBRUARY 2014

EXAMINATION NO. 1;

QUESTION NO. 3: ANSWER IN DARK GREEN BOOKLET

During their Friday afternoon deliberations at Doug's state court trial for robbery of a federally insured state bank, the jury appeared deadlocked because of one juror. The district judge, after speaking to the jury foreperson about the hold-out juror, declared a mistrial. A discussion with the full jury in open court, however, convinced the judge that the jurors were still willing to deliberate. The judge expressly withdrew his declaration of mistrial. The judge then instructed the jurors to return on Monday to resume their deliberations. The judge also admonished the jury not to talk about the case or to read or view any media accounts of the case over the weekend.

On Monday, before the jurors arrived, the judge met privately with counsel and told them he would declare a mistrial. The jury was brought into the courtroom where the judge *sua sponte* declared a mistrial and permanently excused the jurors. Before concluding court, the judge set a new trial date.

Prior to the start of Doug's second state court trial, Doug timely filed a motion to dismiss the robbery charge with prejudice. Although the judge denied Doug's motion, the state prosecutor contacted the U.S. Attorney and demanded he initiate a federal prosecution against Doug. At Doug's second state court trial, he was convicted of bank robbery. Doug was sentenced to a prison term.

During the second state court trial, Doug was indicted in federal court on a federal charge based on the same facts that gave rise to the state charge. Doug was convicted by a jury in federal court. Doug was sentenced to a federal prison term to be served consecutively to the prison sentence he received in state court.

1. Identify the constitutional basis of Doug's motion to dismiss and discuss fully the legal arguments he must make in support of the motion.

2. Was the district judge correct in denying the motion? Why or why not?

3. Given his conviction in state court, is Doug's federal prosecution and sentence constitutionally permissible? Why or why not?

3)

======== Start of Answer #3 (1483 words) ========

Constitutional Law

1. Identify the constitutional basis for Doug's motion to dismiss and discuss fully the legal arguments he must make in support of the motion.

Double Jeopardy Clause

The double jeopardy clause of the US Constitution prohibits a person from being tried twice for the same crime by the same sovereign. The initial criminal case is brought in Nevada state court. Thus, both the Nevada state constitution and the federal constitution will apply. With a jury trial, double jeopardy attaches at the time the jury is sworn. With a bench trial, it attaches at the time the first witness is sworn.

Exceptions

There are various situations in which the person can be tried again by the same sovereign. If the defendant appeals, and the appeal is successful, and the appellate court remands for further proceedings consistent with its judgment, for example, the trial court can proceed again. Additionally, the jury hangs, there is a mistrial, and the person will be tried again (and again) until a jury is able to reach a verdict. Or if there is juror misconduct (jurors look to information

outside the trial, etc.), there would also be a mistrial.

Did the judge properly declare a mistrial?

Here, it looks like the judge was going to declare a mistrial because one juror would not relent, thus resulting in a hung jury. If this would have actually occured, then the declaration of a mistrial would be proper, and the defendant Doug could have been tried again for the same crime, robbery of a federal bank, in the same court.

However, what happened on these facts is that the judge THOUGHT the jury would hang, but after talking to the jury, decided perhaps if they continued to deliberate (there is no time limit, essentially, on deliberation... if one juror is not convinced the jury can continue deliberating until they decide its impossible, or they convince the outlier) they could probably reach a verdict, and thus allowed them to leave, not talk to anyone about the case, and come back and continue deliberating. This is permissible.

The judge, however, declared a mistrial before the jury had a chance to reconvene. This is not likely proper. The judge took the case ot of the hands of the jury before they had come back and said either they were hung and could not go on or that they had reached a verdict. At least this is what Doug will want to argue. Although the foreperson initially told the judge there wa sa hold-out juror, the jury never finished deliberating. Doug will want to argue there was not a mistrial. And thus double jeopardy attaches.

Other reasons for mistrial...

However, the jury hanging is not the only grounds for a mistrial. The judge was permitted to withdraw his sue sponte declaration of a mistrial (NRCP 59 and 60 allow for amendment to or vacating judgments). And there is large discretion with the judge regarding amending or altering their own judgments, at least before a written order is entered. Nonetheless, the facts do not state why the judge delcared the mistrial for the second time on Monday. Perhaps he had received information that over the weekend the jurors or a juror violated the requirement of not talking to anyone or watching media regarding the case. If something like this occurred, there would be a valid grounds for a mistrial. But if not, the judge cannot just take the case out of the hands of the jury after determining they want to continue deliberating and allowing deliberations to continue and having deliberations essentially be ongoing at the time.

Right to a Jury Trial

There is a right to a jury trial in criminal cases under the federal and state constitution. While the seventh amendment to the US Constitution requiring a jury trial in civil cases has not been applied to the states via the 14th Amendment, Nevada has such a provision not only for general jurisdiction but also for justice court cases.

This is not a civil case. Under either federal or state constitution, the defendant has a right to a

jury trial. If the jury has not come back and said they cannot reach a verdict, and they are still deliberating, and there are no other grounds for declaring a mistrial (at least explicitly stated in these facts), the judge cannot violate the defendant's right to a jury trial by simply declaring a mistrial before having grounds for doing so.

Conclusion: If the judge took the case from the jury before they deliberated, this is a violation of the right to criminal trial by jury of peers and the defendant should argue there was not a mistrial and double jeopardy applies to preclude the second trial. However, if the judge had a distinct and valid reason for declaring a mistrial on Monday, such as receiving information regarding juror misconduct over the weekend, the mistrial would be valid and the defendant Doug could be tried again for the same crime in the same court.

2. Was the district judge correct in denying the motion? Why or why not?

Same analysis as above. The judge either wrongfully took the case out of the jury's hands and violated defendant's right to trial by jury, in which Doug will argue the double jeopardy clause attached and he should not be tried again. Or the judge properly declared a mistrial based on a valid reason--juror misconduct, etc.--and the defendant is not precluded from being tried again based on double jeopardy. The right attaches at the time the jury is sworn, not when they have reached a verdict.

Note there are multitudinous reasons for a mistrial, not just jury misconduct. Any wrongdoing

that goes on during the trial that seriously infects the defendant's rights to due process--perjury, inadvertent introduction of inadmissible and extremely prejudicial evidence that cannot be correct by a jury instruction, serious and egregious procedural errors, etc.--would allow for a mistrial declared by the judge. The facts in this case are not clear as to why the judge declared the mistrial on Monday morning, but there is certainly a possibility that things other than the jury's continued deliberations were the cause. However, because the facts do not state, author has to assume that there were not sufficient grounds. There is no mistrial if the jury did not actually hang and deliberations were ongoing. The judge should probably have granted the motion to dismiss, not just based on double jeopardy but based on the right to trial by jury, which defendant never waived.

However, Doug can appeal the conviction to the appellate court and/or file a petition for writ of habeas of habeas corpus in the federal or state court. This is his next line of defense given the state court judgment.

3. Given his conviction in state court, is Doug's federal prosecution and sentence constitutionally permissible?

Yes. As stated above, the double jeopardy clause precludes prosecution of a criminal case against the same defendant for the same crime BY THE SAME SOVEREIGN.

The state court action involved a prosection by the state of nevada, the district attorney, for

robbery of a bank as a violation of state law. The federal court action is an action by the federal government, by the attorney general, for violation of federal criminal law. The federal government and the state government of Nevada are separate sovereigns.

The double jeopardy clause is not likely to preclude the second action against Doug, although it is for the same crime, because it is an action by a separate and distinct sovereign from the state of Nevada, the federal government.

Even if Doug gets his state conviction for robbery of a bank dismissed on appeal or by habeas corpus, via the double jeopardy clause and the constitutional right to trial by jury, the federal conviction will stand and he will remain incarcerated until he serves that sentence.

Sentencing

The sentences are being served consecutively, not concurrently. This means by getting the first state conviction dismissed, Doug will greatly reduce his prison sentence. If the sentences were running concurrently, or at the same time, there would be less advantage to Doug of seeking to dismiss the first conviction in state court. The sentences would be running at the same time, and this would not likely be of great impact on the length of time he spent incarcerated, depending on the sentencing guidelines for each court and whether the federal sentence was longer or shorter than the state sentence.

Perhaps Doug can argue that while he can be tried and convicted in both courts, the consecutive sentences for both crimes are unconstitutional because he is essentially being punished twice of the same crime. However, he will probably be able to get the state court conviction dismissed, as stated above, so he will not need to make this argument in that case.

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

END OF EXAM

FEBRUARY 2014
EXAMINATION QUESTIONS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

- EXAM 1, QUESTION 4 -

FEBRUARY 2014

EXAMINATION NO. 1;

QUESTION NO. 4: ANSWER IN ORANGE BOOKLET

Al owns the Flying R cattle ranch in Nye County, Nevada. In 2010, Al applied for a loan from the Tonopah, Nevada branch of an Idaho bank ("Bank") to finance operations. Dan, an Idaho lawyer, also licensed in Nevada, represents Bank. The loan was negotiated between Al in Nevada and Dan in Idaho through email and telephone calls.

The parties agreed to the loan terms, whereby Al would receive a loan for $1 million, secured by Al's ranch and an interest in all Al's "furniture, fixtures, equipment and 400 head of cattle bearing the 'Flying R' brand and offspring, together with all proceeds thereof."

Dan prepared the Note and a Deed of Trust. Al executed these documents in Tonopah and Dan recorded the Deed of Trust in the Nye County Recorder's Office.

In 2011, Al obtained additional financing from EquipCo in the amount of $500,000. He purchased two tractors and a hay-bailer. Al signed a Security Agreement granting EquipCo a security interest in "two tractors, a hay-bailer, all of Al's equipment, 200 head of cattle bearing the 'Flying R' brand and all offspring, together with all proceeds thereof." EquipCo filed a Financing Statement with the Nevada Secretary of State.

In 2012, a wildfire ravaged the ranch, destroying the buildings, fixtures, equipment and killing all but 200 head of cattle. The ranch buildings were insured for $400,000, with the equipment and cattle being insured for $600,000.

Al obtained the insurance check and received demands from Bank and EquipCo for their loans to be paid in full from the insurance payment.

Al does not pay Bank's loan in full and Bank decides to sue Dan for professional negligence. For purposes of this question, assume Idaho has a statute limiting damages on legal professional negligence claims to $50,000. Nevada has no such limitation.

Fully Discuss:

1. Should any of the following parties receive any of the insurance proceeds and why?

- **a. Bank**
- **b. EquipCo**
- **c. Al**

2. After payment of insurance proceeds, will Bank or EquipCo continue to have a security interest in Al's remaining assets?

3. Which state's law would a Nevada court apply regarding Dan's alleged professional negligence and what recovery the bank could receive?

1)

======== Start of Answer #1 (2023 words) ========

Bank's Secured Interest

Bank engaged in a secured transaction by loaning money to Al in return for a security agreement on the ranch, the furniture, fixtures, equipment and 400 head of cattle (their offspring) and all proceeds thereof.

The issue here is whether Bank has a priority over the other creditors and over Al. To determine this, we must decide whether Bank attached the property and whether it perfected its secutity.

Attachment occurs when the creditor has given value for the security, has a written agreement or taken possession showing the security agreement, and the debtor has actual rights to the property.

Here, Bank gave $1 million dollars to Al in exhange for the security agreement, which satisfies the value element. Bank also had Al sign a Note and Deed of Trust, which had the loan terms in it. This would suggest that there was a written agreement stating the security agreement. Lastly, Al had the rights to the ranch and the fixtures, cattle, etc.. which would allow Bank to properly attach it.

Attachment allows Bank to assert its security agreement over the borrower.

The next issue would be whether Bank perfected its security agreement as to take priority over other creditors. In order to perfect, you must determine what type of property the security agreement is over and then take the appropriate action: either the perfection is automatic, you file something, you take control, or you take possession. The difficulty here is that the ranch was included with the loan transaction. Typically, real property is governed by its own set of rules, not UCC section 9, and so the recording of the deed of trust with the County Recorder's Office would perfect the lien on the ranch against subsequent creditors or purchasers. So, although the Note and Deed of Trust were intended to encompass the ranch plus the other personal property, it is more likely that the deed of trust being recorded in Nye County will only be enforceable against the ranch and not the personal property.

The other personal property would be considered equipment and inventory, since the agreement states "equipment" and "400 heads of cattle". In order to perfect a security interest in equipment and inventory, the creditor needs to file a financing statement with the secretary of state. This lets other creditors know that the creditor has a lien on that personal property. Bank did not do this and so EquipCo wouldn't have known that the equipment and inventory was encumbered by checking with the secretary of state. It would only have known if it decided to check the County recorder's office in Nye County.

So, Bank's security interest would be superior over the ranch, but probably not over the equipment and cattle.

Because Bank has a valid interest in the ranch, once the buildings burned down, Bank would have an interest in the insurance proceeds which should be used to either restore the collateral (i.e. the buildings) or be used to pay off the lien against the ranch. Bank would have an interest in the $400k from the insurance proceeds for the buildings and could enforce that right against Al.

EquipCo's Secured Interest

The same analysis applies to EquipCo that was mentioned for Bank. He engaged in a secured transaction, UCC 9 would govern because the transaction involved equipment (tractor and hay-bailer), which is perosnal property. In order to have an interest superior to the borrower, EquipCo would have to attach and then in order to have a priority over Bank, EquipCo would have to perfect.

Attachment -- EquipCo gave value for its security interest by loaning $500k to Al. EquipCo had Al sign a security agreement which reflected the secured transaction and EquipCo's interest. This satisfies the "possession" portion of attachment. The third part would probably be satisfied because Al still had the rights to the tractors, the hay-bailer, and his equipment and 200 heads of cattle (and its offspring) and the proceeds thereof.

There might be an issue because Al already burdened the cattle, the equipment and the proceeds from the previous lien with Bank, but because Bank had not yet foreclosed, Al still had rights in

it and could enter into this transaction with EquipCo.

Perfection -- the tractors and hay-bailer are equipment used on the ranch, plus the agreement included Al's "equipment" and cattle. The equipment and inventory would be perfected by filing a proper financing statement with the NV secretary of state, which is what EquipCo did. That means, by filing the statement in the proper place, EquipCo would perfect its security interest over the other creditors, including Bank. (One may argue that the loan was a purchase money security interest because the money was used to purchase the tractors and hay-bailer, but a PMSI typically only applies to consumer goods and these items are equipment used on the ranch probably for commercial purposes.)

Because EquipCo's interest has priority over Bank's, he would be entitled to enforce his lien over Bank's on the equipment and cattle. There are insurance proceeds for $600k on the equipment and cattle. Once that property was destroyed, the insurance would substitute for the collateral that was lost until it was either replaced or the security interest was paid off. Here, the $600k would be used to pay off EquipCo in full. If Al refuses, EquipCo could foreclose on its security interest and try to attach the insurance proceeds or anything left of the cattle / equipment in order to recoup its loan.

Another point to note, the security agreement specifically stated that the proceeds from the equipment and cattle would be used to satisfy the debt. The insurance could be viewed as proceeds since it was given to Al to cover the loss to his equipment and inventory. It may be

cnsidered after-acquired property that could potentially fulfill the collateral obligation in the security agreement. This would give EquipCo another claim on the insurance proceeds.

Al's Share

Because Al was the owner of the ranch and the equipment / inventory, he would be entitled to receive all the insurance proceeds. However, he would still have valid claims against the property by Bank and EquipCo. If Al does not pay off the debts, Bank and EquipCo could enforce their rights through foreclosure or attachment and obtain the insurance proceeds. It is likely that Bank would take the full $400k and EquipCo would take $500k of the $600k. That would leave $100k for Al to possess. Al should probably use this to continue to pay off Bank. Because Bank still has a vlid attachment over the equipment and inventory, Bank could take whatever was left of the insurance proceeds after EquipCo was done. Therefore, it is likely that Bank would foreclose on the remaining insurance proceeds, leaving Al with nothing and Bank satisfying $500k of its loan to Al.

Remaining Security Interest

As stated above, it is likely that EquipCo would be the preferred creditor here and would obtain the insurance proceeds from the inventory and equipment, fully satisfying its $500k loan. Therefore, EquipCo would not have any security interest afterwards.

The Bank on the other hand would get the insurance proceeds from the ranch and then potentially the remaining insurance proceeds on the inventory and equipment for a total of $500k to satisfy

the $1 million loan. The Bank would potentially have a security interest remaining to satisfy the outstanding $500k. Al would argue that he has no more collateral and that the note and deed of trust would be extinguished. However, only 200 of the head of cattle were killed and Al agreed that 400 cattle would secure Bank's loan. Therefore, Bank would argue that it has a $500k loan secured by the remaining 200 head of cattle.

If EquipCo were not to have priority over Bank, the roles would be reversed. The insurance proceeds would all have gone to the Bank who would have recouped its $1 millino loan and would no longer have a security interest. EquipCo would have an outstanding loan of $500k. Al would argue that the 200 cattle securing the loan and the equipment were all killed / destroyed during the fire. EquipCo would argue that Al had more than 200 cattle and so the remaining cattle would still be around to secure his interest. This scenario would not likely play out since EquipCo perfected and Bank did not (see above).

Conflict of Law

The issue here is which state's law should apply since both NV and ID are involved in the transcations. There are three approaches to determine which choice of law would apply: vested rights, substantial relationship, and government interest.

Under Vested Rights approach (first restatement), the specific type of law would determine which state's law would apply. This would be a contract action most likely. Under contract law, the place of formation or performance would determine which state's law applies. Here, because

the formation was done over email and telephone, it is too difficult to determine whether ID or NV law should apply. The performance was to occur in NV where the ranch was and where Al would be making payments. So, under the vested rights approach, it is probable that NV law would apply. However, the cause of action is for professional negligence, which is a tort, which would suggest that the place of the injury would control the choice of law. The place of injury would likely be ID because Dan is an idaho attorney. However, it could be arued that Dan was maing the deal on behalf of the NV branch of the Bank with a NV resident, making the injury in NV. All in all, the vested rights approach would likely conclude that NV law should apply.

Under the substantial relationship approach, we analyze several factors to determine which forum has the most significant relationship with the parties. Here, Dan is living in ID but he was representing the NV branch of Bank. Al lives in NV on his ranch and was taking out the loan for use in NV. Dan's representation was over a loan that originated from the NV branch, making NV interested in the legal representation of Dan. Under this approach, because the professional negligence seems to affect both the NV branch of the bank and the license Dan has to practice in NV, NV would seem to be the most applicable choice of law. However, both Dan and the Bank are really from Idaho, and as residents of Idaho, it may be proper for the state where they reside to decide this matter. Under the substantial relationship test, the parties seem to have a stronger relationship to ID than to NV and so ID law would apply.

The government interest test looks to the policies that are in conflict and if there is no conflict, the forum law applies. If there is a conflict, the governement that has the higher interest in the

matter would apply its laws. Here, there is a statute limiting damages for professional negligence claims to $50k in ID. NV has no such limitation. The poicy in ID seems to suggest that it wants to protect the lawyers from excessive awards and limit their exposure for professional negligence. NV does not have any such policy. However, Dan was practicing in NV when he made the loan to Al, so NV has an interest in protecting its citizens from the professional negligence of attorneys. Although it may seem like there is a conflict, because NV has no real policy on limiting liablity, this would probably be a false conflict and so ID law would apply to the proceedings under the governmental interest approach.

All in all, after evaluating all three approaches, it is likely that the NV court would apply its own procedural rules but then apply the state laws of ID because the parties are from ID, there are plicy considerations in ID that NV does not have, and the representation was by an ID attorney over an ID bank (even though it was for a NV transaction.) This would limit the Bank's recovery to $50k in damages.

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

END OF EXAM

FEBRUARY 2014
EXAMINATION QUESTIONS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

- EXAM 2, QUESTION 1 -

FEBRUARY 2014

EXAMINATION NO. 2;

QUESTION NO. 1: ANSWER IN PURPLE BOOKLET

Mr. Smith was a high level State Department employee. He left the State Department and became a blogger. As a result of his outspoken political opinions, he developed a nationwide following. Criminal espionage charges were brought against him in federal court. Smith and his lawyer made repeated statements to the press regarding the charges. Smith claimed he was being prosecuted to advance the prosecutor's political ambitions. He called the government's witnesses liars, criminals and traitors.

Smith's comments were widely reported on cable news and talk radio. His lawyer gave press interviews in which he claimed there was no evidence to support the charges. The prosecutor denied their assertions and outlined some of the evidence against Smith. The prosecutor claimed that Smith's blog posed a risk of disclosing the identities of confidential government sources. The judge repeatedly admonished Smith and the lawyers regarding communications with the press.

In the weeks before Smith's criminal trial began, press coverage intensified. Statements made to the press became increasingly inflammatory. The federal judge issued a gag order precluding Smith, the lawyers and all witnesses from making statements to the press that "would materially prejudice or interfere with the trial" or "were intended to influence public opinion" about the case. The gag order allowed statements "solely regarding the general nature of the claims and defenses without elaboration."

One week before Smith's criminal trial, the judge conducted a hearing with respect to whether certain evidence should be suppressed. Without giving prior notice, the judge closed the hearing to the press and public, and sealed the transcript of the hearing for the stated purpose of preventing pretrial publicity regarding the disputed evidence.

After the gag order was issued, Smith continued to blog about the case. He claimed the FBI investigators were "crooked cops." He continued to accuse the prosecutor of improper motive and to assert that the government's witnesses were liars. The judge then held Smith in contempt of court for violating the gag order and imposed sanctions. Smith claimed his comments were not in violation of the specific terms of the gag order.

Muro, a reporter, sought to intervene in the criminal proceeding to challenge the gag and sealing orders. Before the court ruled on Muro's challenges, Smith was convicted and the orders were vacated. Smith has vowed to appeal his conviction.

Set forth in full detail the constitutional issues raised by the following:

1. The federal court's gag order;

2. The federal court's closed hearing and sealing order;

3. The federal court's contempt sanctions against Mr. Smith; and

4. Mr. Muro's motion to intervene in the criminal proceeding.

1)

======== Start of Answer #1 (1718 words) ========

1. Federal Court Gag Order

The First Amendment protects freedom of speech and expression, and safeguards against impositions on free speech by the government. These protections do not apply where there is private action, but only when the action is carried out by the government. The First Amendment protections were incorporated to the states through the Fourteenth Amendment. This is not, however a blanket protection, giving individuals the right to say anything without regard to consequences. Exceptions have been made to allow the government to restrict speech, but such exceptions are held up to the strict scrutiny of the law, and must be shown by the government to be narrowly tailored to meet a compelling state interest. Even where the restriction on speech is valid, it may not be overly broad or vague. A law is found to be overbroad when it restricts more speech than necessary, and vague where the reasonable person would have difficulty determing what speech is restricted.

Here, the federal court gag order would be held to the strict scrutiny test. The gag order was issued by a federal judge, an arm of the government. Thus, absent a showing that the gag order is necessary to meet a compelling government interest, it would be considered an unconstitutional restriction on speech, and be struck down. The first part of this analysis is to recognize whether there is a compelling state interest at stake. The government would argue that the right to a fair criminal trial by a jury of unbiased peers is a compelling state interest. This would likely be

found true by the court, because a jury trial is constitutionally protected and guaranteed. The right to jury trial, particularly by a jury of peers who have not been unduly influenced, has been safeguarded by the courts. Thus, this would be a compelling government interest. The second part of the analysis would be whether the gag order was narrowly tailored to meet the state interest. The state would argue that the communication with the press was influencing a substantial part of the community from which a jury would be drawn, making it difficult to assemble an impartial jury. The state would further argue that the gag order was aimed at providing a fair trial for Mr. Smith, and not taint the jury pool. Moreover, the state would say that the gag order was narrowly tailored to the issues in this case: it only prevented statements that would be considered to "materially prejudice or interfere with the trial" or "were intended to influence public opinion." The parties and witnesses were not prohibited from all speech, just speech which would taint or influence potential jurors. The state may also point out that the gag order is consistent with the rules of professional conduct in many jurisdictions, which restrict the ability of attorneys to speak about their cases to the public absent a showing of prejudice to their client if speech is not made, or that it is a routine statement. Though the opposing side would counter that the order was not narrowly tailored because it left room for interpretation on the materiality of statements or interference, the state's argument would likely be successful because the parties remained able to speak about the case, just not in a manner which would influence the jury pool. Thus, the gag order is constitutionally sound.

2. Closed hearing and sealing order

The Constitution also provides the public with the right to view jury trials, whether by their physical presence or by reports in the press. While this right is not boundless, the court must make a strong showing as to the necessity of the closed hearing. In order to close the hearing, the judge must generally provide the parties and public with notice that the hearing will be closed, and provide a compelling reason for closing the hearing. A transcript from a hearing may generally not be sealed indefinitely, and must be made available to the public under the Freedom of Information Act after a reasonale period of time.

Here, the judge closed the hearing to the press and public without notice. The facts show that the purpose of closing the hearing was to prevent pretrial publicity on evidence which may be suppressed. The judge would argue that closing the hearing was necessary to protect the jury pool from evidence which may not be admissible and lead them to unfounded conclusions regarding the case before the trial even began. Though this would be a compelling reason to close the hearing, the actual closure would not be constitutional because it was done without notice.

Similarly, sealing the transcript would not be constitutional because the seal was made for an indefinite period of time. The information in the transcript must be made available to the public in order for the seal to be valid. Here, the judge did not state that the transcript would be made available after the hearing or even after the trial commenced, thus making the seal overbroad and more restrictive than necessary.

3. Contempt Sanctions

Contempt sanctions are a means of enforcement available to the court when an individual violates a rule of the court. If the rule at issue is not valid, the sanctions may not be properly imposed. The rule at issue here is the gag order imposed. Specifically at issue is whether the gag order would be considered vague as applied to Mr. Smith. A restriction on speech may be struck down as unconstitutional where the restriction is not explained such that a reasonable person would be unclear as to what speech is restricted. Restrictions on speech must be sufficiently clear as to permit awareness as to the nature of the restriction. In application, the speaker may only be held to the terms of the law in order to be held in contempt.

Here, Mr. Smith would likely contend that the gag order was vague as it relates to him. The order stated that he was precluded from "making statements to the press that would 'materially prejudice or interfere with the trial' or 'were intended to influence public opinion.'" The fact that the gag order was specific as it relates to the press and the nature of the statements would prevent it from being considered vague: a reasonable person would interpret it as preventing speech to reporters regarding the case, unless it was of a general or routine nature. This does not mean, however, that as applied to Smith the contempt sanctions were valid. He would contend that the nature of the press may be considered by some to mean only those individuals identified with a newspaper, radio, tv station, or other means of communication specifically designated for disseminating information to the public. He would further argue that his blog would not be considered the press, because it is a personal blog not meant to do anything but communicate his individual opinions. The court would counter by showing that he has a nationwide following on

his blog, and that the spirit of the order was to prevent statements which would taint a jury pool and influence the public prior to the trial. The court would further argue that Smith's statements regarding the government and its' witnesses would be aimed at influencing public opinion, and would therefore fall within the bounds of the gag order.

Given a strict interpretation and to prevent vagueness, the court would most likely find that the contempt sanctions are not valid, because Smith's blog would not be considered press. In application, the gag order became a restriction on Smith's ability to speak and share his opinions, even on a personal platform. As such, it goes outside consitutional bounds and unreasonably restricts his freedom of speech.

4. Motion to Intervene

An intervention in a case is permitted where the intervenor has an actual issue common to the question of fact in the case, and the intervenor's interest may not be adequately represented by a party in the case. In order to properly intervene, an individual must have standing, the case must be ripe, and not moot. Standing is found when the individual has suffered an injury for which the court may bring a remedy. A case is ripe where the issue is available for review. Mootness occurs when the case or controversy has passed, and a case may only be further reviewed when the defendant has voluntarily ceased the practice and may raise it again or where the issue is capable of repetition.

Here, Muro is a reporter challenging the gag and sealing orders. The issue common to the question of fact in the case would be the gag orders. He would argue that his interest is not being represented because the attorneys and Smith are focused on the case itself. This argument would be countered that the attorneys and Smith also have an interest in being able to speak with the press, and that the remedy they would seek would be the same as the remedy Muro would seek. Muro would contend in opposition that he has a different interest, because Smith and the attorneys have no need to pursue this issue once the case has been decided by the jury, while he has the possibility of being continuously injured by future orders. This argument would likely succeed, and Muro would be an appropriate party for intervention.

If Muro was seen as an appropriate party for intervention, he would still have to meet the standing, ripeness, and mootness requirements. He would claim to have standing because he has suffered an injury by not receiving the full information needed for the case in the gag order, and not having access to the information in the sealing order. He would say that the orders prevents his ability to fully do his job, and the court may remedy this by lifting the gag order and sealing orders. The state would counter by showing that the orders have been vacated and are therefore moot. Muro would argue that there is a larger issue, in that the orders were vacated because the trial ended, but it is still possible for this or other judges to take similar action, thereby damaging him in the future. This is a strong argument in favor of finding the issue not moot.

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

FEBRUARY 2014
EXAMINATION QUESTIONS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

- EXAM 2, QUESTION 2 -

FEBRUARY 2014

EXAMINATION NO. 2;

QUESTION NO. 2: ANSWER IN YELLOW BOOKLET

Paint-Co manufactures and sells paintball guns. Paint-Co tests its products at a paintball playing field it owns near its manufacturing facility. The playing field is next to a farm owned by Farm-Co.

Paint-Co employed Al as its delivery driver. One morning Al loaded Paint-Co's delivery van at the manufacturing facility and headed out to make deliveries. On the way to make his first delivery, Al invited his friends Ben and Cam for a game of paintball. Ben and Cam accepted the invitation, and met Al at the playing field.

Al, Ben and Cam loaded their paintball guns and began the game. During the game the three players chased one another on and off of Farm-Co's farm, trampling and destroying a crop of cucumbers that was ready for market. Cam won the game.

After the game, Cam gloated about his victory. Incensed about losing the game, Ben picked up a big rock and threw it at Cam's face. Cam ducked and the rock missed him, hitting Al in the back of the head as he walked toward the van.

Dazed, but also in a hurry to make his morning delivery on time, Al jumped into the van and sped away. Al ran a stop sign at an intersection in violation of a state statute. The van crashed into a car being driven through the intersection by Dan. Dan, who was texting on his cell phone in violation of another state statute, broke his nose in the crash. Dan said later that he might have avoided the van if he had looked up "a second earlier."

Fully discuss the claims for relief that may be brought by the following parties, and any defenses to those claims:

1. **Farm-Co**
2. **Cam**
3. **Al**
4. **Dan**
5. **Paint-Co**

2)

======== Start of Answer #2 (2101 words) ========

1. Farm-Co.'s Claims

Trespass against Al, Ben, and Cam

Tresspass is an act of invasion against real property. The defendants need not know they have trespassed onto another's land, they need only intend the act of invasion. The act of invaction must also be voluntary.

In this case, the facts state that Al, Ben, and Cam chased one another on and offer Farm-Co's land. Although A, B, and C may not have intended a trespass, it is clear from the facts that their act of running, walking, and chasing was an intentional volutional act.

Conversion (or trespass against Chattels) against Al Ben and Cam.

Conversion and Tresspass aginst Chattels both require an act of physical invasion against ones personal property. Where the act of invasion results in only very minor damage that can be remedied by returning the property, the correct tort is trespass against chattels. Where the act of invation is major resluting in the destruction of property, there is conversion. These are intentional torts that require intent and a voluntary act.

In this case, Al, Ben, and Cam's act was voluntary. They agreed to the game and the chase. Their act of invation was intentional. Although they may not have intended to destory the cucumbers, they intended to chase each other, which was the act of invasion. The cucumbers were owned by FarmCo., and they were destroyed. FarmCo has a claim for Conversion.

Viacarous Liability for the above Acts against Paint-Co. Due to its Employee Al.

Farm-Co may argue Paint co is vicariously liable for the acts of its employee Al. Generally speaking, an employer or master will not be liable for the intentional torts of its employees except where the employer ratifies the act, the employer commits the tort to serve the employer. Employers will likewise not be held responsible for the torts of their employees when they are on a "frolic" (as opposed to a mere detour).

In this case, Paint-Co has a valid defense. Al was employed as a delivery driver. But these are intentional torts. Al committed neither tort in an effort to serve his employer. He was not field testing the paint-ball guns, he was just playing a game. Field testing the guns was not part of his job as he was employed as a driver. There is no indication that Paint-Co ratified his conduct. Although he stopped at the field on his way to make deliveries, this stop appears to have amounted to more than a mere detour given the passage of time and that it had nothing to do with his job. A delivery driver may be expected to stop fo gas or to run an errand, but one would not anticipate stopping to join friends for a pick-up game.

2) Cam

Assault against B.

Assault occures when one creates a reasonable apprehension in another by conduct greater than words along of an immediate battery.

In this case, Ben picked up a rock and threw it at Cam's face. That is did not hit Cam's face is no defense to the assault. It appears that Ben's act of throwing the rock created a reasonable apprehension of contact in Cam, because Cam was forced to duck.

Ben may argue that we was provoked due to Cam's gloating, but this is not a valid defense to an assualt. Ben may also argue Cam consented to the assault since they were already playing paintball and were already creating an apprehension in one another of being struck with paintballs, but eh defense would not be valid. While consent can be express or implied, consent is only a defense to an intentional tort if the scope of consent is not exceeded by the tortfesor. There is no indication that Cam expressly or impliedly consented to be hit with a rock in the face.

3) Al

Assault Against B

[Statement of rule concerning Assault reincorpoerated here from above by this reference.]

Al may argue B committed an assualt against him, but there is no indication that Al had a reasonable apprehension of unwanted contact. The rock hit him in the back of the head, so there was never a chance for him to apphrehend the contact.

Battery Against B

Battery is the application of unwanted force or contact with the Plaintiff's person. The tort requires intent and a voluntary act. Where the tortfeasor intents to strike one victim, but actually hits another, his intent will be deemed to have transferred to the victim actually struck.

In this case, Ben's act of throwing the rock was voluntary. The fact indicate that he meant to do it, and C's provocation is no defense. Although the fact indicate that he meant to throw the rock at Cam's face, the fact that it hit Al does not destory intent. Because Ben meant to hit Cam in the face, which would have been a battery, his intent transfers to Al. Finally, there was contact with Al's person.

Ben may argue that Al had consented to "contact" because they were playing paintball, a game where the participants were already shoting projectiles at each other. But this defense would not be valid. Consent is only a defense to an intentional tort so long as the tortfeasor does not exceed the scope of the consent. Al consented to being struck by paintballs, but there is no indication in

the facts that Al consented to be struck by a rock in the head.

Battery Against C.

[Above language stating rule of Battery incorporated here]

Al could argue that by ducking, C caused the rock to hit Al in the head. But Al's claim would not be valid. C's act of ducking so the rock would strick Al would not be deem voluntary.

Negligence Against Dan.

[See discussion below in part 4 concerning Dan's comparative Negligence driving his car]

4) Dan.

Negligence Against Al.

Al owed Dan a duty of reasonable care. In other words, he owed Dan a duty to drive his van as a reasonably prudent person would have done. If Al breaches that duty,and if the breach of that duty causes damages, he is liable to Dan for damages. Subject to some exceptions, a plaintiff must point to specific conduct consituting a breach. Negligence per se will constitute a breach of the duty where the tortfeasor violates a statutory duty of care resulting in conduct within the class

of conduct of the statute and harm to a person who was within the class of the statute or in other words a person who the statute was seeking to protect. Expert where there are multiple parties, the tortfeasor must be the but for and proximiate cause of the defendant's injuries.

In this case, Al was driving the van in a negligent manner. A reasonably prudent person does not drive in a hurry or speed away. A reasonably prudent person does not run a stop sign. In this case there is also negligence per se. A state statute forbids stop sign running. The likely scope of harm prevented by the statute is cars running into one another. The likely class of person protected by the statute are other drivers. In this case there is therfore negligence per se.

Al was the proximate cause of Dan's injuries. It was foreseeable, or should have been forseeable, that by running the stop sign Al would collide with another car. Al is also the cause in fact or "but for" cause of Dan's injuries. But for the fact that Al ran the stop sign, the accident would not have occured. Although the fact suggest that Dan could have prevented the accident had he looked up there can be more than one "but for" cause to an accident. And "but for" Al's negligence, the accident would not have occured.

Al may raise defenses of comparative neligence. He may also raise the defense of "last clear chance" though that defense has typically been swallowed up in the comparative negligence analysis.

Nevada applies the rule of partial comparative negligence. In other words fault is apportioned

among the guilty parties by percentage of fault. So long as the plaintiff is not more at fault than the defendant, he or she may recover, but where the parties's fault exceeds the victim, there can be no recovery

In this case, Dan was also negligence. He was texting at the time of the accident in violation of a statute. The resonable prudent person does not text and drive. This is also negligence per se because the statute is meant to protect against texting and driving is ment to protect agains this type of harm (accidents and car collisions) and is also meant to protect this calss of victims, other dirvers. Furthermore, there is Dan's statement that had he looked up he could have avoided the accident all together. Thus, there are sufficent facts that a jury could find Dan has a higher percentage of fault than Al. If this is the case, Dan would be barred from recovery.

Battery Against Al

Battery is the application of force or unwanted contact with Plaintiff's person. Plaintiff's person includes all objects attached to the Plaintiff's person. It is an intentnional tort requireing the tortfeasor intent the conduct and a voluntary act.

The van being driven by Al struck Dan's car. Striking Dan's car, because it was in contact with Dan's person, was sufficient to consituted contact with Dan's body. The contact was unwanted. There is no indication that Dan consented to being struck. However, the claim is not valid because there is no indication in the facts that Al intended to strike Dan's car.

Vicarious Liaibility for Al's Negligence against Paint-Co.

Dan (assuming he can recovery in negligence) may argue Paint co is vicariously liable for the acts of its employee Al. Generally speaking, an employer or master will be liable for the negligence of its employees if the act is committed on the job (not a frolic) within the scope of the employees job duties, or to serve the employeer. In this case Al was employed as a driver, and the accident occured as he was on his way to make a delivery that was within the scope of his employment. If Dan's negligence claim surivives Al's comparative negligence defense, he will be able to hold Paint-Co vicariously liable. he can also seek recovery from Paint-Co to the extent that the negligently hired or trained Al, but there is little indicatioin ithe facts that that occured.

5) Paint-Co.

Neglience against Dan or Indemnity from Al.

A stated above, there is a chance Dan may be found to have more comparable negligence than Al. If this is the case, Paint-co would have a claim against Dan for the damages it suffered as a result of the accident (damage to their van). Assuming Dan was found to have been more comparably negligence, Dan's actions would have caused the damage to the van. He would have been the but for cause of the damage (because but-for) his neligence the accident would not have

occured. he would have been the proximate cause of the accident because while texting and driving it woudl have been forseeable that he would have collided with another car.

Where another is held liable for the neligence of another and is without fault, they have a claim for indemnity against the tortfeasor. Should the fact-finder conclude Al was responsible for the accidnet, and that Paint-co had no negligence for hiring or training Al, Paint-co may have a claim for idnemnity against Al.

Trespass Against Al and Trespass Against Cam and Ben.

Tresspass is an act of invasion against real property. The defendants need not know they have trespassed onto another's land, they need only intend the act of invasion. The act of invaction must also be voluntary.

During the course of the paint-ball game, Al, Cam and Ben ran on Paint-Co's land. All indications are they meant to run on the land, and the facts state it was owned by Paint-Co. The facts also indicate that Al, Cam, and Ben were acting voluntarily.

Each may raise a defense of consent. The fact do not state that Al had permission to use the field for pick-up game,s but if Pain-co had allowd this type of use in the past consent could be implied. Ben and Cam may also claim that Al had apparent authority on behalf of Paint-Co to

invite them to come onto the field to play paint ball because he was an employee of Paint-co, and Paint-co appeared to them to have used the field for paintball games.

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

FEBRUARY 2014
EXAMINATION QUESTIONS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

- EXAM 2, QUESTION 3 -

FEBRUARY 2014

EXAMINATION NO. 2;

QUESTION NO. 3: ANSWER IN DARK BLUE BOOKLET

Molly, a registered patent attorney, recently left a large firm to set up her own practice in downtown Las Vegas. She has a blog on which she gives legal advice to startups. She often meets with clients and potential clients at the local coffee shop. She likes the free wireless and has an ad posted on the bulletin board offering "expert legal advice" to entrepreneurs.

Susan discovered Molly through her blog. At their first meeting in the crowded coffee shop, Susan explains that, with substantial financial help from her father and the technical assistance of her 14-year-old brother, who is a "computer genius," Susan developed a software program that will "save millions" for small businesses. Molly is very impressed and tells Susan, "This is right up my alley." Molly suggests that Susan form a company. Susan says her father had suggested this as well because they will need additional funds to get the venture off the ground. Susan explains to Molly she would like the ownership of the company to be split evenly among her father, her brother and herself, even though her father "probably" deserves more given his financial aid and business knowledge.

Susan says she is worried about how much this will cost. Molly explains she is willing to charge a reduced rate in exchange for a five percent interest in the company. As a special concession, Molly volunteers to advance any necessary costs. Susan agrees. While at the table, Molly prepares her standard ten page engagement letter, naming Susan as the client. Molly immediately emails this letter to Susan. Molly explains that the letter is mostly boilerplate, but to let her know if Susan has any questions. Susan has no questions and immediately replies to Molly's email, "I agree!"

After Susan leaves, Pete introduces himself to Molly, saying, "I couldn’t help overhearing your conversation" with Susan. He explains he represents a group of wealthy clients who are always interested in new opportunities. Pete offers to provide the startup capital Susan will need, provided he and his group can "get a piece of the action". Pete would also be willing to hire Molly to assist his group. Molly tells Pete she will have to think about his offer.

Fully discuss:

1. Any ethical issues raised by (a) Molly's blog and (b) her bulletin board ad.

2. Potential conflicts of interest involved in Molly's representation of Susan and the company she has agreed to form for her.

3. Any ethical issues raised by Molly's choice of meeting place.

4. Any ethical issues implicated by Molly's fee arrangement with Susan.

5. Any ethical considerations implicated by Molly's decision whether to accept Pete's offer.

3)

======== Start of Answer #3 (1858 words) ========

Ethical Issues Raised by (a) Molly's blog and (b) her bulletin board ad

Advertisements

A lawyer in Nevada may advertise but must be sure to follow certain requirements. First, the ad should never be misleading. It should never compare that lawyer with other lawyers. A copy of any advertisement should be sent to the State Bar within 15 days of the first use of the ad, and the lawyer should keep a copy of any advertisement used for 7 years after initial use.

Here, it is inappropriate for Molly to use the label of "expert legal advise" as part of her ad. A lawyer may not ethically call herself an expert unless she has been approved by one of the organizations recognized by the Nevada State Bar for an attorney to prove she is a specialist. The Nevada State Bar has a list of all specialists in all areas on its website so the public may research which attorneys have been found to be qualified in a particular area.

Futher, the ad may be misleading in that it offers advice to entrepreneurs but Molly has a background in patent work. Certainly, as we will address below, Molly's client base will include entrepreneurs. But holding herself out as an expert for entrepreneurs may create unrealistic expectations.

Blog Issues

An attorney in Nevada may utilize a blog. However, the blog should include clear language indicating that every legal issue is different and not to be construed as legal advise. The blog should make it clear that the blog does not court create an attorney-client relationship that could cause conflicts as well as confusion. The blog should clearly indicate that it is NOT legal advice. Here, molly specifically offers legal advise through a blog. However, there is no way for her to know who she is actually communicating with online: Molly could be giving advise to an opposing party raising ethical issues precluding contact with a represented party, she could be giving advice to a competitor of her own client creating a conflict of interest, and so forth. If she is telling others online she is giving legal advice, as the facts suggest, this could create a reasonable beleif by the person online that there is an attorney-cleint relationship or could mislead individuals to rely upon "advice" when it was only intended to be a general discussion of the law as opposed to actual legal advise that should be relied upon only after an attorney has done her due diligence to understand all of the facts and all of the law related to that particular legal issue.

Potential conflicts of interest involved in Molly's representation of Susan and the company she has agreed to form for her

Competence: Molly is a patent attorney that recently opened her practice. This is business situation that involves multiple factors that are beyond simply patent law; specifically where Molly instructs Susan to "form a company." An attorney must generally decline representation if she cannot fully pursue the action competently from start through conclusion of the matter. If a lawyer does not have adequate training and experience she must either have a reasonable beleif that with research and effort (not charged to client for her lack of knowledge) that she can be fully prepared as lawyer, or find counsel experienced in this area to associate with, or she must decline representation.

There is also a potential issue of candor on the part of Molly when she tells Susan that "this is right up my alley" when portions of representing the company are beyond simply the patent work that is her background.

There is serious potential for conflicts of interest in this company. First, there are three different individuals that are part of this venture: the father, the 14 year old brother, and Susan. Susan is the only one who signed the fee agreement. Molly is already suggesting a company be formed but she has not even spoken with the other two involved in this setting. Who is Molly representing? What type of company will be formed? Who will represent the different individuals if there are conflicts? Who will make sure the 14 year old minor is protected when he cannot even sign the fee agreement and be bound to it due to his age. Is Molly suggesting that she will be Susan's attorney of the proposed company's attorney, as these will dictate very different ethical

requirements in terms of who she may speak to and what advise she may give. And since she has already had Susan sign a fee agreement without even meeting the other two people involved (again, this assumes proper steps are taken for the protection of the 14 year old who may not always have the same priorities as the sister and father.)

An attorney should never accept representation where there are two clients who may have competing interests unless, at a minimum, both parties are fully apprised ot eh situation in writing, each party is given the opportunity to consider the options or other counsel, and that there is a knowing, intelligent signed waiver of the conflict. Even then, an attorney must not represent partied who have a conflict of interest unless the lawyer has a reasonable beleif that the representaton of the multiple parties can be done without placing the interest of one client over another and without putting the attorney in the unacceptable position of being provided confidential communication from one party that could be a detriment to another party due to the represenation of both.

Ethical issues raised by Molly's choice of meeting place

First, the attorney-client privilege that is so essential may be lost if others are part of the conversation. Moreover, in a busy coffee shop it is more difficult to ensure that confidential discussion will be or remain confidentail. This was, in fact, demonstrated later in our factual scenario which led to a clear loss of confidential communication that a lawyer should take every

reasonable step to ensure for a client or potential client.

The fact that Molly is only meeting a potential client does not change this issue. A potential client has the opportunity to speak to an attorney with the beleif that the communications will remain confidential. This is an analysis that depends on how the communication occurs to determine if the prospective client would have a reasonable belief that the conversation would be kept confidential. That would be a reasonable belief as this appears to be a meeting between counsel and a prospective client considering hiring the attorney and thus the meeting place raises clear ethical issues.

Further, Molly utilized "free wireless" which creates a very real risk of client confidential information being stolen from "hackers." In practice today this is a MAJOR concern for any responsible lawyer. A lawyer must take every reasonable step to protect client information. The use of public wireless is a risky choice for any lawyer and should be avoided. If a lawyer is remotely accessing her office (very possible in a new client meeting) then the password she uses to access her office may be stolen. This could potentially give access to incredibly sensitive and private attorney-client privileged information. While even taking all reasonable steps does not guarantee the protection of client confidential information, using public wifi at a crowded, public coffee shop is a poor ethical choice, to say the least.

Ethical issues implicated by Molly's fee arrangement with Susan

Taking the 5% stake in the company is an immediate ethical problem. An attorney should rarely take a percentage of a matter the attorney is working on (literary rights with some limitations and contingency fee agremeents or other exceptions aside) and here Molly is even proposing it. To make it worse, even in a situation where an attorney is accpeting any financial dealings with a current client - even if not part of the direct attorney-client relationship - this should only be done when the attorney puts the client on notice - in writing - of the proposal and encourages the client to seek outside counsel on the arrangment. The attorney must then give a reasonable amount of time for the client to seek the opinions of another attorney.

Moreover, Molly has volunteered to advance any costs necessary. Generally, a lawyer should avoid taking on a financial interest in the case and must not pay for costs under any circumstances. While it is allowable for a client to advance costs, this can only be done if the fee agreement make it clear in a bold font at least the size of the largest font on the page who will be responsible for costs at the end of the representation. This is generally allowed in under the Nevada's ethical rules in contingency fee arrangments, not in cases such as this one where there is an hourly fee being paid for business-related work.

Further, a 10 page engagement letter with "mostly boilerplate" that is not even read by the client raises further ethical concerns. A lawyer must take the necessary time to explain the fee arrangement to a client. Molly did the correct thing by putting a fee agreement/engagement letter in writing, but doing 10 pages of boiler plate defeats the very purpose of putting a fee agreement

in writing to ensure a client is aware of the entire fee arrangement. Here, Susan "immediately" emailed Molly back accepting the terms, demonstrating the client never even attempted to read the letter and thus was not adequately informed or aware of the letter. In fact, it does not even appear that Molly discussed the contents of the 10 page letter with Susan.

Also, as referenced above, to the degree that Molly has experience in patents but not in setting up corporations, partnerships, LLCs, or whatever the appropriate business model may be, she should not be charging the client extra due to her need to take additional time to learn enough of the area of law to provide competent represenation.

Ethical considerations implicated by Molly's decision whether to accept Pete's offer

This conflict of interest would not be waiveable. While, as addressed above, a lawyer may represent two clients at the same time under certain circumstances and with adequate notice, here we have two entities that require an arms-length transaction. In fact, Molly is not put into a difficult position and may have to withdraw immediately. This is because she now knows of a business opportunity for her client that Pete is offereing. Molly must relay that information to Susan. However, Pete has overheard their discussion (addressed above as to why Molly made the wrong choice for a potential new client meeting) and this creates further problems.

Also, Molly should have immediately made it clear to Pete that she was representing Susan and could not rerpesent Pte or his company. By doing so, she may have created a situation where Pete

now has a beleif that his discussions with Susan were covered by the attorney client privilege. If so, Molly should withdraw immediately to allow each party (or set of parties, as addressed above) to be represented by separate counsel.

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

FEBRUARY 2014
EXAMINATION QUESTIONS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

- EXAM 2, QUESTION 4 -

FEBRUARY 2014

EXAMINATION NO. 2;

QUESTION NO. 4: ANSWER IN LIGHT GREEN BOOKLET

Andrea owns Redacre and Yellowacre. Redacre is a remote ranch in Nevada consisting of 200 acres, including an old ranch house. Every summer, Andrea and her best friend Beth enjoy visiting the ranch.

When Andrea was 21 years old she decided she wanted to give Redacre to Beth. By way of a signed document, Andrea agreed to convey Redacre to Beth upon Andrea's 40th birthday. Soon thereafter, Andrea told Beth about the document and where it was kept. Andrea told Beth she did not want the document recorded in case Andrea changed her mind. Andrea told Beth to use Redacre as if it were her own.

Beth took Andrea at her word and renovated the ranch house, including adding two new bedrooms and a porch. Andrea told Beth she liked the renovations. Beth took over paying the taxes on Redacre and lived in the renovated ranch house full time. Andrea did not interfere with Beth's use of Redacre.

A few days after Andrea's 40th birthday, Andrea deeded "all of the real property I own" to Charlotte. Charlotte recorded the deed.

Fully discuss the real property rights of Beth and Charlotte.

4)

======== Start of Answer #4 (760 words) ========

BETH'S INTEREST

Real property is typically conveyed via deed. A deed must be in writing, describe the property to be conveyed, identify the parties, and be signed. A deed must be delivered before the conveyance becomes effective. The grantor's intent is the key to determining whether a deed is delivered. Physical delivery is not required. A deed is delivered if the party executes a document complying with the deed formalities and manifests an intent that the property be transferred, such as by calling the recipient of the property to inform her of the conveyance. A deed must however, indicate the present intent to convey the property. Delivery of a deed may be conditioned on a future event, such as the grantor's birthday. For a deed to be delivered at a later date, the grantor will generally give the deed to a third party such as an escrow agent with written instructions to deliver the deed upon the occurrence of the future condition.

It is unclear what kind of "document" Andrea has executed or what arrangements she has made. If it is a deed, it is likely ineffective because Andrea apparently retained the ability to not convey the property if she "changed her mind." It does not appear that the document Andrea has signed was put into escrow. Even if the deed is effective, it has not been delivered because there is no manifestation of present intent to convey the property.

The "document" Andrea signed could be a contract to convey Redacre to Beth upon Andrea's

40th birthday. The document would not satisfy the statute of frauds because it was missing the price term. All of the other requirements of the statute of frauds are met because it was signed by Andrea, identifies the parties, identifies the property, and the time for closing. In reliance on Andrea's instruction to Beth to use Redacre as if it were her own, Beth moved in and constructed valuable improvements on Redacre. Those two things would take the contract out of the statute of frauds as part performance. Beth could argue that on Andrea's 40th birthday, she had a binding contract for the purchase of Redacre, and the court could set a reasonable price. Although Beth did not sign the document, a signature is only required of the "party to be charged," and Andrea did sign the document If Beth wants to enforce the contract, she may do so.

Adverse Possession:

A person can gain title to real property through adverse possession if the party has possession of the property, the possession is hostile, continuous, open and obvious, exclusive, and lasts for the statutory time period. In Nevada, the statutory time period is five years, so long as all taxes are paid.

Beth does has not gained title to the property through adverse possession. Her possession has been continuous because she moved onto the ranch. It has been open and obvious because anyone can see that she is living there. It has been exclusive because Andrea has not interfered with her use of Redacre and it appears that nobody else has either. The time period has been met

as well because Beth has been present for 19 years. Beth's use has not been "hostile," however, because she has had Beth's permission to use Redacre as if it were her own.

CHARLOTTE'S INTEREST

A deed must describe the property being conveyed with sufficient certainty to permit all parties to identify the property. Andrea deeded "all of the real property I own" to Charlotte. Although that lacks the specificity that is typical in a deed, it is probably sufficient because the facts indicate that Andrea owned only Redacre and Yellowacre, and a reasonable person could identify what was being conveyed. Thus, whatever interests Andrea had in those properties was conveyed to Charlotte.

Recording statutes:

Nevada is a race-notice jurisdiction. Because no document was recorded relating to Beth's interest in Redacre, the contract of sale would not have been valid against a bona-fide purchaser for value. Charlotte, however, is not a bona fide purchaser for value because she did not provide any consideration to Beth. Thus, the common law rules of "first in time, first in right" apply because Beth had a binding contract for the sale of Redacre (on Andrea's 40th birthday) before Redacre was conveyed to Charlotte (a few days after Andrea's 40th birthday), it will be enforceable against Charlotte and Beth can sue for specific performance of the contract. Specific performance is approprate because the contract is for the sale of land, which is unique.

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

END OF EXAM