FEBRUARY 2016
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

EXAM DAY 1, QUESTION 1

1)

I. MOTION TO SUPPRESS

Search and Seizure: The 4th Amendment to the Constituion protects against unreasonable search and seizure. The 4th Amendment it incorporated to the States through the 14th Amendment. In order for a search to be unconstitutional, there must be government action and the search of an area in which the Defendant would have a reasonable expectation of privacy. Generally, to conduct a search a police officer or government actor must have a valid warrant that is secured with probable cause.

Search of Car: An automobile execption exists, by which a police officer may search the passenger compartment of a vehicle if probable cause for arrest arrises during a lawful stop. Under those circumstances, a police officer may search the car in any area that is likely to contain evidence of the crime based on probable cause. Here, Dan's car was stopped and searched but the search is likely in violation of Dans Constitutional Rights, becuase there is a question as to whether the Police had Reasonable Suspicion sufficient to stop Dan in the first place. Even if reasobable suspicion is found, there are no intervening acts that would give rise to probable cause for an aresst or a search based on the original stop and the dog sniff is also likely to found to violate Dans consitutional rights in this instance. The constitutionality of the search and the dog sniff will be discussed below, but if both are found unconstiitional, Dan's motion to supress shoudl be granted.

Fruit of the Poisoness Tree: Under the exclusionsary rule, evidence that may otherwise be admissable in an action will be barred if it was obtained as part of an illegal search and seizure. The are exceptions to the rule that will stop the evidence from being barred if it would have been discovered inevitably, if there was an independent source for the evidence or if there is an intervening act. The rational for those excepts is that the police woudl have found the evidecne without the violation, so the violation is not the sole source and it should not be barred if otherwise relevant and admissable. The doctine also excludes evidence that was obtained as a result of the illegaly conducted search. These are fruits of the poisoness tree. While the drugs found in Dans car would normally be admissable in court, they will be barred in this circumstance because the police did not have probable cause for the search and the dog sniff was in violation of Dan's rights (see below), and Dan's motionto supress should be granted.

Plain View: The plain view doctrine allows police to obtain evidence found in plain view if they are lawfully present. Here, Dan will argue that the stop was illegal and therefore the plain view doctrine would be barred. However, beacause the drugs were "under the backseat seat" of the car, there is no reason to believe they were in palin view and the doctrine will not apply.

Motion to Supress: If a defendant believes that evidence to be used against him has been obtained in violation of his 4th amendment rights or as fruit of the poiness tree,

he can file a motion to supress the evidence. A motion to supress, if granted, will keep the evidence from being used against the defendant in court. Here, if Dan can show that the dog sniff violated his constituional rights, the motion should be granted becuase, based on these facts, there is no reason to believe the drugs under the passenger seat would have been otherwise discovered.

II: LEGITIMATE BASIS FOR STOP & CONSTITUTIONAL DEFENSES

Legitimate Stop: Police Officers are required to have reasonable suspicion to stop a vehicle. Reasonabel suspicion is a lower bar than probable cause, which is needed for an aresst. Probable cause can arise after a stop based on reasonable suspicion based on the circumstances of the stop. For example, if the officer sees contraband in plain view, or if the vehicle was stopped for swerving an the driver smells stongly of alcohol and is slurring his words. If probable cause arises, the police may arrest the defnedant and conduct a search incindent to a lawful arrest.

Reasonable Suspicion: Deputy Smith will argue that the lack of a front license gave him reasonable suspicion to follow and stop Dan. Even though by statute the state of NV does not require a front license plate if there is not attachment mechanism, we are also told that most people are unaware of this law. In addition, we are told that NV DMV issues two licenses plates for each vehicle. Deputy Dan will argue that becuase he did not know about the statute, and possibly believe that beacause two are issued

they are both required to be displayed, that he had reasonable suspicion for the stop. Dan will argue that becuase he was in compliance with statute, and committed no traffic violations while being followed, Deputy Smith's failure to know about the statue will not rise to the level of reasonable suspciion. The facts tell us that Deputy followed Dan. Police are allowed to follow a car if they have a reaosnabel suspicion, so the Deputy's initial follwoing of Dan may be ok. Dan's stronger argument would be that even with the Deputy follwing him, he did not committ any traffic violations and therefore the stop should be unconstitutional.

Whether Deptuy Smith's ignorance of the statute gave rise to reasonable suspicion will be determined by the court, and courts often find that police have met the burden of reaosnable suspicion. Here, Dan will have a strong arguement against it, though, becuase Deputy Smith is police office and shoudl know of the license plate law and Dan committed no traffic violations.

Constiutional Defenses: Dan will argue that the stop, and the subsequent dog sniff and seach of his car violated his 4th amendment right againt search and seizure. Dan might also argue that the Dpeuty violated his Right to Travel by questioning him about where he was going, but this is unlikely because the Deputy made no further remarks on the matter. Dan's strongest defnese would be his 4th AMendment rights.

III. DOG SNIFF AND CONSTITUTIONAL RIGHTS

Fourth Amendment: As disucssed above, the fourth amendment protects against unreasonable serach and seizure, whigh requires governmetn action in violation of a reasobable expectation of privacy.

Dog Sniffs: The "dog sniff" test has been decided on by the courts, and the use of a dog sniff is permissible in certain circuamstances. A dog sniff of a home without a warrant constitutes a search beacue of the high expectation of pricay in a home. However, the courts have held that dog sniffs of car are only unconstitutional if they prolong the stop. If an officer stops a car and the dog is present at the stop and alerts to the presence of contraband, that may give rise to probable cause for a search and arrest. However, unless there is already probably cause, an officer may not have a dog brought to a stop, extending the time of the stop, to sniff a car.

Here, Deputy Smith did not have the dog with him, nor did Deputy Jones happen to show up with the dog to assist Deputy Smith while he was in the process of stopping Dan. Even if reasonable suspicion is found to have made the stop proper (See above), the dog sniff in this case would have unreasonably extended the time of the stop and search based ont ehprobable cause fromt eh sniff will be found unconstitutional. In these facts, Dan has been stopped, provided legitiimate license, regiatration, and insurance, and is not in violation of any statute. From these facts, there is no evidence that Dan was acting intoxicated, or that there were any items of contraband in plain view, or any smells detectable by Deputy Smith to give rise to probably cause. Dan

was only going to be issued a citation for the license plate violation (which was was not correct and Dan would be able to show this in cournt.). He also told Dan that "everything looks good," and Dan askedif he could leave. Howver, Deputy Smith had called Deputy Jones to bring out the dog and Dan "had to wait" for that other deputy to arrive. This clearly is an extetion of the time of the stop without cause (Deputy Smith said "everything looks good") and the dog sniff is unconstituioal.

Contitutitional Defnese: Dan should argue that the dog sniff was a vioaltion of his contitutional rights, and the court should find in his favor. The Deputies may argue that the exetnaion of time was only a few mintues and that the dog sniff shoudl be constitutional, but based on the facts discussed above, any arguement for an extension of time on this stop would be weak. The court should find for Dan here.

END OF EXAM

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EXAM DAY 1, QUESTION 2

2)

1. Enforceable Contract

Applicable Law

In a mixed goods and service contract, it must be determined what the predominate purpose of the contract is. If the predominate purpose is the sale of goods with incidental services included, generally, the contract will be governed by UCC Article 2. Goods are objects that are movable at the time of identifcation for the contract.

Here, this is a mixed contract for services and goods because the contract is partly for supplying exit signs and emergency lights, which are movable and therefore goods, and for the installation of the lights. The predominate purpose is for the sale of goods because Mary needed the interior lighting for her theater in order to meet the building codes. Although she was constructing her theater, the contract was predominately about the goods because she needed the lights to meet the building codes.

Here, the UCC will apply because although it is a mixed contract, lights are movable at the time of identification.

Merchants

Under the UCC, there are several special rules for merchants. Merchants are those who deal in the goods of the kind contemplated under the contract or hold themselves out as having special skill related to the goods.

Here, Acme is a merchant because Acme specializes in interior commercial lighting, the goods that are the subject of the contract. Additionally, Mary is a merchant because althgouh she appeared to be totally relying on Acme for their skill in goods and didn't hold herself out to have any, she deals in goods of the kind, here interorior lighting, because she is a businesswoman who is buying the goods for her theater and will have to deal with these goods regularly throughout the time she is in busiuness.

Therefore, both parties are merchants at will have the special merchant rules under the UCC.

Offer

An offer is the manifestation of intent to enter into a bargain, which would justify a reasonable person in concluding their assent is invited and will form a contract, containing definite and essential terms.

Here, bills e-mail to Mary probably serves as an offer because the email stated they

would install the necessary exit signs and emergency lights on or before March 15. Additionally, the offer contained language including standard terms and conditions per our website providing more evidence that a reasonable person would conclude this was an offer that invited assent. However, it could be argued that the terms of the offer are not definine enough because it does not contain a clear quantity term. Howeer, it does say necessary lighting.

There is probably an offer.

Acceptance and Additional Terms

Additionally, there must be an acceptance to form a contract. An acceptance, if a manner is not specified in the contract, may be given by anyway reasonable under the circumstances. Under the UCC, an acceptance containing additional terms that does not make acceptance condititional on the offeror's acceptance of the additional terms serves as a proper, unlike the common law. Between merchants, these additional terms become part of the contract unless the other party objects, the terms materially alter the contract, or the acceptance is conditional upon acceptance of the terms.

Here, there was acceptance because Mary sent an email to Bill Stating let's say 8,500 and MArch first and it was reasonable to email acceptance because the offeror, Acme, sent the offer in the email. Although these contain additional terms, the mirror image

rule of the common law does not apply because this is a contract for goods under the UCC and this serves acceptance because acceptance is not conditional on assent to these adidtional terms.

As far as the terms, both parties are merchants and so it must be determined whether Mary's additional terms in the acceptance become part of the contract. The offeror Bill did not object so therefore, the other party did not object. Additionally, the terms do not materially alter the contract because a price change of 1/8 is not a huge shift of price Additionally, 15 days earlier for delivery is not a material alteration.

There was acceptance and Mary's additional terms will become part of the contract.

Consideration

Additionally, to form an enforceable contract, there must be a bargained for exchange of benefits or legal detriments exchanging promises or performance.

Here there there was consideration because Acme and Mary agreed to exchange 8,500 for the installation and purchase of necessary exit signs and emergency lights.

Therefore, there was consideration.

Conclusion to Question 1: There was probably an enforceable contract that included Mary's additional terms, Delivery by March 1 for 8,500, including Acme's standard Terms and Conditions, including the purported warranty disclaimers, which I will discuss infra.

2. Claims and Defenses

Acme Statute of Frauds Defense to Enforcement

For the sale of goods over $500, there must be a writing or series of writings that evidence the parties, the subject matter of the contract, and the quantity term of the contract. However, as an exception to this requirement, as for goods delivered under the contract, the contract is enforceable with respect to those goods actual delivered, but not others agreed to by the parties that have not been delivered.

Here, there are a series of writings evidencing the parties because the name on the emails show Acme and Mary, the parties under the contract. Addtiionally, the

writings show the the subject matter of the contract because Acme's email contained the subject, exit signs andemergency lights. However, the quantity term is not in the writings because the email only says "necessary exit signs and emergency lights per sample."

Mary's Counter Defenses: Mary could argue this is some sort of requirements contract but that is really not applicable here because this should be a one time installation. However, she will have more luck with the goods delivered doctrine because the entire quantity term of the contract, the exit signs, was delivered on March 10th and the isntallation was "completed."

The contract, despite not satisfying the statute of frauds, will be enforceable because delivery and installation of the goods was "completed" as of March 10. However, if there were any more delivered after they would not be enforceable.

Breach of Perfect Tender

Under the UCC, a seller of good must provide perfect tender and the goods must conform, in all respects, with the requirements under the contract. If goods to not conform, perfectly, under the contract, the buyer of goods may accept all the goods, reject all, of accept some of the goods and not others. If the seller of goods ships non-conforming goods, they are treated as a breach of the perfect tender doctrine, if

there was no notice of accomidation. The buyer has a reasonable time to inspect before rejecting.

Here, the goods to did not conform to the time under the contract, March first, because the goods were delivered and installed March 10th. Additionally, the goods did not conform to the contract because the signs were "per sample" (referring to only steel exit signs and emergency lights) and Acme sent plastic signs and lights. Additionally, the terms did not conform to the contract because they were broken.

Acme's Counter Defenses: Acme could argue that they sent these non-conforming goods as an accomidation but this will not work because they did not provide a notice of accomidation and not only that, the contract was already formed by an exchange of promises, rather than a prompt shipment, by Mary's return email. Additionally, Acme could argue that Mary accepted the goods despite their obvious non-conformities because she did not send them a notice and she accepted the goods anyway. However, this argument will probably not work because Buyers of goods have a reasonable time to inspect and she had notified them in 4 days, March 10th was the installation and on March 14th Mary immediately sought to get other goods. Acme could also argue that Mary needed to give them a reasonable time to cure however, they were already 10 days late on performance and past the time for performance and there are no facts that show a course of performance of dealing that would justify additional time.

Acme breached the contract.

Breach of Express, Fitness For a Particular Purpose, and Implied Warranty of Merchantability?

An express warranty exists if a representation is given as to the quality of the goods and it becomes a basis of the bargain. A representation of fact and the showing of a sample can constitute an express warranty, but not mere sales puffery. Additionally, the implied warranty for a particular person exists if an expert person has special skill in goods, and another person relies on their expertise, with knowledge of the expert party, and the expert party has reason to know of a particular purpose. This warranty is breached if the goods to not live up to their particular purpose. Finally, every good sold by a merchant contains the implied warranty of merchantability that the goods are fit for their ordinary purpose. These warranties can be waived by a consicuous disclaimer or simple language such as "as is."

Here, there is an express warranty that the goods would be for steel exit signs and emergency lights because Acme's salesperson showed Mary the stock on hand, which only included steel signs and emergency lights. This became a basis of the bargain because Acme sent an email to Mary saying that they would supply and install the necessary exit signs and emergency lights "per sample", referring to the sample steel lights. Acme breached this warranty because it sold and shipped plastic lights rather

than steel ones.

Additionally, there is the implied warrant of merchantability here because Acme is a merchant. Additionally, this warranty was breached because the ordinary purpose was for lighting that works and for lighting that would not include lead and mercury because lighting is ordinarily used for light and by law can't contain lead and mercury. Acme breached this warranty because the lights were broken and also had lead and mercury in them, making them illegal.

Additionally, the is an implied warranty for a particular purpose. Aceme is an expert in lights because it specializes in interior commercial lighting. Additionally, Acme had knowledge Mary relied on Acme because she stated "Wahtever you recommend, I'm depending on you." Additionally, Acme knew of Mary's particular purpose because Mary told Bill, an Acme salesman, that she needed these lights for a movie theater, and Bill responded "we know all about movie theater lighting."

ACMES DEFENSE: Aceme will claim it waived the warranties because It had a contract term that stated "all warranties, express or implied, are excluded." However, Mary will retort that this was not conspicuous because it was in the middle of 25 untitled paragraphs of identical type, which included the term. This will not be consicuous enough for the court.

Acme probably breached all of these warranties.

Non-Assignability Clause

Generally, contracts are freely assignable, including rights and duties, except where a clause prohibits it or the assinee is not capable of meeting the demands of performance under the contract.

Here, the contract contained a non assignability caluse because a clause stated, in the standard terms that became part of the contract that any contracts we enter into may not be assigned. Here, Acme breached this clause because it assigned the duty to perform to Cahrlie's Contracting. Additionally, it appears that the assignee Charlies' Contracting, did not have the skill of Acme who specialized in lighting and "knew all about movie theater lighting," per Acme's salesman.

It appears that this was an invalid assignment because it was prohibitted under the contract and the asignee did not have the same skill.

Risk of Loss

Under the UCC, if the contract does not specify, the contract is a shipment contract, which means the seller shifts the risk of loss to the buyer once the goods are delivered

to a carrier and notifies the buyer.

Here, Aceme could argue that Mary bore the risk of loss for the broken lamps that were installed anyway because Acme delivered the the lights to a type of carrier, the assignee, Charlie's contracting and that Mary bore the risk for those broken lights.

However, Mary could argue that this was not a carrier because Charlie's was a purported assignee under the contract and that the seller, Acme, did not notify her.

On balance, Acme probably still bore the risk of loss because Charlie's was an assignee rather than a carrier and they never notified Mary, and the contract was mixed goods and services, including installation, therefore, it wasn't complete and tendered until installation.

Mary Repudiation?

A party may suspend their own performance or sue for breach if the other party breaches the contract.

Acme could argue that Mary repudiated her contractual duty to pay because she stopped payment on her check. However, Mary could more-successfully argue that

she just suspended her performance after Acme's Breach.

Consequential Damages

A party may be liable for any conseuential damages if that party had reason to know of the special needs of another party.

Here, Mary could argue for conseuqential damages for all the profits she lost from the latest star wars episodes, which was very popular and made a lot of money. She could argue that Acme had knowledge of the special time because she changed the delivery term up to March 1st rather than the 15th. However, although Acme knew about the time for performance there are no facts showing they knew about the need because of star wars. Had they known about the need to show star wars, Acme would e liable for a reasonable estimate of the box office receipts that Mary lost, due to the popular movie not being shown due to their breach. Acme would have been liable for two weeks of profits, including the special damages due to the star wars breach had she been clear about her special purpose.

Expectation Damages for Mary

A party to a contract is generally entitled to the benefit of their bargain.

Cover

Mary has a duty to try and make a commercial reasonable cover.

Mary had to buy replacement lights to to Acme's breach, which caused her to spend 6,500 more for replacement goods to Nevada Safety Lighting. There are no facts showing that this was not commercially reasonable.

Acme is liable for these cover damages.

Incidental Damages

A breaching party is liable for any incidental damages caused by a breach.

Here, Acme will be liable for the 10K that Mary had to spend to cancel her print and media ads and reschedule them because this expenditure was justified by the breach and caused by the breach. She would not have had to do that if Acme performed on time.

Acme Not

END OF EXAM

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EXAM DAY 1, QUESTION 3

3)

This question involves property law.

Fee Simple Absolute: Originally, both Alice (A) and Bob (B) own their respective lands in fee simple absolute. This is absolute ownership of land that is freely transferable, alianable, and devisable.

COVENANT BETWEEN A AND B

Restrictive Covenant: A restrictive covenant is a negative easement in land that prevents the owner of a parcel from using the parcel in a certain way or conducting certain activities on the parcel. To create a valid restrictive covenant that applies to subsequent property owners, there must be intent between the original parties that the covenant continue, the covenant must touch and concern the land, there must be horizontal privity between the original creators, vertical privity between subsequent owners, and notice to subsequent owners.

Intent: Here A records a writing covenanting that neither A or her "heirs, successors and assigns" will use whiteacre (WA) for anything other than residentail use. This writing shows an intent for the covenant to continue.

Touch and Concern: Because this involves A's ability to use her land for anything other than residential purposes, it touches and concerns the land.

Horizontal Privity: Typically horizontal privity means a non-hostial connection between the parties that created the covenant. Here the parties are neighbors but

nothign indicates B sold WA to A or had any connection or interest in WA other than being a neighbor. Accordingly, a later owner challenging the covenant could make an argument that horizontal privity did not exist and no covenant occurred.

Vertical Privity: This is a non-hostile connection between a prior land ownder and the current landowner. Carol (C) eventually takes a life estate from A and therefore has vertical privity with A.

Notice: Notice may be actual, constructive, or record. Here the covenant is recorded in a document with the land, creating record notice to any subsequent purchasers or owners of WA.

Because horizontal privity is likely missing, a restrictive covenant on WA will not likely flow to any subsequent owners of WA. However there may be an equitable servitude.

Equitable Servitude: An equitable servitude only requires: 1. intent; 2. notice; and 3: Touch and Concern the land. As discussed above, these 3 elements are each satisfied. The difference between an equitable servitude and a restrictive covenant is the remedies sought. Equitable servitudes are enforced with equitable remedies (injunctions, tro's, specific performance, etc), whereas restrictive covenants are only enforceable through montary damages at law. B likely has an eforceable equitable servitude as to A regarding her use of WA (subject to all equitable defenses).

EASEMENTS:

Generally: An easement is a right to use the land of another in a specified way or for a specified purpose. An easement appurtenant runs with the land, meaning the owner

of a dominate parcel has the right to cross or use the servient parcel as indicated by the easement. An easement in gross is not attached to any land rights but gives a person the right to enter and use the servient parcel for a specific purpose. Here, it appears the parties intended to create an easement appurtenant via a driveway that would give both A and B the right to use the driveway (that originally was intended to sit on both properties).

Types of Easements: Easements may be express, implied (easement by necessity or easement by prior existing use), or negative (covenants and servitudes). An easement may also be created by prescription. Here the parties intended to create an express easement but B mistakenly built the driveway entirely on WA. The question becomes what are B's rights to use the driveway.

License: A license is permission for the license holder to come onto the land of another. B could argue that even though the driveway is entirely on WA, he has a license to use the driveway based on the intent of the parties in buidling the driveway. While a license is generally revocable at will, it becomes irrevocable if it is coupled with an interest or the license holder expended funds in reliance on the license. Here B spent the funds to build the driveway and could argue he therefore holds an irrevocable license to use the driveway. However, because a licensee is not assignable, when B sold his property to D, the license disappears and D may not rely on the license for purposes of using the drive way.

Necessity: An easement by necessity arises when two parcels were originally one large parcel and the easement is necessary for the reasonable use and enjoyment of the dominant parcel. Here, nothing indicates WA and BA were originally one large parcel. Futhermore, the facts indicate both have access to public roads. While Nevada does not require total necessity for an easement by necessity, it does require more than mere inconvenience to create such an easement. Since it would appear BA used his public road and had access to it well before teh driveway was built, there is not easement by necessity.

Prior Existing Use: Against, prior existing use requires two parcels that were originally one large parcel and that the easement was used upon division of the properties with intent that it would continue in its use. This does not apply to the facts here.

Prescription: An easement by prescription arises when there has been: 1. continuous; 2. open and adverse; 3. use of an easement; 4. For the statutory period. In Nevada, an easement by prescription arises after 5 years. As noted above, D may not rely on B's license to use the driveway, so it will likely require D to establish an easement by prescription.

Continuous: The facts indicate B used the driveway since he built it without interruption. After B transferred his land to Dick (D), D continued to use the driveway (easements run with the land not the owners). He did not stop until C built

the block wall around WA. During this, at least, 10 year timeperiod, use was continuous. (Tacking - For prescription and adverse possession purposes, parties that are in non-hostila vertical privity may tact together their team for purposes of satisfying the statutory obligations, however, since D used the driveway for at least 5 years, that is not necessary here).

Open and Adverse: D openly used the driveway, even continuing to drive around the gate built by C so that he could continue to access the driveway. This behavior is open and certainly adverse to C's wishes when she put of the coded gate.

Statutory Period: Nevada Created a 5 year statutory period for gaining an easement by prescription. It would appear D satisfies the requirements for an easement by prescription and should have therefore brough an action to record the easement. If he does not bring such an action, however, the block wall is likely sufficient to destroy the easement, even if by prescription.

Destroying an easement: An easement may be destroyed by agreement of the parties, estoppel, destructing of the dominant tenament, emminent domain/taking, and by prescription. C's act in building a stone gate around WA that cuts off D's access the the driveway is sufficient to constitute a blockage of the driveway, and therefore start the time for ending any prescriptive easement acquired by D. The gate did not accomplish this since a blockage must prevent complete use of the land in question yet D was able to simply drive around the gate.

D against A: A gave C only a life estate. This means that A has retained a

reversionary interest in WA. Upon C's death, the property will automatically revert to A. D could therefore create an argument that he has a constructive easement in the use of the driveway based on A's dealings with B and the fact that B and D are in vertical privity. This claim is likely to fail given C's actions in attempting to destroy the easement.

SHOPPING CENTER

As discussed above, because there was no horizontal privity between A and B in creating the restriction recorded on WA, the likely result is a equitable servitude. Enforcement of the equitable servitude will run to C through A because C had record notice, the servitude touches and concerns the land, and there was intent for the servitude to continue. While equitable servitudes do not require horizontal and verticle privity, I would not there is vertical privity between B and D due to the non-hostile transfer of B's interest to D in fee simple.

Enforcement of Equitable Servitude: Remedies for breach of equitable servitude are equitable remedies. Equitable remedies are only available to a party where the legal remedy is insufficient, enforcement of the equitable remedy is feasible and the court considers a balance of the burdens on the defendant if the equitable remedy is granted. D would need to seek an injunction in this case blocking C from building the shopping center.

Enforcement: Here, enforcement is easy to monitor. The court could issue an

injunction blocking the building (and D could also seek an interlocutory injunction prior to trial to stop the building if he should reasonable likelihood of success on the merits and irreparable harm). There would be no ongoing monitoring because C would simply be unable to build.

Balance: The court must balance the interests of the proeprty owners. Of note, while C owns a life estate, A and her heirs/devises have a vested reversionary interest in the property. Building a shopping center if outside the regular use of the property could be considered amerliorative waste. A life tenant has a duty to not commit waste to the property. Waste may be permissive (failure to upkeep buildings, pay interest on mortgage, pay property taxes), voluntary (waste of resources on the land outside of necessary use or use in line with previous use), or ameliorative (waste that increases the property value of the land but changes the character/use for reversionary interest holders and is done without their consent). Changing the use of WA from residential to a shopping center would very likely increase the value of WA but would constitute a change in character sufficient to establish amerliorative waste, therefore, because C does not automatically have this right to use teh land in such a way, the burden on her to keep the land residential is small.

Equitable Defenses: C would need to raise equitable defenses to an injunction. Equitable defenses included laches, unclean hands, and estoppel.
Laches: C could argue that the passage of time from A agreeting to the servitude to D's enforcement makes it unreasonable to enforce the servitude. It appears

approximately 10 years have passed since the servitude was recorded so this is likely to be an unsuccessful argument as C would have had record notice in taking her life estate of the covenant and has only been on the property 5 years.

Unclean hands: This occurs where the plaintiff is engaging in the same behavior he seeks an injunction against. Here, while D may be engaging in hostile behavior by his use of teh driveway, he is not violating anything relevant to the covenant created by A and B. C will therefore lose this defense.

Estoppel: Estoppel can occur where parties allow others to get away with violating a servitude, or there has been a change in character of the land sufficient that enforcement would deprive the owner of reasonable use of the land. Nothing in the facts indicates that WA is not in a large commercial zone or that WA is no longer suitable for residential use. Accordingly C will likely lose this argument.

D will likely be successful in enforcing the recorded equitable servitude on WA.

Note: A could join in this action if she so chose due to her reversionary interest.

Were the covenant to comply with restrictive covenant elements, B could seek any monetary damages to his property as a result of the breach of covenant however, he would need to show property damages (trespass, nuisance, etc) as a result of teh shopping centers construction.

END OF EXAM

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EXAM DAY 3, QUESTION 1

1)

Assembly Bill #1

Dormant Commerce Clause: The first issue is whether Assembly Bill 1 (heainafter AB1) violates the dormant commerce clause. Purusant to the Commerce clauseCongress has the right to regulate interstate commerce. This includes instrumentalities, channles of interstate commerce and anything that subsntatially effects interstate commerce. IF the activity is ecomimic in nature, courts will look at the aggregate effect of the activity to determine if it affects intestate commerce. Under the applicaiton of the dorment commerce clause, the states may not burden interstate commerce with regulations. If the state passes law discriminates against out of state commerce, the state must have a commpelling reason for that law and there must be no less discirmmantory means for it. If the law does not discriminate against interstate commerce, the effect may not be one that substantially burdens (or hinders) interstate commerce.

A law discrimates against intersterstate comemrce if tthe law makes it so there is a benefit to interstate commerce (at the expense out commerce form other states) or if it prohibits commerce from other states from entering. Here, AB 1 requires state agencies to purchase computer softweare only from companies whose technical suppor servces are located in Nevada. Software (buying and selling) is an instrumentality of commerce, and the buying and selling of it implcates the commerce clause. This is dsicrimiantory against out of state commerce beacuse it makes it so out

of state software companies will loose the business of state agencies. Thus, the law must meet a higtened level of scruinty to be valid (unless it fits within an exception, as will be discussed). Here, the purpose of the law is to avoid delays and disruption, and invonencie that was occuring when the agencies had to wait for the companies to address certain problems. Officails testfies taht the dealys delay disrputed the work of agecny personnel and were invconenent to NEvada residents who interacted with the agencies. While this reason makes the AB 1 rationally realated to the issues at hand, this reason alone is likely not enough to pass the higher scrinity requires when a state discrimiantes against out of state commerce.

However, there are exceptions to the dormant commerce clause, including the market particpant exception and congressional authoirization (not applicable here). Under the market participant exception, if a state actor is acting just as anyone else would in the market place, it may dicriminate agsint out of state commerce. For istance, if the state was sellling an item such as timber, it could require that that it would first sell to those instate. Here, the state agencies are acting as market particpants beacuse they are buying computer software. Beacuse the state agencies have a choice of who they want to buy software from, here, a court would likley find that this law fits within the market particapnt exception. AB 1 does not ban anytone from buying from out of state providers, just for its own businesses, it wants to have a more effiecent workplace.

Privleges and Immunities Clause of the Constitution: The second issue is whether the discrimontory nature of this law discussed above vioaltes the privleges and immunites clause. Under the privileges and immunites clause, the state may not

pass a law that disrimnates against out of staters and affects those out of staters fundemtal rights or thier livehood. However, the privlege and immunites clause does not apply to corporations. Here, AB 1 discrimnates against out of staters and arguablly effects the livlihhods of those who provide techical support services. Howerver, AB 1 is written towards discriminating against coropartions (as it says state agencies are only to prucahse computer software from companies who tecnhcal support services are located in Nevada), therefore, it would liklely survivce a privileges and immunites challenges.

Equal Protection: A company may bring a challenge under the equal protection clause of the US Constiution, as it applies to the states through the 14th. Under the equal protections clause, the goverment may not makes laws that treat peope/groups differently that are in the same posistion. Here, however, busines is not a protected class so the law need only to meet rational basis review - ie , the law must be rationally realted to serve a legitimate goernment interest. Here, AB1 has a legitmate gov interest- to make the work palce more effeicent and not annoy NEv resdients. By only allowing software to be purcahsed from comapnies who service teams are in NEvada, this law is rationally realted to that interest beacuse it means that it will take less time for the service teams to fixt the problems. Thus, there is not EPC violation.

Contracts Clause: Also of note, AB 1 could violate the contract clause if the state agencies already had a contract for services with certain comapines who they no longer could use beacuse they did not sell softeware in state.

Assembly Bill 2: (AB2)

Equal Protection Clause (EPC). The first issue is whether the fact that a court reporter must be a United States citizen and sucesfully pass an exam is a vialtion of the EPC. A court reporter may bring a challenge under the equal protection clause of the US Constiution, as it applies to the states through the 14th. Under the equal protections clause, the goverment may not makes laws that treat peope/groups differently that are in the same posistion. Here, the law makes a catoegorical distinction between those who are and who are not United States Citizens. Certain supsect classes are given hightneded scruinty if a law makes a discintion based on thier status. Suspect classes who are entitled to strict scruinty under the law include categorizations based on race, religion, natitional origin, and aliange (some of the time.) If the law facially discrimnates agasint theses groups (or the laws intent and effect is to treat these classes differntly), then the law must be necessary to serve a compelling government interest. However, disctinctions based on alienage must only meet strict scruinity if 1) the law is made by the states, and 2) is not aimed at preserving the right to self government. If it is made by congress or the states to perserve right to self government, it need only meet reational baisis review (rationally realted to a legit government interest). AB 2 requires court reporters to be US citizens. A court woul not likley find that a court reporter is a job that implicates the right to self goverment. While courts have determiend that police officers, judges, teachers, and jurors do implicates this right, as acourt reporter does not have the deicision making, discretion, or effect that these other positions have, a law that catoegorizes US citizes vs. non US for court reporters would have to meet strickt scruinty. There is not reasons given in the facts that would indciate why the state would have a

compelling reason for this law. However, there is likely none, so the US requirment would fail on constiutional grounds.

Requiring someone to pass an examine that test the applicant's knowledge of legal termainonly would only be evaluated under rational basis review if someone challeged this porvision to say it makes a discintion based on those who could pass and those who could not. If the state had a letimate reason for this law, making court reporters pass a test would be reationally realted to it.

Due Process Clause: This law may also be challenged as infrining on a person's fudmetal rights under the Due Process Clause. The right to earn a livehiood is a fundmetnal right. However.

Assembly Bill 3: (AB 3)

At issue is whether AB 3 violates the 1st Amendment, specifically establisment clause of the consituion. Under the Establishment Clause, there can be no excessive governent entaglment with religion. Courts implicate two tests (Lemon and Marsh) to determin whether the law violates the Establishment clause. Under the Lemon test, a law will be uphled if it has a secular purpose and neither advances nor inhibits a religion, and there is no excessive government entaglement,. Under Marsh, even if a law vioaltes the Lemon test, it can be upheld if it is so rooted in the history and tradition of the naation. First, AB 3 triggers the estalsihment clause beacause it applies to public schools. Here, AB 3 does not mandate that the students do yoga or the slient medidation. The law seems to have both a secular an non secular purpose. Its purpose is to clam agressision, reduce injury, and combat chilhood obesity. These

goals would the firts prong of Lemon beacuse they are secular (ie non religious); however, people would argue that promoting the spirtual aspects of yoga is relgious, and thus not secular. Second, yoga and emdiation arguablly promote relgion, especially since they are at the cetner of certain relgiigons such as Buddasim. Nonethelss, it would be argued that yoga and mediation are more geared to self mindfulness, and thus are not directed promooting or advacning a ceraint relgioin. Third, beacuse the public school are only giving the option in replace of gym, a court would likle find this was not excesive government entaneglment with relgion. Overall, a court would likely not find this law vioaltes the establishment clause, although it would be a close call because allowing prayer in schools has been deemed to vioalte the establsihment clause.

END OF EXAM

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APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

EXAM DAY 3, QUESTION 2

2)

QUESTION # 2

1) Solicitation

An attorney may not solicit clients into representation if the contact is in-person or telephonic. However, an attorney may solicit clients into representation by mail if the attorney does not solicit individuals he/she knows need particular type of representation. If by mail, the solicitation must clearly state "ADVERTISEMENT" in red ink on both the envelope and the document inside the envelope. The solicitation must be truthful and cannot be misleading under the constitution and cannot make any guarantees, as guarantees are misleading.

Abe violated the solicitation law because the solicitation did not say "ADVERTISEMENT" on the outside of the envelope and on the document on the inside of the envelope. Furthermore, Abe gave a guarantee of a particular result when he stated "Abe knows all the right people to get you the best result," thus Abe violated the law that prohibits guarantees. Furthermore, attorney's cannot guarantee a result by implying you know the right people to get the individuals the verdict they want because this suggests impropriety and reflects negatively on the profession. This also violates Abe's duty of candor with the court.

However, Abe did not violate the solicitaiton law requiring he not solicit people with particular ligitation needs, because Abe sent out a "mass mailing" rather than seeking out particular individuals. Abe is permitted to state his name, phone number,

that he is a licensed attorney and that he was a former distrcit attorney because these facts are all true and permitted by the Nevada laws.

2) Duty of Loyalty to prospective clients.

An attorney owes a duty to prospective clients to keep the information the attorney gains in the consultation confidential. Since the person to be the client is Samual, rather than Dan, and Dan called on behalf of his son, there is an issue as to whether Samuel really is a prospective client of Abes, especially since Samuel is an adult rather than a minor. However, the information Abe gained as a result of this consultation is still confidential even though he did not hear the information directly from Samual himself. Thus Abe owes a duty to Samuel not to reveal the information he gained about Samuel and his case as a result of the consultation with Dan.

3) Duty of Loyalty

An individual may offer to pay the expense of another's litigation costs. However, the client must give informed written consent, and the payor may not exert any influence of how the case progresses or make any decisions relating to the representation, may not influence the attorney or the outcome, or how the attorney handles the case.

Here, Dan wishes to pay for Samuel's litigation costs, which is permissible, but Samuel must give informed written consent, which he did not. Furthermore, Dan is already attempting to influence the progression of the case by stating he wants the case to go to trial, even though he admitted this is against Samuel's wishes. This is a

big problem, because a client has the final say in whether to enter a plea, and no one else can make that determination, even the client's attorney, let alone the client's father. Thus, if Abe accepts Dan's payment, he must get informed consent from Samuel and must advise Dan that Dan will not have any say in how the representation or case is run or determined.

4) Dut of Obedience regarding a Client's decisions.

A client has the final determination of whether to settle or go to trial, whether to pleade guilty, and whether to testify during a criminal trial, and his/her attorney must abide by those decisions. Samuel wants to enter a plea deal, while his father wants him to go to trial. Abe has a duty to his client to abide by his decision to settle even if the attorney himself thinks its a bad idea or another individual thinks its a bad idea. Thus Abe has a duty to enter a plea deal according to Samuel's wishes and not to go to trial.

5) Attorney's fees

Attorney's fees must be reasonable and in writing. Attorney's fees must be reasonable under the circumstances, depending on things such as the skills required, the time involved, and whether the issue is novel. The attorney must explain his fees and break them down for the client, whether the fee arrangement is a contigency fee or a flat fee. Contingency fees are not permissible in criminal cases or domestic cases. This is a criminal case since it is a robbery and conspiracy case, therefore contingency fees are impermissible. Any payment by a client or an individual paying on the client's

behalf must be put in the client's trust account.

Abe required Dan to pay a 100,000 non-refundable retainer, but failed to state why the cost was that high and failed to break down the fee agreement for Dan. $100,000 plus attorneys fees and costs seems excessive and unreasonable since Samuel wants to enter a plea deal and not go to trial, and since Abe is familiar in this ara of law since he was previously a district attorney. Thus Dan violated this regulation. However, Abe properly put the money in Samuel's client trust account.

6) Client trust Account.

An attorney must place all of they client's funds into a separate client trust account and may only withdraw money when the lawyer has performed services that enable him to withdraw money from the account. An attorney may not borrow money from the client trust account and may not withdraw funds before he/she performs the services equal to the money they wish to withdraw.

Abe violated this regulation and must be disciplined because Abe "borrowed" $2000 from his client trust account, which is impermissible. It does not matter that he gave a promissory note and agreed to pay back with interest because borrowing money from a client trust account is strictly prohibited. It also does not matter that he borrowed the money to purchase a computer for an office function because that money in the client trust account is not his until he actually earns it.

7) Unauthorized practice of law.

Non-attorneys who are not licensed may not perform duties that are primarily

done by a licensed attorney, such as meet with clients, retain clients, and render legal advice. However, non-attorneys may assist attorney's with non-legal duties such as filing paperwork and secretary work such as connecting the clients to the attorney. Non-attorney's may not solicit legal representation unless the attorney himself would be able to do so, thus non-attorneys may not perform in-person or telephonic solitication of clients.

Lucy is a non-attorney hired by Abe. Thus she may not meet with clients and also may not solicit clients if Abe would not be able to solicit clients in that situation. Abe had Lucy "meet with prospective clients" which is unauthorized practice of law since non-attorney'a may not meet with prospective clients since they are not authorized to render legal advice. Abe also had Lucy have the prospective clients sign a representation agreement, which is impermissible, because this means Lucy is having client's sign legally binding documents which is not permissible by a non-attorney because it involves rendering legal advice. Lucy violated the unauthorized practice of law.

When a non-attorney violates a Nevada regulation, the supervising attorney is responsible for the actions of the non-attorney if they knew about the actions and did nothing to rectify them, or if they directed the individual to act in a certain way that the attorney knows is a violation of the law, or if the attorney later ratifies the conduct. Thus, Abe will be responsible for Lucy's violations of the unauthorized practice of law because he directed her to perform solicitation of prospective clients.

8) Conflict of Interest.

Before retaining prospective clients, attornys must perform conflicts checks in order to ensure there is no conflict of interest between concurren clients the attorney is representing. A concurrent conflict exists if the attorney believes there is a substantial risk his/her representaiton of either client will be materially limited. An attorney must not take on a new client if the prospective client's interests are materially adverse to a current client's becuase they attorney will not be able to adequately, competently, and zealously represent both clients.

Thus, Abe violated this law when he failed to perform conflicts checks before meeting with prospective clients and having prospective clients sign the legally binding representation agreement. Abe cannot delegate this duty to Lucy because Abe must be the one to determine whether his representation of either client will be materially limited and a non-attorney not working on the cases cannot make this decision for him.

9) Unauthorized practice of Law

Non-attorney's may not meet with prospectice clients. While the duty of confidentiality is not at risk here since agents of the attorney are permitted to know confidential information in order to assist the attorney in representation of the client, non-attorney's may not render legal advice or meet with clients and mislead them into thinking the non-attorney may render legal advice if asked. Frank revelaed confidential information to Lucy when he stated he had pending felony charges, thus Lucy may not reveal this information to anyone except Abe. Furhermore, Lucy had a prospective client sign legally binding representation agreement which a non-attorney

is not permitted to do. Thus Lucy violated the unauthorized practice of law.

When a non-attorney violates a Nevada regulation, the supervising attorney is responsible for the actions of the non-attorney if they knew about the actions and did nothing to rectify them, or if they directed the individual to act in a certain way that the attorney knows is a violation of the lawor if the attorney later ratifies the conduct. Thus, Abe will be responsible for Lucy's violations of the unauthorized practice of law.

10) Misleading Advertisement

Attorneys and agents of the attorneys may not make guarantees about the representation the attorney will provide or provide misleading information regarding the representation. Here, Lucy told a prospective client that "Abe is the best criminal defense attorney in Nevada" which is misleading since Abe just recently became a defense attorney and thus is a new defense attorney and therefore cannot be the best. Furthermore, the "best attorney" is an empty promise that cannot be delivered since what qualifies as the "best" is a subjective determination.

When a non-attorney violates a Nevada regulation, the supervising attorney is responsible for the actions of the non-attorney if they knew about the actions and did nothing to rectify them, or if they directed the individual to act in a certain way that the attorney knows is a violation of the law, or if the attorney later ratifies the conduct. Thus, Abe will be responsible for Lucy's violations of the unauthorized practice of law since he told Lucy to meet with prospective clients.

11) Conflict of Interest - Concurrent clients.

A concurrent conflict exists if the attorney believes there is a substantial risk his/her representaiton of either client will be materially limited. An attorney must not take on a new client if the prospective client's interests are materially adverse to a current client's becuase they attorney will not be able to adequately, competently, and zealously represent both clients. When a prospective conflict exists, the attorney must assess whether he can competently represent both clients. When there is an actual conflict, the attorney must reassess whether he can competently represent both clients and must inform the clients of the conflict of interest and get their informed consent or withdraw. In a criminal case, an attorney may represent co-defendants, however, in a criminal case there is a very high likelihood the interests of the clients will diverge. Thus, the law discourages attorneys from representing co-defendants.

According to Dan, Samuel was "dooped" by his "hooligan friends" which would include Frank, the co-conspirator Abe just retained. Thus, there is a likelihood and probability that the interests of Frank and Samuel will diverge because Frank will state he did not convince Samuel to do anything, while Samuel will say the opposite, and this is the crux of a conspirator case. Thus, Abe should withdraw from representing Frank since Abe has already acquired confidential information regarding Samuel and since Samuel is already a client.

END OF EXAM

FEBRUARY 2016
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EXAM DAY 3, QUESTION 3

3)

The Nevada Rules of Evidence found in the Nevada Revised Statutes apply. This question asks about the admissibility of 5 pieces of evidence.

Preliminarily, the Nevada Revised Statutes provide that evidence must be relevant to be admissible. Evidence is relevant if it has any tendency to make a material fact more or less probable than it would be without the evidence. Evidence that is relevant may still be excluded under other gounds enumerated under the rules.

1.

Is Mark's (M) testimony that Steve (S) insisted M would make a profit admissible?

Challenges to this statement might be made under the hearsay rule and under the parol evidence rule.

Hearsay. Relevant evidence may be inadmissible if it is hearsay. Hearsay is an out of court statement offered for the truth of the matter asserted. M's statement is relevant because it tends to make the allegation that S guaranteed M a profit more likely. However, the statement could initially be contrued as hearsay because S's statement was made out of court and M is offering the statement to prove S was guaranteeing a profit.

However, the statement is not actually hearsay because the rules specifically exclude statements of an opposing party offered against the opposing party. M is offering the statement against the interests of S. Therefore, the statement is not hearsay.

Parol evidence. The statement still might be excluded under the parol evidence rule. Parol (meaning "oral statement" in old Frech) evidence is statements of the parties to a contract made prior to or contemporaneously with the execution of a written agreement. The general rule is that parol evidence may not be admitted to contradict the terms of a fully integrated written contract.

Here, a written contract exists, and could be construed as fully integrated. Contracts often contain a merger clause, which states that the writing is complete and final, and merger clauses are probative of finding an integrated agreement. Here there is no such clause. But a merger clause is not required for a finding of integration. M's statement might be excluded because it directly contradicts the clause stating, "Steve does not guarantee his distributor's profitability."

However, parol evidence can be admitted to demonstrate the existence of a condition precedent upon which the enforceability of the contract depends. M's testimony that S said M would not have to pay the contract if M was not making a profit is probative of the existence of a condition precedent and therefore will not be excluded by the parol evidence rule.

This may still be a close question though since the actual terms of the written agreement disclaim the grounds of the alleged condition precedent. For this reason, courts might give inconsistent answers regarding the admissibility of the statement. However, most courts will probably allow M's testimony since it constitutes an exception to the parol evidence rule.

Testimony of M's brother & CPA that before the contract was signed, M told brother about S's representations

Out of court statements of a party are hearsay if they are not admitted against the party. Here, M's brother wants to testify about statements M made outside of court for the benefit of M. Therefore, the statement appears to be hearsay.

However, prior consistent statements are not hearsay if they are made to rebut an express or implied allegation that the speaker had a motive to lie. The prior consistent statement must have been made before the motive to lie arose.

Here, S has accused M of lying because M does not want to pay what he owes under the contract. M's prior consistent statement to his brother was made before he had a motive to lie about S's representations. He had not yet signed the contract and did not know he would not make a profit selling S's stucco. Therefore, the prior consistent statement is not hearsay. It is admissible both to rehabilitate M and for the truth of the matter asserted.

The CPA's testimony is inadmissible hearsay, however. M spoke to the CPA about S's represenations at the time the second payment was due under the contract. Therefore, M knew he wasn't making a profit and had probably already decided not to make the payment. His alleged motive to lie had already arisen by that point. Therefore, the CPA's testimony about the prior inconsistent statement is inadmissible because it is hearsay not falling within any exception or exclusion.

2. M's expert witness Bob (B)

Expert witnesses are competent to testify if they are shown to possess specialized knowledge in their stated field and their testimony would be helpful to the finder of fact. The competency requirements do not require that the expert possess advanced degrees or specialized education or training. They can acquire their specialized knowledge through practice, experience, study, or other means. Their prior training, experience, and education goes to the weight the finder of fact should give to the testimony.

Therefore, the fact that B is not a colelge grad and has no professional license does not necessarily render him incompetent to qualify as an expert witness. He seeks to testify as an expert in lost profits. It is the judge's prerogative to decide whether B is competent to testify. If the judge concludes B possesses specialized knowledge about the economics of small construction companies that would be helpful to the finder of

fact, B may be allowed to testify. S may have the opportunity to voir dire the expert witness to determine the extent of his expertise and qualifications. The finder of fact should consider the expert's background and qualifications in determining the weight that should be accorded to the testimony.

The expert may base his opinion on evidence heard at trial or on other information not necessarily admissible at trial but which other experts in the field would reasonably rely upon in drawing their conclusions. The expert must use generally-accepted practices in reaching a conclusion.

Because B has extensive experience bookeeping and managing the finances of small construction companies, he will probably be allowed to testify as an expert regarding M's lost profits. Testimony regarding the lost profits is admissible because it is relevant to damages, which is an essential element of M's claim.

3.

S's expert's written report and deposition.

S wants to offer the written report of his expert witness with an affidavit authenticating the report. The reason the expert is not present to testify is because he was on vacation.

The Nevada Rules of Civil Procedure require the pre-trial disclosure of expert

testimony. Expert's written reports are prepared and disclosed as part of discovery. If a party fails to comply with discovery rules regarding disclosure, that party risks being unable to admit omitted evidence, including omitted expert witnesses, at trial. Here, S has complied with the discovery rules, but wishes to admit the expert report as an exhibit since the expert is unavailable to testify.

Writings must be authenticated to be admissible. Authentication usually occurs when a witness who has personal knowledge about the writing testifies as to its authenticity. Sometimes, trial testimony can be had in the form of a sworn statement such as an affidavit. Here, if the court admits the expert's sworn statement, it could be reasonable to conclude the statement contains sufficient authentication for the admission of the expert report.

However, the affidavit is irrelevant since expert's written reports are generally not admissible and may not be published to the jury at trial. They are hearsay. They are often helpful in preparing for trial and for the parties to discern the nuance of an expert's analysis. However, the expert generally must appear at trial to provide the expert testimony for the trier of fact. The expert report is not admissible.

S also wishes to admit the exxpert's deposition from another similar case. Prior sworn statements, in some circumstances, are not hearsay and may be offered to provde the truth of the matter asserted. For prior sworn statements to be admissible, the testifying party must have been subject to cross examination by the other party. M

was not a party at the other trial, so he could not have cross examined the expert at the time the statement was made. The confrontation clause protects M's right to confront his accusers, if the testimony is testimonial. Deposition testimony is certainly testimonial. Therefore, the deposition is not admissible.

4.

Emails between M and former employer

Mark's emails may not be relevant. S's lawyer is asking about what M's former employer said about the risks of going into business for yourself. This may tend to show M's negligence in opening the business and losing profits, but this does not appear to be a defense to breach of contract. Further, it might be offered to show M's character for carelessness or negligent business practices. Character evidence is evidence which shows a propensity to act or behave in a certain way and is generally not admissible. Because they are irrelevant and because they may constitute character evidence, M's emails are not admissible.

If they are relevant and are not character evidence, the emails may be admissible under a hearsay excdption. Any document may be shown to a witness to refresh the witness's recollection. Once the document is shown to the witness, the attorney asks whether the witness's recollection has been refreshed. Generally, the document is not read or published to the jury.

However, if the document does not refresh the witness's recollection, the document may be read to the finder of fact if it is shown the witness recorded the information when the information was fresh in the witness's mind. The document is not admissible as an exhibit, however.

Here, M does not recall the content of the emails, so it was proper for S's attorney to attepmpt to refresh M's recollection with the emails. However, when M still could not recall the emails, S should have asked if M remembered making the emails and if the emails were made between M and his former boss. At that point, S's attorney could have read aloud the content of the emails in open court. The documents themselves would not have been admissible unless M's attorney requested their admission.

5.

Judicial notice

The court may take judicial notice of facts if those facts come from a source that is readily verifiable and not subject to serious dispute. The contents of court dockets in other cases are often viewed as reliable sources. However, Nevada case law states that courts should rarely take judicial notice of other proceedings unless those proceedings are similar or closely related to the case at bar. for example, judicial notice of an underlying case in a legal malpractice action would be an appropriate exercise of the court's judicial notice. Here however, the testimony in another case is hearsay.

However, a transcript of that testimony might be admissible since the statement was made under oath and S had the opportunity to cross examine that witness at the prior proceeding. Therefore, the testimony does not violate the confrontation clause and is not hearsay. The testimony could be admitted as a prior bad act probative of truthfulness.

END OF EXAM

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EXAM DAY 3, QUESTION 4

4)

Note on Strict Products Liability: In a strict products liability aciton, the plaintiff must be a user or consumer of the product. The plaintiff may only recover for personal injuries, not for property damage or other economic losses.

Here, Ann suffered serious injuries will using a saw made by Cut and rented to her by Nevada Saws. Thus, among other causes of action, Ann may assert strict products liability claims against NV Saws and Cut.

1) Ann v. NV Saws

Express Warranty: A manufacturer or retailer is liable for a braehc of express warranty when the retailer mades an express warranty to the consumer or use that a product will function as it is described or as demonstrated by a floor model. The warranty must be based on an objectively verifiable fact about the product, mere puffery or sales language is not actionable.

Here, Ann will argue that NV Saws warranted that the saw was the safest on the market, a fact which is verifiable through looking at data about accident rates. The warranty was breahced because a study showed the saw was 10 times more dangerous than other saws on the martket. NV saws will counter that safest is merely sales language, all saws are unsafe if used improperly. It is likley a court will hold that the safest language is actionable warranty given that there is an objective study that demonstrate how dangerous the safe really is.

Negligence: In order to state a claim for negligence, plaintiff must show that the defendant owed her a duty, defendant breached that duty, the defendant's breach caused the plaintiff's injury and plaintiff suffered injury.

Duty: A defendant owes all foreseeable plaintiffs a duty of reasoanble care. The duty of reasoanble care requires that the defendant act as a reasoanbly prudent person would in the defendant's situation. Here, Ann will allege she, as a customer of NV saws, is a foreseeable plaintiff and that NV Saws owed her a duty of reasoanble care. Court will likely find NV Saws owed her a duty of reasoanble care.

Breach: A breach occurs whenever the defendant behaves differently than the reasonably prudent person in his situation would. Here, Ann will allege that NV Saws breached its duty when it failed to pull the dangerous saw from its rental rotation or alternatively replace the warranty sticker. Ann will argue that a reasonably prudent retailer would have checked the warning sticker and replaced it when it got worn out because to do so would be inexpensive and would prevent serious harm. A court will likely find NV Saw's breached its duty by failing to replace the warning sticker.

Causation and Damages: The defendant's breach must be an actual or but for cause of the plaintiff's injuries (i.e. but for the defenant's breach, the plaintiff would not have been injured). The defendant's breach must also be the proximate cause of the plaintiff's injuries, i.e. the plaintiff's injury was foreseeable at the time of the

defendant's breach. Once the first three negligence elements are established the defendant is liable for all of the plaintiff's injuries no matter how severe (egg-shell plaintiff rule).

Here, Ann likley satifies actual and proximate cause. But for NV Saws' failure to warn her or failure to take the saw off its rental rotation, Ann would never have been injured. NV Saws may argue that its failure to replace the warning sticker was not an actual cause; the brace language is too vague and even if Ann had braced the saw's recoil may still have knocked her over. However this is unavailing since Ann likley did not brace at all and she has the alternative breach theory that NV Saws was negligent in renting the defective saw in the first aplce. Additionally, Ann's injuries, arising from the saw's recoil, was foreseeable at the time NV Saw's failed to replace the warning stick which would have informed Ann to brace for impact. Thus NV Saws will likely be liable for Ann's injuries under a negligence theory.

Comparative Negligence: NV is a partial comparative negligence state. This means that the plaintiff will recover as long as his fault does not exceeds the defednant's fault. However the palintiff's recovery will be reduced by her degree of fault. Here, Ann is likely not at fault for her own injury, she chose what she thought was the safest saw on the market from a reputable dealer and used the saw "carefully." Thus Ann's recovery will likely not be reduced.

Conclusion: Ann likely has a negligence cause of action against NV Saws.

Note on Strict Products Liability: All entities in a product's supply chain are liable under a strict products liability theory. This includes retailers who sell or rent the product to the public.

Here, Ann can bring a strict products liability action against NV Saws since it rented the saw to her. Strict products liability analysis follows in the next section.

2) Ann v. Cut (manufacturer)

Warranty: See above for rule. Here, Cut did not make any representations to Ann herself. There was nothing on the saw itself that looked like a warranty nor do the facts indicate that Cut told NV Saws to repeat the safest saw motto. Since Cut made no direct representations to Ann, Ann does not have a warrant cause of action against Cut.

Negligence: See above for rules. Here, Cut owed Ann, a user of its saw, a duty of reasoanble care. It breached its duty when it allowed a defectively designed saw to enter the stream of commerce because a reasonably prudent manufacturer would have spent the nomial cost to install the safety guard rather than be exposed to liability especially since Cut knew that the saw was 10 times more dangerous than any other saw on the market. Cut's decision not to install the plastic guard because but for Cut's decision the plastic guard would have prevented Ann's injury, and it was foreseeable when Cut declined to install a guard that substantially lessened the saw's recoil that someone would be injured because of the saw's recoil. Cut may argue that there is no

causal connection; Ann may still have been knocked over even with substantially reduced recoil. This is likley a factual question for the jury, i.e. how substantail was the reduction and would it have been sufficient to knock Ann down.

Despite Cut's causaiton defense, Ann has a viable neligence claim against Cut.

Strict Products: Liabiltiy: In a strict products liability action the plaintiff must show, the defendant is a manufacturer or retailer of the product, the product was defective when it left the manufactuers control and the plaintiffs use of the product was foreseeable.

Defects come in three varieties: manufacturing defect, design defects and warning defects. A manufacturing defect is the one in a million product that does not conform to the manufacturer's specifications. A design defect occurs when the plaintiff can show that there was a safer design avaialbe that would not inhibit the function of the product and would not be unduly expensive for the defendant to implenment. A defecetively designed product may not be cured through the use of a warning; the product must be redesigned or the else the manufacturer is liable for the defective design regardless of warnings.

A warning defect occurs when the manufacturer's warning does not adeqautely warn of the dangers that could not be designed out of the product. A manfacturer gets the benefit of a presumption that whatever warning its placed on the product will be read by the consumer.

Here, Ann has a strict products liability claim against Cut. Cut is a manufacturer, Ann will allege the saw was defectively deisnged when it left Cut's control, and Ann's

use of the saw to cut wood was a foreseeeable use of the saw. The main issue will be whether the saw was defectively designed. Ann will allege that Cut knew about the saw's dangers through Cut's safety study. Additionally Ann will allege the plasitc guard, a nominal cost, would have prevented her injury with no reduction in efficiency of the saw or unduly burdensome increase in cost to Cut. Cut's argument that the guard cost too much money is unavailing since facts state guard was of nominal cost. Additionally if a design defect is found, Cut's warning sticker does not cure the design defect.

Ann may also allege that the warning was defective because the warning didn't advise her of the potentially injury she may suffer, explain how the saw recoiled or what exactly Ann needed to do to "brace." Cut may argue that it used simple enough langauge, everyone knows braces means get ready. Cut's argument is unavailing, the warning was conspicuous but failed to inform about any of the dangers of using the saw.

Conclusion: Ann has a strict product liability claim against Cut (and NV Saws) on design and warning defect theories.

3) NV Saws v. Cut

Warranty: See above for rule. Here, actionable claim of safest saw.

Misrepresentation: Misrepresentaiton occurs when the defendant makes a statement he

knows is false and induces the plaintiff to reply on the statemenet. Here NV Saws has a claim for misrepresentaiton agianst Cut; Cut knew the saw was not the safest or even remotely close to be the safest saw on the market, and as a result of Cut's misrepresentation, NV Saws entered into a long-term K with Cut based on Cut's representation that the saw was the safest. NV Saws has support for its claim because it repeated Cut's motto in its store display, which shows NV Saw likley relied on Cut's statement when it decided to enter into the K.

Note: Ann does not have a misrepresentation cause of action againt NV saw because it didnt know and had no rasons to know NV saws not safe, since NV saws entitled to rely on manufacturere's calims osf safety.

Indemnification: If a plaintiff recovers from a retailer, the retailer may seek indemnificaiton from the manufacturer. Here, if Ann recovers from NV Saws, NV Saws can sue Cut for indemnification.

4) Cut v. Edge

Intentional and Negligent interference with Business Relations:

The tort of intentional interference with business relations requires that: there be an existing business relationship, the defendant's statement caused the destruction of that business relationship, the defendant knew (intentional) or should have known (negligent) about the business relationship and the plaintiff suffered economic loss. A

defendnat may assert that his statements were true and thus not made with intent to destroy business relationship.

Here, Cut has a claim against Edge for child labor, but not defective saw statement. Edge likley knew that child labor statement was false or should have known it was false, insufficient facts to determine truth of assertion. Edge also knew that Cut was in K with NV Saws, as evidenced by Edge's statement about Cut's sales, and the statement was made in an effort to destroy the Cut/NV saws relationship. Finally Cut can show it suffered loss due to K cancellation. Edge may try and defend itself by stating that NV Saws decision was based solely on defeective saws statement which was true. This is likley a question for the jury: which statement caused NV saws to cancel its K. However Cut may still pursue the claim that Edge's call both intentionally and negligently interfered with its business relationship with NV Saws.

END OF EXAM