FEBRUARY 2018
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

QUESTION 1

1)

Question #1

This question asks how the court should rule on objections made to evidence offered to be admitted. Because the lawsuit is "in a Nevada state district court," the Nevada rules of evidence apply. As a general matter, in Nevada relevant evidence is admissible so long as its probative value is not substantially outweighed by unfair prejudice. Evidence is relevant if it makes a fact more or less likely.

Patty has sued for breach of contract. Relevant to her claim is evidence regarding the existence of the contract, its terms, facts of any breach, and damages. DMZ has filed for defamation. Relevant to its claim are facts regarding a publication of a "libelous statment," the content of that statement, and damages.

Patty's Evidence

Photocopy of Contract

Patty seeks to introduce a photocopy of her contract with DMZ. This is relevant to both a contract's existence and its terms.

The court must evaluate whether to apply to "best evidence rule," which generally

requires the original of documents to be admitted as evidence. However, that rule can be avoided in circumstances where the party admitting the evidence does not have the original and a reliable photocopy is presented. In this case, the facts are unclear as to why Patty did not receive the original in discovery or why it is not an exhibit for DMZ. She states "she never received the original contract from DMZ." Patty would have personal knowledge that the contract is what she purports it to be--the contract she made with DMZ. The court should ask DMZ whether it objects under the best evidence rule--i.e., whether it is demanding that only an original be produced--and if so, whether it denies that Patty's photocopy is an accurate duplicatiion.

If the court is satisifed that Patty does not have an original copy of the contract, and the original is not among DMZ's exhibits and DMZ does not object assert that the photocopy is unreliable, the court should overrule the objection.

Customer Service Agent

Patty seeks to admit this testimonny for the relevant fact of terms of the contract. It appears she may be using parol evidence to prove that the contract included a condition that delivery be made "no later than September first." Therefore, the testimony is relevant as to that fact.

Patty has personal knowledge of this statement because she heard it when the "agent told Patty." This is not a hearsay statement. Hearsay is an out-of-court statement offered for its truth. Patty is not offering the statement because it was

true that she would receive the order "no later than September first." In fact, if she did, it would be detremental to her argument that "DMZ failed to fimely deliver the products she ordered." Rather, she is arguing that the statement turned out to be untrue. The statement is offered to show a term of the contract that was breached. Therefore, the court should overrule the objection and admit the testimony.

(Note: even if the statement was hearsay, it would be admissible as a party admission--that is, a statement by the party against whom admission is sought (DMZ); a "party" includes its authorized agents, which in this case is a "customer service agent")

Former DMZ Employee

Patty seeks to introduce this statement to show DMZ breached its contract with her because it "never honors its commitments." This evidence is largely irrelevant as to whether DMZ honored its commitment with Patty in this case. However, even if seen as relevant, the statement is impermissible character evidence.

Character evidence generally may not be admitted to show that the party against whom the evidence is admitted acted consistent with that character. That is, to show DMZ never honors its commitments, so it didn't honor its commitments to Patty, either. Exceptions, including bolstering of a criminal defendant's character for crimes where the character trait is relevant, do not apply here in a civil case.

This is particularly true because the witness wished to use "several examples," which are evidence of specific acts. These particularly are not allowed for character evidence. Rather, only opinion and general character evidence is permitted on direct examination (specific acts may be used at times in cross examination).

The fact that the witness is a "former DMZ employee" does not change the analysis. It does increase the evidence's probative value--the witness is likely to have personal knowledge of how DMZ honors its commitments. However, the court should sustain the objetion as improper character testimony.

Note that this evidence is offerend in Patty's case-in-chief, and therefore no impeachment/rebuttal issues are raised.

Copy of Judgement

Patty seeks to admit a certified copy of a civil judgement in which DMZ "was found liable for breach of contract." The relevance for this evidence is unclear, and unfair prejudice likely substantially outweighs its probative value. The judge or jury (the facts are unclear on which) may decide that "once a breacher, always a breacher." Additionally, not enough facts are availble on the judgement (For example, it may have been stipulated by the parties as part of a settlment agreement, and the breach of contract may have been collateral to other issues in the case), nor is it clear how old the judgement is (the judgement is from 2008 but

the facts do not say when Patty's lawsuit occured).

Patty may be complying with the Best Evidence Rule (providing a certified copy), but the court should sustain the objection becuase the evidence is unfairly prejudicial and not relevant to Patty's claims.

DMZ's Evidence

Settlement Conference

DMZ is seeking to admit Patty's statement that she owns teh social media account where the defamatory statements were published. This is relevant as to Patty publishing a statement (i.e. the identity of the author). However, for policy reasons, Nevada excludes statements made during settlement negotiations even if relevant. Nevada believes that encouraging candor and cooperation in a settlement is worth later not admitting these relevant statements.

This prohibitions includes statements beyond just offers of settlement. Therefore, even though Patty's statement is not "I will pay you $500 to make this go away," but instead is an admission about a relevant fact, the statement is stil inadmissible. The court should sustain the objection.

Note that this rule applies because DMZ is offering the statement in its case-in-chief. The court could rule differently if Patty sought to deny ownership and the

statement was introduced for impeachment purposes.

Stock Reporting

DMZ is seeking to introduce the price of its publicly traded stock "the day after the alleged defamatory statements were published" to show damages. Therefore, the evidence is relevant.

This evidence is being offered for its truth (unlike Patty's introduction of the sales agent's testimony), and therefore is a hearsay statement. In fact, DMZ needs it to be true to show that its "price fell 15 percent" to prove damages (if the price increased, for example, it is possible no damages could be shown).

While hearsay generally is not admissible, an exception applies to learned treatises and other reports where the reliability of such reports is not subject to much doubt. In other words, it is unlikely that the "reputable stock reporting service" would make an untrue statement about DMZ's stock price. It would have no motivation to do so--in fact, if it did, it would soon no longer be "reputable." Therefore, the court can determine that the stock reporting service is of the kind of publications where the hearsay rule should not prohibit admission, and overrule the objection.

Cell Phone Screenshot

DMZ seeks to introduce this evidence to show that Patty owned the social media account. Again, this is relevant as to the identity of the author.

Introduction of physical evidence, such as this, requires testimony by a person generally with personal knowledge that the printout is what the admitting party asserts it to be. In this case, DMZ needs someone to testify that the person "who resembles Patty" is, or likely is, Patty.

The witness is a "DMZ salesperson Patty met with," although the facts do not say whether the meeting is in person. Assuming that it was, the person does have personal knowledge of Patty's appearance. Therefore, he can testify as to whether the person who resembles Patty actually is Patty. This is not expert opinion, because it is asking for the witness's own conclusions from his "five senses"--i.e., to compare a photograph with the person he met with. (Note: as a practical matter, the court may not want to spend too much time on this question because the jury, if there is one, can see Patty because she testified in her case in chief).

The facts state that the printout "did not come from [the witness's] phone." This should not be a barrier to admission. DMZ is not asking whether the witness accessed the social media account--in which case the witness may need to show that he actually did. Instead, DMZ is asking if the person who resembles Patty is actually Patty.

Therefore, the court should overrule the objection.

<u>Ex-Husband</u>

In Nevada, a former spouse may not testify regaridng confidential spousal communications unless the other spouse waives the privilege. (A former or current spouse may testify generally if he or she wishes.) The ex-husband does not appear to be testifying about any confidential communications, so that privilege does not apply here. Rather, he is testifying about Patty's general attitude towards the truth.

DMZ wishes to introduce the evidence to show that Patty is reckelss when it comes to posting on social media. This may be relevant for an "Actual malice" defamation standard if DMZ is a public person or the contract involves an issue of public concern, although that appears unlikely from the facts.

Like some of Patty's evidence, this evidence appears to use the character of a party to prove that she acted in conformity with that characer. As noted above, this type of evidence is inadmissible. It also does not appear that the evidence is bieng used to impeach Patty's credibility (assuming DMZ introduced evidence after Patty did). The ex-husband's statement regarding untruthfulness is limited to social media, not testifying in court ("when it comes to posting on her social media account").

This evidence also does not appear to e habit, which is admissible to show that a person who regularly conducts him or herself in a routine etc. acted consistent with that routine. Instead, the statement is generalized.

Therefore, the court should sustain the objection.

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QUESTION 2

2)

Generally applicable consideration - Exclusionary Rule

The exclusionary rule is a court doctrine meant to deter police misconduct. In accordance with this doctrine, any evidence which has been illegally seized or searched will be inadmissible for substantive purposes at trial, but may be used to impeach. In addition, any secondary evidence, derived from the original illegality will be inadmissible as fruit of the poisonous tree, absent an exception. The exceptions to the exclusionary rule include: inevitable discovery, annutation and good faith reliance on a warrant. To retrieve a warrant it requires an officer to 1) present an affidavit based on probable cause; 2) issued by a neutral and detached magistrate; and 3) particularly describe the person to be seized or thing to be searched. With these facts in mind, the essay will be analyzed accordingly.

1. Olive (O) violated Dales (D's) 4th Amend rights

The fourth amendment protects citizens from unreasonable searches and seizures from their persons and effects. A search or seizure is generally considered reasonable so long as there is a warrant. See rule above for warrant. In order to assert a fourth amendment violation there must be 1) government action or someone acting at the direction of the government and 2) the person must have standing.

Government actor - this is easily met because Officer O works for the Clark County Police Department and therefore works for the state and will qualify as a government actor. Thus, the government actor elemtn is satisfied

Standing - standing is satisfied upon a showing that one had a reasonable expectation of privacy. A reasonable expectation of privacy is a two part test in which the first part is objective, i.e., society finds the thing to be private and secondly, the person actually and subjectively finds it to be private. In this case, D will argue that his fourth amendment rights were violated for stopping and searching him and subsequently arresting him because he has an expectation of privacy in his person. Moreover, this is a widely recognized societal expectation because no where can be more private that ones own body. Thus, the standing element is satisfied.

O's Stop and Search

Stop: Generally, an officer must have a reasonable suspcision in order to stop and search someone. This is derived from the caselaw of Terry v. Ohio in which the court ruled that a resonable suspicion is an articualable suspiscion based on the totality of the circumstances. In this case, O will argue that she watched as D looked through several car windows and even went so far as to pull on the locks. Moreover, she knew D's name and birthdate due to prior contacts she had with him which were likely related to similar issues here. D could try and argue something to the effect of he was looking for his car or helping a friend find his car

but this clearly wouldn't be a viable argument and will likely fail. Thus, Officer O had the requisite intent and resonable suspicion which permitted her to stop and search D for a brief period.

Search: An officer is also permitted to conduct a brief frisk during a stop and search so long as they have a suspicion that weapons can be found on the person and they fear for their safety. Here, O may have an issue because she didn't find any weapons on D but instead found the heroin in his sweater. In addition, if D had to manipulate that bag of heroin in anyway, this evidence will be thrown out as inadmissible.

In conclusion, which Officer O could have stopped D based on her resonable suspicion that criminal activity was afoot, her subsequent seizure of the heroin which be inadmissible as a violation of D's fouth amendment rights.

2a. Heroin

Arrest and Search Incident to Lawful Arrest (SILA)

As indicated above, the heroin would not be admissible under the fourth amend. However, O can argue that she subsequently arrested D upon finding there was a warrant out for his arrest. An arrest can be made without a warrant while in public and if the officer is aware that a crime has been committed. Here, O is aware that D has a warrant for failure to appear and has witnessed him likely operating with criminal intent by searching car windows and pulling on doors. Moreover, O will

argue SILA.

SILA is proper where the arrest is valid (as indicated herein) and the officer is permitted to search the defendant and his wingspan for safey precautions. Here, anything that O found during the search would be admissible.

Ineviditable Discovery - since the heroin was found prior to the SILA and will likely be inadmissible O and the state will try to get the evidence in another way and will likely argue that the discovery of the heroin would have been inevitable because she had already requested the dispatcher to check if D had any warrants and would have made an arrest even if she hadn't found the drugs before the arrest. This will likely be a sufficient arguement to permit the admission of the heroin.

2b Foil; O's testimony; Text Messages

Fifth Amendment

The fifth amandment provides protection for citizens in so far as it gives a privilege against self incrimination. This privlege is protected by the seminal case of Miranda v. Arizona wherein the Miranda warnings were dervied. Purusant to Miranda, the police must warn a suspect that 1)they have the right to remain silent, anythig they say can be held against them; 2) they have a right to a court appointed attorney. These warnings must be given if a suspect is in custody and subejct to interrogation. The Miranda warmings may be waived by the suspect so long as it is done knowingly and voluntarily. In the contrary, the warnings may be invoked

upon a clear and unambigous request.

Custody - a suspect is determined to be in custody based on her personal experiences, age and contacts with law enforcement and whether he believes he is free to leave. Here, D is clearly in custody because O handcuffed him (prior to arrest) and therefore physically restrained him. Moreover, after she arrested him she placed him in the car and drove him to the Clark County Detention Center.

Interrogation - the interrogation element will be satisfied if an offer direct questions a suspect of makes statements in which they are aware will illicit incriminating statements. Here, O will argue that she did not directly question D regading why he was looking into car windows and pulling on doors, but asked him abot the heroin. This arguement however, will likely lose because O should have known it would elicit incriminating statements. Thus, the statements made by D that he smoked before he drove to the mall and he discarded the foil in the trash would be inadmissible because D was in custody and interrogation and should have been given his Miranda warnings prior to any questioning.

On balance, the statements are likely inadmissible.

Foil - D will argue that the foil should be exclused under the fruit of the poisonous tree doctrine

Fruit of the poisonous tree - see rule above. D will argue that since his fifth amendment right against self incrimination was violated by the officer not

adminstering Miranda warnings prior to questionning D, the statements made and subsequent discovery of evidence is entirely inadmissible. Conversely, O and the state will argue the evidence should be admissible and D canot claim a reasonable expectation of privacy in the trash. In this instance, while the statement was made and received illegally, Offier O could have searched the trash without the statement the foil will be admissible as inevitable discovery and would not implicate a violation of fourth amendment because there is no reasonable expectation of privacy in a malls trash can.

On balance, the foil will likely come on.

B's text message

Bill is constituionally protected under the Fourth amendment to be free from unreaonable searches and seizures. Moreover, to arrest someone without a warrant requires the crime to be committed in front of the officer or the officer to have probable cause.

Here, Detective I has probable cause to arrest B because he monitored the cocain transaction and saw for himself the crime being committed. Therefore, B's subsequent arrest was constitutionally valid. In addition, as indicated above, a SILA may be conducted so long as the arrest is valid and the officer conducts a brief search of the arrestees person and wingspan. In this case, the seizure of the

cell phone is permissible because it was on B's person and will be given to inventory after B is booked. However, Dectective I needed a warrant to search B's text mesages.

B will rightfully argue that Dectective I needed a warrant because he had a reasonable expectation of privacy in the messages on his phone and therefore his fourth amendment rights were violated. Decective will try to argue that no warrant was necessary because he witnessed B committing a crime. However, because there was no on going emergency and Dectective I had already seized the phone, he likely had time to go and retain a warrant to search the phone from a detached magistrate.

Therefore, the text messages should be inadmissible as against B.

Co-Conspirator Liability and the text messages against D

The issue here is whether D may claim his rights were violated as a result of B's text messages being uploaded. As stated above, in order for one claim their rights have been violated they must have proper standing. Here, D has no standing because he does not own B's cell phone, it belong to B. Thus, only be has a right to claim the text messages being uploaded violated his rights.

Confrontation Clause

However, D may have a viable argument that any admissibility of the text mesages as used against him may violate his 6th amend right in the confrontation clause.

The confomtation clause requires that any testimonial statement made which implates guilt on D, be given again so that D have the opportunity to cross the declarant. The text messages most certainly implicate D as B's co conspirator but the question turn ons whether they are testimonial in nature. Here, the text messages aren't testimonial because they do not assist with solving the crime.

Therefore, the text messages should be admissible as against D.

3. Irving's (I) testimony

The testimony from Dectective I regarding another officer seeing D and B driving to the mall may implicate another controntation clause issue as addressed above because the statement was made to assist police in investigating a crime. Thus, it requires the officer who made the statement be required to testify so that D may have the opportunity to cross the decalarant.

4. D's attorney and effective assistance of counsel

The seventh amendment guarantees a right to a fair jury trial. Moreover, the fifth and sixth amendments permit assistance of counsel. Implicit in these rights that the assistance of counsel be effective. Counsel is considered to be effective if they use their legal skills, knowledge that a resonable attorney in the community would use. D must prove the :1) legal standard of care and 2) his counsel fell below that standard; 3) had he not fell below the outcome would have been different.

Here, D's attorney should have filed several motions to suppress based on everything discussed herein or at the very least, object to the evidence being admitted a trial. A reaosnable attorney in the las vegas area would have done at least that. By failing to do so, D's attorney has fallen below the standard. Moreover, had he done the above mentioned things the outcome for Dale may have been different in that he likely wouldn't have been charged with possession of heroin.

Thus, D's attorney did not provide effective assistance of counsel within the meaning of the sixth amendment.

END OF EXAM

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QUESTION 3

3)

K between Smiths and Mountain Escape

The initial flier from Mountain Escape (ME) specified a price and key detailes of the offer, as well as a specific form, time and manner of acceptance. While Mr. Smith met the form (filled out flier and sent half the money) and manner (mailed it) specified, ME received Smith's acceptance after the date specified. WHile typically the date an item is deposited in the mail is evidence of the accepatance date, in this instance the offer specified that acceptance was judged based on it's reception at ME before the expiration date. Thus, Smith's attempted acceptance became a counteroffer. While there is no explicit acceptance of the counteroffer communicated to the Smith's, ME's keeping of the deposit and actually booking the room for the week specified in the counteroffer shows acceptance and therefore a valid K existed between the Smith's and ME on the same terms as the original offer, and with the date specified (3rd week) in Smith's counteroffer.

Mrs Smith attempted to alter the contract after making travel arrangements for the wrong week. She emailed this attempted alteration to ME but there is no evidence of receipt or acceptance. Further, there is an open question whether emailing is a proper means of communicating a change to ME as the original offer and acceptance were performed by mail. As this K is for services, the common law controls. If a court determines that this communication was a proper channel, the

lack of response from ME may be sufficient to show effective acceptance (if the agreement were for goods, the UCC would control and ME, as a merchant, would be deemed to have accepted). In this instance though, the lack of response and the fact that ME did not change pickup or reservation dates likely demonstrates they did not accept (or perhaps, even receive) the email with the attempted alteration. Based on the facts in front of us, it is likely this email will not be deemed to have altered the terms.

Thus, the Smiths will not be entitled to recoup their taxi fee to the resort nor the differential between a deluxe room and the room they received. If the email were deemed to be an accepted alteration, then they would be entitled to receive both of the damage remedies.

However, because the hotel accepted their reservation, gave them an inferior room, and did not communicate that they were not accepting the original terms of the counteroffer, the Smith's are not required to provide $3k to ME at the conclusion of their stay, but rather only owe the remainder of the contract price agreed to above, $2k (of the original K of $4k).

K between ME and Spa

There appears to be a contract in place between ME and SpaLux (Spa) with the Smith's as intended third-party beneficiaries, though we do not know the exact

terms of the arrangement and whether it is for the Smith's specifically or party of a larger agreement with many guests being the beneficiary over time. There is no direct contract between the Smiths and Spa. (It should be noted that the Spa's statement that its "customized treatments would surpass Mrs Smith's highest expectations" would be deemed puffery and not utilized to supplement the terms of the agreement between ME and Spa)

Spa will argue that ME owes Spa for both treatments. Mrs Smith, even though displeased, received the first treatment and failed to cancel the second. Assuming the K between ME and Spa include the 24-hr cancellation term, then Spa will argue it is entitled to that payment as well. ME can assert any K defense a third-party beneficiary has against Spa and Spa can inpunge ME with any K liability incurred by Mrs Smith within the scope of the agreement. In this instance, ME may attempt to assert the defense of Mrs Smith that the first treatment was ill-performed and not up to the requirements within the contract. Spa will argue that it provided the treatment as required under the K to Mrs Smith (and likely that she is just a hypersensitive person). Spa will also argue that because cancellation was not received from Mrs Smith for the 2nd treatment, that it is owed that treatment fee from ME as well (again, assume contractual provisions are mirrored). Spa may also assert that ME could have, but didn't, notify Spa of the cancelleation of the 2nd appointment as conceirge was aware of how bad the first treatment went (though this argument is likely to fail).

ME might assert a breach of K claim against Spa for the first treatment Mrs SMith

received being below the contractual standards or general standard of care, but this is an unlikely approach given that the K between ME and Spa is likely for many guests and not just Mrs Smith.

If the treatment was deficient and below the contractual standards, ME may be entitled to some compensation for incidental and consequential damages if it can show that Mrs Smith or other potential guests are less likely to do business with ME. IF the treatment was not deficient and meets the contractual standards, Spa should receive compensation from ME for the price of at least the treatment performed, and subject to the above, likely the second treatment.

Mrs. Smith may have a tort action against Spa if the treatment was below a reasonable standard of care since there was a duty owed and the treatment resulted in a physical harm to Mrs Smith.

K between Smiths and Sail

There is a valid K between Sail Heaven (Sail) and the Smiths. As this contract was separately booked, ME is not a party or beneficiary of this agreement. While the full terms of the agreement are unknown, we do know that Sail has an option to cancel the agreement (and presumably refund the payment) if the weather does not allow Sail to conduct the trip. In this instance, Sail felt it could conduct the trip even with the thunderstorm. THe Smith's will assert they were entitled to terminate the agreement for frustration of purpose under a force majeure event and therefore

are not liable for a material breach and should be refunded their payment. Sail will argue that the thunderstorm was not sufficient to frustrate the purpose, that it was ready, willing and able to set sail, and that the Smith's were in breach. The determination of liability will come down to whether it was commercially reasonable to sail with the thunderstorm in play. If it was, the Smiths are in breach. If it wasn't, the contract should have terminated and the Smith's are entitled to their payment back.

K between Smiths and Jeweler

The K between the Smiths and Jeweler (J) will be covered by the UCC-2 and the J is a merchant. The J will argue mistake of fact in the pricing of the bracelet and seek the remedy of either the $9,000 deficiency or return of the bracelet. Mr. Smith will argue that this mistake was patent, and therefore the J is not entitled to claim it as a defense. Because the price was indeed patent, and there's no evidence that Mr. Smith caused such mistake, there is likely a K between Mr Smith and J for $1,000 in exchange for the bracelet, which has been completed as of the date the possession of the bracelet was exchanged.

No K between Smiths and Security

Mr. Smith's reward offer to security likely did not result in an enforceable K. There is no evidence the security officer agreed to take on any additional responsibility or incurred any liability in exchange for Mr. Smith's promise. As the security officer has a duty to ME to look out for the safety and well being of resort

guests, the security officer would already be required to return the bracelet to Mr Smith should he find it and know it was Mr Smith's. This was a gratuitous offer, and did not establish a contractual relationship. Further, it appears moot at this time as the bracelet has not been recovered. Mr Smith would obviously have no claim against the security officer that the officer MUST find the bracelet.

END OF EXAM

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QUESTION 4

4)

Adam, Barbara, and Clint, as Nevada-licensed attorneys, are subject to the Nevada Rules of Professional Conduct and the disciplinary authority of the State Bar of Nevada.

Ethical issues raised by Adam's conduct

Adam owes special duties to OVC, because he is acting as an attorney for an organization. When an attorney represents an organization, it represents the organization itself, not the officers, directors, or employees of the organization. Accordingly, Adam owes the fiduciary duties of care, competence, confidentiality, and loyalty to OVC and not any constituent of OVC. An attorney must take reasonable steps to communicate to the officers, directors, and employees with which he deals the fact that the attorney represents the organization, not the officers, directors or employees.

When the woker comes up to Adam and tells him that the crew sprayed some of OVC's vineyards with pesticide to stop a spreading fungus, it is possible that the worker believes he is consulting Adam as his (the worker's) attorney. Adam should have prospectively informed this individual (with whom he was familiar) that Adam was not the worker's attorney. Whether or not he did, Adam should have informed the worker immediately after the statement was made that he was

not the worker's attorney and may have a duty to report what the worker said up the chain of command in the organization. As a side note, even if Adam were representing the worker along with the organization (which in certain circumstances is permissible, with informed consent to both clients regarding the potential for conflicts of interest to arise), it is not clear that the worker's statement was made to Adam in his capacity as attorney, as it was not for the purpose of obtaining legal advice and may not bear on any legal rights or duties of OVC.

However, the scope of the duty of confidentiality is much broader than the scope of the attorney-client privilege, which applies only to confidential communications between attorney and client for the purpose of obtaining or giving legal advice. Thus, Adam likely owes a duty to communicate the information he learned from the lower-level employee to OVC's management. If the fact that the crew sprayed the vineyards with pesticide poses a threat to the health or safety of consumers, then Adam has a duty to elevate the concern to higher management if the initial person(s) he tells do not take action.

Because Adam tells no one at OVC about the conversation, he likely has violated the duty of communication and duty of loyalty to his client and may be subject to disciplinary action.

Ethical issues raised by Barbara's conduct

Representation of an organization

Barbara, like Adam, is an attorney for an organization, XYZ Corp., and owes the same duties to the organization under the Rules of Professional Conduct relating to representation of an organization (see above discussion).

Duties owed to former clients

Additionally, Barbara owes duties to XYZ Corp. as a former client. Under Rule 1.9, attorneys must avoid conflicts of interest with former clients and must not accept representation adverse to the former client in violation of this duty. Prohibited representations include becoming directly adverse to the client in the same or a substantially related matter. For example, Barbara would have been prohibited from changing law firms in the middle of the XYZ Corp. discrimination lawsuit and going to work for the law firm who represented the plaintiff in that same suit. The question here is whether the wrongful termination case that Barbara's new firm is pursuing against XYZ Corp. is "substantially related" to the prior discrimination lawsuit.

"Substantially related"

A second matter is substantially related to a first matter if there is a substantial likelihood that information learned in the first representation will allow the attorney to gain a material advantage over the client in the second matter. Here, Barbara's role as counsel in the discrimination lawsuit likely is substantially related to the wrongful termination case. Barbara has likely learned confidential information about XYZ Corp.'s employment policies and practices, and has gained the

confidences of XYZ Corp. employees and management. From XYZ Corp.'s point of view, "their" lawyer is now suing them. Barbara's remaining duties to former clients prohibit her from continuing to represent the new client in the wrongful termination case, and likely required her to disclose this potential conflict to her new firm when she was hired.

Imputed conflicts

Not only does Barbara suffer from the conflict of interest with former client XYZ Corp., but because Barbara is part of a law firm, the conflict is imputed to the other members of the firm. This means that any client that Barbara cannot represent due to a conflict, no one else in the firm can represent. There are several exceptions to imputed conflicts. For example, where a conflict is wholly personal in nature, the conflict is not imputed. Here, because Barbara has a conflict with XYZ Corp., the conflict is imputed and no other attorneys at XYZ Corp. can ethically continue representation of the new client in the wrongful termination matter.

Waiver of conflict

Notwithstanding Barbara's conflict of interest and the conflict imputed to the other members of her firm, Barbara and the firm's representation in the wrongful termination case may be permissible had they obtained informed consent, in writing, from XYZ Corp. Informed consent is given only after all relevant facts are

communicated to the former client and the former client has the ability to review the facts with independent legal counsel. Barbara must also reasonably believe that her representation of the new client will not be materially limited by her prior representation. The facts do not demonstrate that Barbara or the firm obtained informed consent in writing at the beginning of the relationship, but it may be possible to obtain informed consent at this later time to continue the representation. It is also possible that XYZ Corp. may agree to waive the imputed conflict, but not the direct conflict with Barbara. In that case, the law firm could staff the case with other attorneys and screen Barbara off so that she cannot access any information about the matter. Such screening procedures are often used when attorneys move firms and bring certain conflicts with them.

Violation of additional duties owed to former clients

Finally, Barbara acted unethically in emailing several employees she knows at XYZ Corp. and asking for relevant information about the termination. A lawyer continues to owe certain fiduciary duties to a former client, including the duty of confidentiality and duty of care. By emailing her contacts and fishing for information that will be beneficial to her new client and harmful to XYZ Corp., Barbara is violating these duties and may be subject to discipline accordingly.

Ethical duties raised by Clint's conduct

Duty of competence

All Nevada attorneys owe a duty of competence to their clients. This means that an attorney should not undertake a representaiton if he is not competent to fulfill the objectives of a representation. Here, Clint is an associate who practices criminal law. Notwithstanding the fact that he is not a patent lawyer, Clint accepted a matter for a client who wants to file a patent application. This likely is outside of Clint's skill set and he should not have taken the matter unless he had adequate aid or supervision. He could be putting his client at risk by practicing in an area in which he is not skilled. This violation of the duty of competence could subject Clint to discipline.

Acceptance of the $100,000 retainer

A lawyer is under an obligation to charge a reasonable fee. While retainers are generally permitted, the retainer must be reasonably related to the anticipated services to be provided, must be deposited in the attorney's trust account, and must only be drawn upon to compensate for services rendered. Here, it is questionable whether $100,000 is a reasonable retainer. However, the facts indicate that the funds made it to Clint's trust account and were not withdrawn until the matter was completed (issues with the amount withdrawn will be addressed below). To the extent there is an amount remaining on the retainer at the end of the representation, Clint has an obligation to return those funds to the client.

Sharing the work and fee with David

There is nothing in the Rules that prohibits multiple attorneys at different law firms

from both sharing in the work on behalf of a client. However, Clint's duties of communication with the client require him to inform the client of this arrangement and get informed consent to work with another attorney. Absent such consent, Clint's sharing of confidential information regarding the scope of representation with David also violates his duty of confidentiality to the client. Suppose the client had worked with David before and was not pleased with David's work. The client likely would not consent to Clint working with David on the patent application. Accordingly, Clint has violated his duties to his current client and may be subject to discipline.

Were the client to consent to the arrangement, Clint could validly split the fee with David in the amount agreed upon by the client. However, because he has not obtained informed consent on either splitting the work or the fee with David, Clint's sharing of $20,000 with David at the end of the representation is unethical.

Unreasonable Fee

As noted above, a Nevada attorney must charge a reasonable fee in exchange for legal services. Reasonableness is judged on many factors, including the location of the work, the time required, the level of skill and education of the attorney, and the difficulty of the matter. Here, Clint charged $120,000 for what seems to be a routine patent application. This fee is likely unreasonable, as demonstrated by the client's reluctance to pay the full amount. Instead, the client was willing to pay $60,000. This is likely a more reasonable amount.

Misappropriation of client funds

Clint and the client have a dispute about the amount of fees owed to Clint. Clint wants $120,000, while the client will pay $60,000. Generally, when client funds are in dispute, the attorney may withdraw undisputed funds owed to him for services performed, but must leave any disputed funds in the client trust account until the dispute is settled. Here, Clint withdrew a total of $80,000 when the undisputed amount was $60,000. Clint has misappropriated $20,000 of client funds and may be subject to discipline.

Clint's blog post

Clint's blog post advertising his win on behalf of Sam Brown, a criminal defense client, is improper due to the inclusion of the statement that "If the jury knew what he had really done, he'd be in jail." This violates Clint's duty of confidentialy to Sam Brown, because it reveals information learned throughout the representation that Clint has a duty to keep confidential.

This statement, as well as the statement that the record of the eyewitness in his current trial "speaks volumes" about her character and the response telling a commenter to "Keep your mouth shut and call me," may also constitute conduct prejudicial to the administration of justice. All Nevada attorneys are officers of the court and have certain duties to uphold the integrity of the judicial system and of the profession. These glib statements are unprofessional and do not instill public

confidence in the profession or the judicial system.

Adam's email to Clint congratulating him after reading his most recent blog post is problematic because Adam is a partner in the law firm where Clint is an associate. Adam has an ethical duty to supervise subordinate attorneys. Adam should have stepped in and told Clint that his behavior was inappropriate and unethical, rather than congratulating him. Adam, as a supervising attorney, is responsible for ethical violations of his subordinates and could be at risk for implicitly condoning Clint's unethical behavior.

END OF EXAM

FEBRUARY 2018
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

QUESTION 5

5)

1. At issue is whether the action was properly removed.

Removal

A defendant may remove a state court case to the federal court case embracing the district in which the state court sits. This is performed by filing a notice of removal with the federal court. The case must have a basis for federal question jurisdiction in order to be properly heard in federal court. In cases in which the federal court claim would be based on diversity of citizenship, an "instate" defendant is not permitted to remove to the court. However, where the claim is based on a federal question, this limitation is inapplicable.

Subject Matter Jurisdiction

In order for removal to be proper, the court must point to a basis for subject matter jurisdiction (SMJ). SMJ refers to the court's ability to hear a particular case. This can be found under a (i) federal question, i.e., where the plaintiff's "well-pleaded complaint" sets forth facts and allegations arising under federal law, or (ii) diversity of citizenship jurisdiction, in which the amount in controversy must exceed $75,000 exclusive of interests and costs and each party must be of diverse citizenship from the other. Furthermore, where there is an adequate grounds for subject matter jurisdiction as to the original claim, supplemental jurisdiction may be

asserted in order to join new claims where there is a common nucleus of operative fact.

Here, Pete is a Nevada resident and fiels a complaint against Cow County. The complaint includes a claim for violations of Pete's constitutional rights, which arise under federal law and therefore fall within the court's federal question jurisdiction. However, the claim for battery and intentional infliction of emotional distress are state tort claims, and would not indepedently fall within the court's SMJ because (i) it does not arise under federal law, and (ii) Pete and Cow County are not "diverse," because they are residents of the same state. However, under supplemental jurisdiction, the claim may be properly brought in notwithstanding the lack of diversity between the federal claim and the state claims. Certainly, violation of the constitutional rights and the battery and IIED claims arise under the same nucleus of operative fact, i.e., the traffic stop whereby the dispute originated. As such, there is a proper basis for SMJ.

Note that Pete might argue that this was improper because the state claim did not have its own independent basis of SMJ. In other words, diversity of citizenship nor federal question would apply to a state battery or IIED claim. Nonetheless, because there is a federal question claim, diversity need not be present, and supplemental jurisdiction would save the state claims.

Personal Jurisdiction (PJ)

PJ refers to the court's ability to exercise jurisdiction over the parties. Traditionally, where the parties are domiciled in the state, present when served, or otherwise consent to the action, PJ will be found. Here, note that there is no PJ issue because Pete is a Nevada resident, and Cow County will be deemed a resident of Nevada.

Conclusion: Because SMJ, in conjunction with supplemental jurisdiction, will be found, the removal to federal court was proper, assuming it was timely filed.

2. At issue is whether it was permissible for Cow County to bring Sheriff Jim into the action, and for Sheriff Jim to bring a claim against the county.

Impleader; Third Party Practice; Supplemental Jurisdiction

The first issue is whether an impleader claim was permissible.

A party may implead another party (the "third party defendant," hereafter "3PD") where there is a common issue or fact and where the 3PD may be liable in part or in whole for any damages that the defendant may be held liable. In other words, a claim for indemnity or contribution typically gives rise to grounds for a third-party complaint. There is a right to implead at the outset of the case, but if not done timely, this would require leave of the court. Because these claims are generally for indemnity or contribution for liability as between the plaintiff and defendant, such impleader claims will get into the court by supplemental jurisdiction, as they arise from the same common nucleus of operative fact as the initial claim.

Here, Cow County asserted a third-party complaint against Sheriff Jim. The third-party complaint includes claims for contribution and indemnity and was personally served upon Sheriff Jim. Jim retains counsel in Nevada and files a cross-claim. Assuming Jim was the sheriff who's conduct is attributed to Cow County in this case by Pete, i.e., he was the one who allegedly violated Pete's rights and performed tortious acts, an impleader would be proper because it arises out of the same nucleus of operative fact as the claim between Pete and Cow County, and Cow County is now seeking contribution and indemnity. Thus, in the event that Cow County is held liable for damages, an action for contribution or indemnity against Jim would be proper to vindicate its interests.

Counterclaims

The second issue is whether it was permissible for Jim to bring an action against the county.

Compulsory Counterclaim/Cross-Claim

A compulsory counterclaim is a claim that arises out of the same transaction or occurence as the original claim, and is waived if not asserted by the opposing party. Note that in Nevada, this are appropriately called "cross-claims." Here, Jim filed a cross-claim against Cow County for unpaid wages. Because unpaid wages

does not arise out of the same transaction or occurrence as the indemnity claim (with regard to the suit versus Pete), this will not be a compulsory counter-claim. Jim's only way to assert this would be as a "permissive" counterclaim/cross-claim.

Permissive Counterclaim.

Where the action is not compulsory (i.e., doesn't arise out of the same transaction or occurrence), the claim is said to be permissive. Here, Jim may, but is not required to bring this claim. Instead, he can wait and file the suit later, or separately. In order for the court to hear its claim, it is discretionary with the court. Assuming the court finds that it could be resolved easily or timely, it may decide to hear the counter-claim. However, it is possible that the court, for purposes of confusing issues or otherwise, might not hear the claim.

Thus, it is in the discretion of the court as to whether the claim can be heard, and as such, this is dispositive as to whether the claim was "permissible.

3. At issue is whether the court ruled correctly on the motion to remand.

Motion to Remand

In a motion for remand, a plaintiff seeks to bring the case back from federal court to the state court in which the action was originally filed. Typically, a showing must be made that the federal court would not have subject matter jurisdiction over the claim. Assuming the motion was made timely, the federal court is not likely to remand back tot he court.

As explained above, the tort claims arise from the same common nucleus of operative fact as the federal claim, and supplemental jurisdiction would operate to allow it to stay in court. Pete might argue that the case should be bifurcated or severed, but this would not be inappropriate under the relevant law, and under the policy of judicial economy.

Conclusion: The court correctly ruled on the motion for remand.

4. At issue is how the court should rule on the motion for Pete to appear for an examination

Mental Examinations

Under the Federal Rules, in order for a mental examination to be had, a court order is required, and certain requirements must be met: (i) the party must have good cause for the physical examination, and (ii) the plaintiff's mental health or condition must have been put at issue. Furthermore, putting one's mental condition at issue operates as a waiver of medical information as to one's alleged mental state or condition.

Here, Pete certainly put his mental condition at issue, because he has a claim for intentional infliction of emotional distress. Cow County certainly has good cause to bring this, as it gets to a pertinent issue in the case, which could subject it to damages. Negligent and intentional infliction of emotional distress require that the

victim in fact be put in severe emotional distress. As such, one's mental state is certainly at issue. The fact that Pete claims "privacy" is not sufficient, because his mental state is at issue, and doing so will operate as a waiver.

Thus, the initial request for a mental examination was apprporiate. Furthermore, the court should grant this order. However, as explained below, while the order might still be granted, Pete cannot be compelled by the court's contempt power to show up to it.

Note: No Contempt for Failure to Appear

Although a party may file a motion seeking an order to appear for a mental examination, his failure to do so (i.e., to not appear) is not punishable by the court's contempt powers. However, when a party puts his emotional condition at issue, and thereafter fails to submit to medical examinations, the court may take other appropriate discovery actions, including adverse inferences, evidentiary sanctions, among others.

Motion for Protective Order; Privacy

Note that Pete might attempt to file a motion for a protective order on a theory that this was privileged (i.e., his "privacy" claim).

A motion for a protective order may be sought where the opponent's intent is to

burden, harass, or delay, where it sought for improper purpose or otherwise seek information protected under the applicable rules. Pete might file this motion to prevent the court from ordering him to submit to a mental examination. While certain information is considered privileged, such as the attorney-client privilege and work product doctrine, under the federal rules, a mere allegation of "privacy" will not be sufficient. Instead, if the state has an applicable doctrine for invasion of privacy (as does CA and NV, though none seem to apply here), this could be a potential grounds.

Again, as explained above, Pete put his mental or emotional state at issue, and the court would probably not grant this motion to compel. There is good cause for Cow County bringing this motion, and it is not to harass or for any other improper purpose. However, Pete might argue that because of the time that had lapsed in between the indicident and now, and since it is not certain that he has an emotional "condition," cross-examination or interrogatories might be the appropriate means to resolving the issue of "subjective emotional distress," with respect to the emotional distress claim.

In conclusion, the motion should be granted, but he cannot otherwise be compelled by the court's contempt powers to attend the mental health examination.

5. At issue is whether the federal court of appeals should entertain Pete's appeal.

Final Judgment Rule

The general rule is that a party may only appeal after there is final judgment, which disposes of all of the claims in the case. The court must have resolved all issues and claims before it until appeal is possible. Absent an exception, such as an interlocutory appeal, which may occur in limited circumstances, the appellate court will not hear the case.

Here, Pete is attempting to file an appeal for an order denying a motion to remand. His attempt will likely be denied, because the court will still have before it an entire case to be resolved. In other words, the merits of the case, after a denial of a motion to remand, must still be resolved in the federal court.

Interlocutory Appeals Act

This may allow review where there is a substantial ground for difference in law, and where the party would suffer irreparable harm. This would not apply here, and the facts do not implicate it.

Collateral Order Exception

Where a case is distinct from the merits, involves an important legal issue, and is essentially unreviewable without resolution of the issue. Here, this exception is inapplicable because there is nothing to indicate

Writ of Mandate or Prohibition

An extraordinary writ is an alternative to the normal appeals route, in which the order compels or prohibits a lower court from doing something that it should be done. Again, these are only issued in extraordinary circumstances, and there is nothing indicating a strong abuse of discretion by the trial judge in ruling on the motions described.

END OF EXAM

FEBRUARY 2018
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

QUESTION 6

6)

1. Does the Nevada District Court have Jurisdiction and Authority to Enter a Divorce Decree?

Jurisdiction: A Nevada state court has jurisdiction to enter a divorce decree between a NV citizen and another person if the citizen has been living in NV for at least six weeks. Here, Henry and Wendy both live in NV and therefore are residents of NV. They have lived in NV for over 20 years and meet the durational residency requirement. To allocate property, a NV state court must be able to excercise personal jurisdiction over the parties. Here, both Henry and Wendy live in NV and a NV court may exercise personal jurisdiction over citizens of the state. Citizenship is established using domicile which is presence and intent to permanently remain. Both Henry and Wendy are present in NV and intend to remain here under the facts. Therefore the NV state court has jurisdiction to enter a divorce decree and make a disposition of the marital estate for Wendy.

Authority: Nevada is a no-fault divorce state. As a no-fault state, NV may grant a divorce between married couples on the basis of incompatibility. Incompatibilty comprises of any fact that makes remaining married impractiable. It does not have to be based on marital misconduct. In fact, marital misconduct may not be a factor for divorce or disposition of the community estate. Wendhey seeks a divorce based on Henry's controlling nature which would fall into the incompatibilty

ground. Although Henry contends that he has done nothing wrong to justify a decision to divorce and that he has religious objections to divorce, A divorce court may yet find the couple to be incompatible and may grant a divorce. Henry's concerns and objections are no defense to divorce nor is the fact that Henry's management of the money resulted in a substantial financial estate. Therefore, the court has the jurisdicition and the authority to grant a divorce. In addition, service of a copy of the complaint and a summons must be effected and Wendy did so here.

Conclusion: Based on the foregoing, the court has the authority to grant the divorce for incompatibility and may exercise jurisdiction.

2. Is the Prenuptial Agreement Valid and Enforceable?

Pre-Marital Contracts: A couple may enter into a pre-marital contract in contemplation for marriage. A pre-martial agreement typically provides for the disposition of property should divorce occur. The agreement may contain additional contractual obligations as the law of contracts would allow. A pre-marital agreement must be evidenced by a signed writing to comply with the statute of frauds. In addtion, the parties must have capacity to contract. Here, Henry proposed a written agreement he had drafted and explained that he would not marry her without it. Presumably, Henry signed the agreement. Wendy did sign the agreement without consulting an attorney. Parties are not obligated to consult an attorney but it is reccomended to avoid a claim for unconscionability or undue

influence. The parties had capacity to contract becasue Henry was 29 and Wendy was 18 so there can be no defense of infancy. The consideration for a marital agreement is the marriage between the parties. Henry stated he would not marry unless an agreement was signed, and Wendy stated she would marry irrespective of finances.

Unconscionability: A party may avoid enforcement of a pre-martial agreement using the same defenses as would be available in contract law. Unconscionability is available when the terms of the agreement are procedurally or substantively unfair such that a reasonable person would not have entered into the contract. Here, the defense would likely not be successful. Wendy had an opportunity to review the contract, was invited to consult an attorney, was aware of Henry's business, mobile home, and belongings. Therefore, Wendy can likely not argue that the substance was unconscionable. In fact Wendy made it clear that she was unconcerned about the finances when she said she was not marrying Henry for the Money.

Undue Influence: Undue influence is a defense to avoid a contract that arises when one party unduly influences and induces the agreement based on a large variety of factors. The influence must overtake the willpower of the party such that there was no intent to agree to the terms but for the influence. Here, some relevant factors may include the time to consider the terms, the chance to consult an attorney, the nature of the relationship of the parties, the reason for the agreement,

the respective bargaining power of the parties, etc. Here, some factors favor a finding of undue influence including the bargaining power as Henry had substantially more financial resources owning a mobile home, working a successful job, and holding the bank account in his name. In addtion, the agreement was signed only hours after it was presented and without attorney consultation and Henry told Wendy he would not marry her unless she signed it. However, some factors weigh against a finding of undue influence. Henry suggested Wendy consult an attorney, he allowed her an opportunity to review the agreement, and suggested his side for why it was fair. In additon, Wendy exclaimed that she didn't care because she was not marrying him for the money. On balance the court would likely not find undue influence and the agreement will be valid and enforceable.

Conclusion: Based on the facts, the parties had capacity and the agreement met the statute of frauds requriement. In addition, the parties likley do not have any valid defenses to enforcement of the agreement. Therefore, the court should enforce the agreement.

3. How Should the Court Dispose of the New Home?

Community Property: NV is a community property state. Community property is defined as any property acquired during marriage that is not separate property. Separate property is property that is acquired before marriage or by inheritance, devise, or gift. Spouses may agree to change the character of martial property to either separate or community property by transmutation. Transmutation must be

evidenced by a writing. NV has a presumption that all property is community property and the presumption may only be overcome by clear and convincing evidence of its separate character. The claimaint has the burden of proving by clear and convicing evidence. A pre-marital agreement may determine how a court should treat property acquired during marriage despite its natural state. In addition, a claimant may establish separate property through the rule of tracing. If the property may be fairly traceable to separate property the burden may be overcome.

Upon divorce, the court generally must divide the community property equally, each spouse taking a 1/2 undivided interest in the community estate. If the court deviates from the equal division, the court must include specific findings of facts and conclusions of law indicating why there is a substantial purpose for the deviation. Generally, the earnings of each spouse are considered community property.

The Marital Home: As the new home was acquired during the marriage it is presumptively community property. When a home is bought using partially separate property and partially community property the court will apply a proration theory. Here, Henry paid for the down payment on the home with proceeds from the sale of his mobile home. The proceeds were separate property because they were the traceable to the sale of the mobile home and the mobile home was separate propety because it was owned prior to marriage and was designated as such in the premarital agreement. Both of these would be sufficient to establish by

clear and convincing evidence that the down payment was made using separate property. In additon, Henry obtained a loan in his name. Debts incurred by one spouse are presumptively community debts. However clear and convincing evidence that the creditor was intending to look to the spouses separate property in satisfaction of the debt may overcome the presumption. The facts do not indicate the intent of the creditor so we assume the debt was community debt. In additon, the debt was repaid using his earnings which are presumptively CP. The premarital agreement specified the disposition of Henry's earnings from AutoWorks as SP. This should be enough to establish that any payments made using only Henry's earnings would be SP payments.

Proration Rule: Had the community estate made any payments on the outstanding debt, and to the extent that they did, the community estate would be entitled to a reimbursement of payments made during the marriage, and a proration of the appreciated value based on the number of payments made in connection with the proportion of total payments made. However, as will be discussed below, the proation rule will not apply and the home will be awarded to Henry.

Comingled Bank Accounts: When a bank account is comingled, a party may establish that expenditures were made with SP if they can show that the SP remained in the account only for long enough to make the payment. Here, Henry was careful to make the payment on the debt immediately after depositing his earnings. Therefore debt payments were made using SP by clear and convicing

evidence. As none of the payments were made using Wendy's earnings, and all were made using Henry's SP, the community estate will not be entiteld to any portion of the new home.

Conclusion: By virtue of the Premarital agreement, Henry is entitled to the entire value of the home.

4. How Should the Court Rule on Henry's AutoWorks?

Business: To the extent that a separate property business grows during the marriage. The community estate is awarded a portion of the increased value based on one of two tests. Nevada courts favor the Perira test because it tends to favor the community estate. The Pereira test awards the community estate the value of the company less the initial separate property investment in the company and a reasonable rate of return. The Pereira test is used when the predominate factor of growth is the skill, labor, and time of the community/spouse. Here, Henry's AutoWorks enjoyed substantial growth over the 20 year life of the marriage and increased in value by Henry's hard work. This would favor application of the Pereira test. However, according to the pre-marital agreement, Henry's interest in the buisness was SP and his earnings from the business was entirely SP. Therefore, the intent of the parties seems to suggest that Henry will take the entirety of the business as SP and Wendy will be entitled to nothing. To the extent that the court applies the Pereira test, Henry will be entitled to the inital value of AutoWorks at the time of the marriage plus about an 8% interest for 20 years. And

the community will take the remainder of the value. Wendy and Henry taking 1/2 each.

The court could apply the Van Camp test. Van Camp is applied when natural growth is the predominate factor. The Van Camp approach favors the separate estate and rewards the community estate with the reasonable market value of services provided less any community expenditures. Here, Henry worked for 20 years and paid for community expenses with the remainder of funds after the house payments. Althought the payments were SP for community expenses, the use of SP for community expenses operates like a gift and the expenditures will be considered community funds. Therefore, Henry would be entitled to the remainder of the value of the business after his 20 years of labor minus the expenses paid from the business. Wendy and Henry would be entitled to 1/2 the community estate value each.

Conclusion: Based on the pre-martial agrement, Henry likely takes the entire value of Henry's AutoWorks as SP. To the extent that he does not, the court would apply the Pereira test and award Henry with his inital value plus a reasonable rate of return, and Henry would take 1/2 of the appreciated value, remainder to Wendy.

5. How Should the Court Dispose of the Savings Account:

Deposit Accounts: Deposit accounts are presumptively CP. The mere fact that an account is held in the name of one spouse does not provide clear and convicing evidence that the account is SP. Here, the savings account is in Henry's name alone

but this will not defeat the presumption. Therefore, the $100,000 is presumptively CP. Henry may attempt to establish that a portion of the account is SP because it includes the remainder of funds after the community expenses. However, Henry will be requried to establish the SP portion of the funds using a direct tracing method which would be exceedingly difficult in this cricumstance. The court will likley not allow Henry to merely apply a retroactive accounting approach. Therefore, the Court will likly find that the savings account is CP. The Pre-Marital agreement did not provide for any bank accounts and therefore does not apply.

Conclusion: The court should find that the $100,000 is CP. Therefore, Wendy will be entitled to a $50,000 undivided interest and Henry will be entitled to an equal $50,0000 undivided interest.

6: Other Factors to Consider:

Alimony: Although not specifically asked, a premarital agreement may waive alimony so long as the waiver will not effectively leave the spouse on governmental welfare. Here, Wendy waits tables and likley made a meager salary. To the extent that Wendy will be left on government assistance, the court may order Henry to pay alimony either as a lump sum or as periodic monthly installments for an indefinite amount of time. This provision alone will not make the entire agreement unenforceable but could affect the disposition of property. In additon, it could give rise to the findings of fact and conclusions of law required for an unequal distribution of the martial property.

Unequal Distribution: As Henry takes the majority of the property, subject to any circumstances not disclosed in the facts, the court could order an unequal distribution of the $100,000 if the court makes the appropriate findings of fact and conclusions of law. Especially if Wendy will be unable to avoid living on governmental assisstance.

END OF EXAM

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APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

QUESTION 7

7)

1) Allen v. Big Boss Leash Co.

Strict Product Liability:

A product manufacturer may be held strictly liable for harms that are caused by products with manufacturing, design, and/or warning defects. A manufacturer is liable for any product that it puts into the stream of commerce, which leaves its possession with a defect. Those in the chain of distribution are also strictly liable. A manufacturer's liability isn't limited to the specific, intended use of the product, but any foreseeable and reasonable use of the product.

A manufacturing defect occurs when one product from the product line deviates from its intended design and leaves the factory with a defect. A design defect occurs when there is a safer design alternerative that would not cost the company significantly more time and money to produce and still maintains the practical use of the product. A defective warning fails to give proper notice to a consumer of inherently dangerous elements of the product itself and/or its use.

Here, Allen has a claim against Big Boss Leash for a manufacturing or design defect. If the leash left the factory as one of the only leashes to be defective, it is a manufactoring defect. If many leashes tend to snap in this manner, there may be a design defect.

Big Boss will likely argue that Allen was not using its leash according to the intended purpose-- for animals equal to or less than 100 lbs. However, it is foreseeable and reasonable that a consumer will use the leash for an animal weighing only 5 more pounds than the intended weight limit, so that a jury may find that Allen did not assume the risk.

There doesn't appear to be a valid claim for a warning defect since Big Boss included a warning not to exceed 100 pounds for use within the packaging, although, this would be a warning that should be coupled on the outside of its packaging where the company advertises that the least is GUARANTEED to control even the most aggressive dog. Allen could argue that the adverstisement was misleading (see below) and that the warning should have been placed on the outside of the packaging so that he would have been properly warned of the risk. A jury could reasonably conclude that the manner of packaging was ineffective.

False Advertisement/Misrepresentation: Allen could also sue Big Boss for false advertising or misrepresentation for the reasons described above. The company made a claim as to the durability of it's leash (GUARANTEED to control even the most aggressive dog), while failing to couple this language with material information about the weight limit. Allen deterimentally relied on Big Boss' false advertisement/misrepresentation in purchasing the leash for his dog and injuries occured as a result.

Contribution: Allen is likely to be sued by Carl, who sustained injuries as a result of a dog attack, when the leash broke. Allen may seek to file a third party complaint against Big Boss Leash in that action so that the company may contribute to any damages assessed against Allen. Allen could also seek to sue Big Boss Leash for indemnity, but that would not be a viable claim because there is no relationship between Allen and Big Boss Leash as manufacturer and consumer that would permit this kind of action/recovery.

Negligence: Allen may also sue Big Boss Leash under a theory of negligence. To establish a prima facie case of negligence against a defendant, a plaintiff must prove duty, breach, causation and damages. The Defendant must owe a duty of reasonable care to Plaintiff (measured by an objective standard), the Defendant must have breached that duty, the Defendant must have actually ("but for" analysis) and proximately (legal cause; foreseeable) caused harm to Plaintiff, and the Plaintiff must have suffered damages (injury/harm) as a result.

Duty to Allen: to place a reasonably safe product into the stream of commerce and adequately warn Plaintiff of any dangerous uses; advertise in a manner that does not mislead plaintiff.

Breach to Allen: Failure to manufacture a safe product and adequately warn plaintiff; misrepresentation.;

Actual cause: but for the leash breaking, Allen would not have sustained injury to his eye and would not be reasonable for injuries to Carl.

Proximate cause: it is foreseeable that a defective, snapping leash would cause injury to the person holding the leash and lead to a dog attack, since the product advertise that it can be used by "the most aggressive dog."

Damages: injuries were caused to Allen's eye, Carl's psychological health, and his ankle.

Res Ipsa Loquitor: The legal theory of Res Ipsa Loquitor is raised when an event or injury wouldn't normally occur but for Defendant's negligence. Plaintiff must establish possession and/or control of the item by Defendant. Here, Plaintiff purchased the leash made by the manufacturer so that possession/control is established and leashes don't generally snap unless they are negligently made. Defendant would argue that this is not accurate because of the weight restriction.

Contributory negligence: Big Boss Leash may assert an affimative defense of contributory negligence against Allen, because he used the leash for a dog that was over the weight restriction.

Assumption of the risk: Big Boss Leash may also assert an affirmative defense of assumption of the risk, because Allen used the leash for a dog that was over the weight restriction.

2) Allen v. Perfect Pets

As mentioned above, strict liability for product defect applies to all defendants

within the chain of distribution.

3) Allen v. Coffee Shop

Allen is likely to be sued by Carl, who sustained injuries after the dog attack and falling down the coffee shop stairs. Allen may seek to file a third party complaint against the coffee shop in that action so that the company may contribute to any damages assessed against Allen.

4) Carl v. Allen

Strict liability for dangerous or wild animals: Strict liability may attach when an owner is known to have a dangerous animal, even if it is domestic, or a wild animal. In this instance, Allen's dog was trained and won an award for his obedience. As a result, Allen had no notice that his animal was dangerous and since a dog is a domesticated animal, strict liability is not likely a valid claim.

IIED: A Plaintiff may pursue a claim for IIED when Defendant acts with intentional or reckless extreme and outrageous behavior (beyond the bounds of common decency) and caused severe emotional distress to Plaintiff. Physical manifestations are not required, but the distress must be severe. A claim cannot be based on unknown sensitivies of the Plaintiff.

Here, Allen did not intentionally cause his dog to chase Carl, nor did he know that Carl was afraid of dogs. Additonally, it is not apparent in these facts that he

suffered severe emotional distress as a result of the dog attack. Thus, this claim will fail.

Negligence: Carl must prove duty, breach, causation, and damages. Allen did have a duty to maintain his dog and prevent attacks in a manner consistent with a reasonably prudent person in similar circumstances. A jury could find that Allen breached that duty by purchasing a leash meant for a smaller dog. Carl did suffer injuries as an actual cause of the dog attack. However, he may have trouble proving that he suffered injury as a proximate cause of the dog attack. Its not foreseeable that the stairs would break as Carl ran down them, but it is foreseeable that Carl would be injured as he attempted to run away from a dog attack. This would make for an interesting motion to dismiss/motion for summary judgment. Carl did suffer damages.

5) Carl v. Big Boss Leash

Strict Liability: Carl may also pursue a strict liability claim against Big Boss Leash. See elements above. It is foreseeable that there would be a victim of a dog attack if the leash broke. It does not matter that he isn't the person who bought the leash.

Negligence: Carl may also pursue a negligence claim against Big Boss Leash.

Duty to Carl: to place a reasonably safe product into the stream of commerce

Breach to Carl: Failure to manufacture a safe product

Actual cause: but for the leash breaking, Carl wouldn't have been running away, thereby causing his ankle injury.

Proximate cause: it is foreseeable that a defective leash would lead to a dog attack; however, we have the same proximate cause issue listed above. Its possible that the stair breaking was subsequent, intervening cause that severed causation between Big Boss Leash's negligence (and Allen's) and Carl's injury. It is also possible that all three Defendant's will be found negligent. In Nevada, a Plaintiff can collect from any one defendant for his injuries where they were all a substantial cause of his injuries. In this case, he would likely go after Big Boss because they have the most money to pay for his injuries and then Big Boss could seek contribution from the other defendants.

Damages: Carl suffered personal injuries.

6) Carl v. Perfect Pets

As mentioned above, strict liability for product defect applies to all defendants within the chain of distribution.

7) Carl v. Coffee Shop

Premise liability: The extent of premise liability depends on the status of the Plaintiff. Plaintiff can be an undiscovered trespasser, known trespasser, licensee, or invitee. Defendant's negligence for each Plaintiff is as follows:

Undiscovered trespasser: Defendant has no liability.

Known (or foreseeable) trespasser: Defendant has a duty to protect the known trespasser from 1) artificial 2) extremely dangerous 3) concealed 4) known conditions on the land.

Licensee: Defendant invites this person onto his property, but not for economic gain, and owes a duty of known dangerous conditions not obvious to the licensee.

Invitee: Defendant invites this person onto his property for economic gain and owes a duty to care for the premise in a reasonably prudent manner. Issues to consider in this scenario are whether Defendant had notice of the dangerous condition and if the invitee went beyond the scope of his invitation.

Carl may argue that he was an invitee because the coffee shop is a business and it had a duty to care for the premises in a reasonably prudent manner since it had prior notice of the broken stair. However, the coffee shop will argue that he was an undiscovered trespasser to who it owes no duty. This is a reasonable argument since the store was closed at the time that Carl was peeping through its windows. The store might also argue that even if Carl was an invitee, he exceed the scope of his invitation because there was no reason for him to be on the stairs when the store was closed. The stairs seem to have been open to the public since they lead from the shop to the parking lot, so that Carl could also argue that he was a known or foreseeable trespasser. This is the most likely scenario. The broken stair probably doesn't rise to the level of extremely dangerous and it wasn't concealed,

so that Carl will have a hard time making a claim for premise liability.

Negligence Per Se: A Plaintiff may claim negligence per se when a Defendant violates a statute or ordinance. Negligence per see may only apply when Plaintiff is in the class of persons that the statute or ordinance is meant to protect and suffers the kind of injury that the statute or ordinance is meant to prevent. Here, Carl is in the class of persons that the building code is meant to protect (the general public who has access to the outside steps) and he did suffer the kind of injury that the building code is meant to protect (by falling into a broken step. Negligence Per Se alleviates the jury decision as to whether a Defendant owed a duty to plaintiff. This cause of action is a viable one for Carl, made worse by the fact that the coffee shop was mandated to repair the stair and only put up a warning.

Contributory negligence: The coffee shop may assert an affirmative defense of contributory negligence because it put up a visible warning that Carl ignored.

Trespassing: The coffee shop may also countersue Carl for trespassing on its property. A tresspass of land occurs when a Defendant intends to by on someone else's property or causes a tangible object to be on their property. Carl was intentionally on the coffee shop's property without consent, but could argue a defense of personal necessity since he was running away from a dog. Compensatory damages caused out of personal necessity are still due to the Plaintiff.

END OF EXAM

FEBRUARY 2018
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

QUESTION 8

8)

1. Quiet Title Action:

Mary deeded property to "Tom for life, then to Amy" The deed was a life estate to Tom, with a indefeasible vested remainder to Amy in fee simple.

A deed must have the a reasonable identification of the property and a reasonable identification of the grantee. Here, the Property was properly defined, and it is assumed from the facts that the deed was "properly executed" and the formalities required by the Statute of Frauds were met. No consideration is necessary for a deed to be valid in Nevada.

After the deed was delivered to Tom -- he moved in. He had the rights to the property for HIS LIFE. A life tenant has the burden not to commit waste -- (1) cannot commit affirmative waste (by actively doing something to harm the property), (2) cannot commit permissive waste (by failing to repair and maintain the property), and (3) cannot commit ameliorative waste (by improving the property, without the consent of all remaindermen).

The life tenant also has the obligation to pay taxes on the property while they live there, and to pay for the normal upkeep of the property during their lifetime. If they rent the property, they may collect rent on the property and retain it during

their lifetime.

Here, Tom Quit Claimed the property to Curtis. A quit claim is a deed that transfers whatever ownership interest the grantor has in the property -- and no more. In addition, no warranties are made in a quit claim deed. Therefore, whatever ownership interest Tom then had in the property, that was precisely what was conveyed to Curtis. Because Tom only had a life estate in the property, he granted Curtis a life estate, pur autre vie. That means, Curtis had rights of possession in the property based on the life of Tom. When Tom dies, that is when Curtis loses his rights in the property.

His borrowing of $1 million was the basis for granting the property to Curtis. The transfer of the deed acted as a mortgage, and the deed purported to give Curtis whatever interest Tom had in the property. At that time, the grant of the deed to Curtis was one of a trustee, holding the deed of the property in trust as security for repayment of the loan. It was not delivered to him for immediate transfer of the property. Therefore, Curtis did the right thing of just putting it in his safe. At that moment in time, Tom still had the rights in the property, and Curtis was holding the deed (albeit in his name) as security for the loan.

Tom defaulted, and Curtis then recorded the quitclaim deed. Curtis was entitled to record the deed once Tom did not make payments under the oral agreement of the parties and the promissory note. However, this was not proper (as described below). Moreover, Curtis's rights in the property would only be limited to Tom's

life estate (i.e., pur autre vie, the length of Tom's life).

Tom filed a lawsuit against Curtis to set aside the recorded quitclaim deed. Nevada is a lien state, and once he gave the quitclaim deed to Curtis, it was simply a lien against the estate and did not act to immediately transfer title. Curtis recorded the deed per their written agreement once Tom defaulted, and purportedly thought he could get ownership interest in the Property by simply filing the deed.

However, in Nevada, Curtis should have gone to the court and set a judicially required foreclosure sale, which is the proper procedure. That would have given Tom notice of the pending foreclosure, and rights of redemption to pay any unpaid amounts due under the mortgage/promissory note to obtain possession back of the home. Nevada allows for debtors to have the right of redemption to pay back the lender of all deliquent amounts anytime before the foreclosure sale. Moveover, Nevada has a statutory right of redemption which allows an additional 6 mos. period to cure all outstanding amounts due -- even after the lender takes possession of the property after a foreclosure sale. Curtis should not have simply filed the deed -- he should have had a properly noticed foreclosure sale. Moreover, he should have given notice to Amy of the sale because she also has future rights in the property. The foreclosure sale notice must be given to all junior mortgages and anyone that might be able to redeem the property.

Tom should ask the court for a constructive trust of property and for it to be

returned to Tom because the property was not foreclosed on properly. The deed was improperly filed in Curtis's name and the court should hold that it is being held in Trust for Tom and Amy. He should be successful to have the recorded quitclaim deed set aside. Curtis will argue that he had all the rights to file the deed because that was the term of their mortgage agreement. However, he does have a lien on the property, which he should record at this point. Because Tom only had a life estate in the property and the lien is attached to the entire property, and Amy did not approve the lien, Curtis will likely be unsuccessful in getting his money repaid. He will be able to sue Tom for the deficiency and for the amount of money he loaned Tom, but it is unlikely that he will be able to get his money repaid by Amy.

Curtis has no rights against Amy because Amy did not sign anything and it is unlikely that the lien will be attached to her FS when she obtains the property since Tom never had the right to burden the property to begin with in this manner. However, in the event that Curtis's mortgage does run with the land, Amy will have to repay it back in full (the full $1 million) if Tom never repays it

2. Claims Amy has against Tom, and defenses:

Affirmative Waste: Tom then entered into an agreement with ABC logging company and gave it a Profit. A Profit is a nonpossessory right to enter the land of another (servient estate) and remove rocks, minerals, or trees from it. Here,

ABC had a profit for 10 years for $100,000 a year. Tom should not have granted ABC a profit in the Property, without getting prior written consent from Amy, who will own the property in Fee Simple after Tom's life estate ends. That is because the Property had never been used in this manner in the past -- no prior owner had ever used it to harvest/remove trees. This is therefore affirmative waste. He is allowing another person to harvest and remove valuable assets from the land and reducing its value without asking Amy -- and depleting its value in a way not anticipated or implied. Moreover, he was keeping the $100,000 for himself for 10 years without sharing it with her. The profit is even more egregious because it granted ABC the right to harvest and remove an "unlimited" number of trees from the property. This could deplete eliminate or reduce the vale of the property from $2 million to almost nothing. This is unacceptable affirmative waste. There might be an exception if the property, when granted to "Tom, for a life estate and then to Amy" had the Property been used in the past as a tree harvesting business. That is, had the property had this as its prior use, then the life estate owner could theoretically continue to benefit and use the property in that manner. Here, however, because there was not prior use, this would be considered affirmative waste.

Moreover, granting a profit also impliedly grants an easement to enter the land of the servient estate to remove the assets. Here, Tom had no right to impliedly grant an easement on the property he did not own in fee simple to ABC to enter onto the land.

Mary is entitled to purge all of Tom's profits that he made for the invalid Profit lease -- $100,000 per year for how ever number of years the lease continued. It was a 10 year lease and it is unclear if Amy ever filed a court action to terminate the lease with ABC. She would be able to do so and asked the court to terminate it based on that Tom had no right to enter into in at all. However, at a minimum, she would be entitled to the entire $100,000 per year called for in the lease that was paid by ABC to Tom. She would also be able to seek additional damages from Tom if the property was damaged in any other way by ABC's activities on the land.

Permissive Waste:

Once Amy realizes Tom has moved out, she sees that Tom has not repaired the roof -- allowing for rain and snow to enter the residence and damage it. Again, Tom as the life estate holder, had the duty to make regular maintenance and repairs during his life tenancy. Amy should be able to recover the sums from Tom that she ended up paying to repair the roof herself.

Real Estate Taxes:

Tom was supposed to pay all standard taxes that were due on the property during his life tenancy (as well as all interests in prior existing mortgages, although not relevant here). Tom has not paid real estate taxes for the past three years in an amount totally $20,000. Amy is entitled to collect $20,000 from Tom for the back

taxes he never paid. Moreover, she would be entitled to payment for all taxes that would be incurred during his entire life tenancy -- however number of years that ends up being.

Tom can renounce the rest of his life estate (and Amy accepts it), in which case Amy would therefore be responsible for paying the taxes once she obtains the property in fee simple per the remainder interest. It is unclear whether Amy was entitled to move into the property when Tom left. If she moved in without Tom renouncing his life estate, she would have to pay him rent for her time there for the length of his life.

Tom can defend against Amy's claims by stating that the Profit he gave ABC was improving the property, and he can offer to share the profits with her. However, as stated above, Tom needed prior permission before he could commit ameliorative waste. In addition, Tom can argue that since Amy is now living in the property that she now has to pay all future taxes on the property. Legally Tom still has the obligation to pay all taxes during his lifetime, unless he renounces his interest and Amy accepts it. Tom was only entitled to renounce his life estate upon the initial conveyance and is not supposed to renounce it after he accepted the conveyance from Mary, which he did. Amy has the rights of repayment for all the real estate taxes, al rents from ABC and all normal, routine maintenance and repairs on the property for the length of Tom's life.

Curtis's debt:

In addition, if Amy is held responsible for the unpaid debt Tom owes to Curtis, she can sue Tom for the entire amount that is encumbered on the land and any amounts that she pays him directly. Tom will owe her $1 million dollars for that lien in the event that it is attached to the deed in record title.

END OF EXAM