FEBRUARY 2019
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

QUESTION 1

1) Please type the answer to Essay Question 1 below When finished with this question, click to advance to the next question.

Austin has the following claims against Terrific Trips (TT):

Negligence actions:

Negligence/Negligence Per Se

Duty-A business in Nevada has a duty to make it's building safe for all business invitees who spend time there. An invitee is owed this duty whether or not he spends any money or makes the business owner a profit. This duty is non-delegable. Here, TT had a reasonable duty under the circumstances to warn it's patrons of known and unknown dangers, to repair those dangers--to inspect the premises to find latent hazards, and then to make the casino safe for Austin, its business invitee, while he gambled, drank and otherwise spent time therein. At common law TT's standard required for it's duty towards Austin to be a duty to warn of and to make safe known and unknown hazards, both natural and man-made on the premises. TT would need to inspect and repair as a reasonably prudent business owner. However, in reality, the common law standard of care for a business owner and the Nevada standard of care for the reasonably prudent business owner, are anazlyzed basically the same way. Here, TT had a duty to inspect it's floor area to discover even unknown hazards and to repair and to fix all

known and unknown hazards to it's patrons such as Austin. At trial, the judge will determine what duty is owed to Austin.

Breach-1) a Nevada business can breach this duty by failing to keep it's business invitees safe from harm if it failed to act as reasonable under the circumstances. Did the business fail to act as a reasonably prudent business towards its customers? Did it inspect it's floor area for any hazards and then repair them? Did it warn the customers of the potential hazard or did it quickly repair the hazard? Here, it is clear that TT breached it's duty to Austin as Austin was harmed while on the premises of the casino. He tripped and fell on a large piece of torn carpet that was known to be torn and hadn't been repaired for days. It had no warning signs to tell him it was there and had not been repaired. A reasonably prudent business owner would not allow a torn carpet to remain on the floor of a busy casino just waiting for someone to trip over it. It is well known that tripping over something can cause an injury. The failure of TT to warn about the hazard or to repair or to replace this carpet was a breach of it's duty to act reasonably under the circumstances towards Austin.

Breach 2) negligence per se.

If there is a law such as a municipal code or a statute on point that 1) is intended to protect a person of the statutory class and 2) the injuries caused as a result of the violation of the statute are the kind of injuries for which the statute was designed to prevent, then a Defendant's violation of the statute can keep a Plaintiff safe from a

directed verdict. Here there is a Reno Municipal Code that prohibits more than 500 people on a casino floor at any given time, and that violation carries a fine. It is reasonble to suggest that the purpose behind this statute is to avoid overcrowding a casino floor, with such overcrowding leading to some pushing and tripping, such as we have in this case. As a result, Austin is the type of person within the class of persons meant to be protected by this municipal code. His injuries may have been caused by TT's violation of the code, as we are told that it was very crowded on the floor as a concert had just let out. However, we don't know how many people were on the floor, and without that information we don't know if this municipal code was violated. We do know that Austin's injuries were caused by him tripping on the carpet--and that type of injiry my be the type that the code reasonably was meant to prevent. But without more evidence as to the number of people on the floor, we can't ascertain whether TT violated the code. However, if TT violated this municipal code, then there is an assumption that it did breach it's duty towards Austin, and the case can go forward with causation and damages, and will not be lost on a directed verdict.

Causation-

1) In order for a property owner in Nevada to be found liable for negligence, it must be shown that the breach by TT of it's duty of care was the legal cause ot the customer's injury. The question is "but for the breach of the duty towards the

customer, the customer would not have been injured". In this case, but for TT's failure to warn of or to make safe the torn carpet area in it's busy casino, Austin would not have fallen to the ground and severly injured his knee. As a result, TT's breach of it's duty towards Austin is the legal cause of Austin's injuries.

2) Additionally, in order for a property owner to be found liabile for negligence, Nevada requires the property owner's breach of the duty of care to be the proximate cause of the Plaintiff's injury. To be the proximate cause of such injury, the Plaintiff must be a foreseeable Plaintiff. Was the Plaintiff in the zone of danger such that it would be reasonably foreseeable that he could be injured by the casino's breach of its duty to make the floor and walkway safe for it's patrons? In this case, yes, as a patron on the casino floor gambling, drinking and otherwise having a good time, it is foreseeable that Austin could trip on a large piece of ripped carpet. The fact that TT failed to repair the ripped carpet or to otherwise warn Austin that it was there, makes that breach the proximate cause of Austin's injuries.

Damages- In order to prove a negligence action, a Plaintiff must provide evidence that he actually was injured by the breach of a duty owed to him by the Defendant. Injuries include physical injuries to one's body and here, Austin can show that his knee injury was caused by the breach of the duty owed to him by TT. His medical bills are his damages, including any loss wages from work. His pain and suffering are recoverable damages as well. Had the carpet been repaired or had there been a warning, Austin would not have tripped over it and severely twisted his knee and as

a result incur these damages.

As Austin is able to provide the fact finder with his prima facie case of negligence, he should prevail at trial.

Negligent infliction of emotional distress

In Nevada, a business owner owes a reasonably prudent standard of not inflicting emotional distress upon its customers. Emotional distress can be shown through duty, breach, causation and damages as in the regular negligence analysis, above. Here TT owed Austin a duty as a reasonably prudent business owner not to inflict emotional distress upon him. It is clear that TT violated this duty, not only by failing to warn of and to make safe the carpet, but lso by the actions of it's casino manager, as will be discussed below.

As for causation, but for the actions of TT, Austin would not have been emotionally distressed. Also, Austin was a foreseeable plaintiff within the zone of danger from both the negligence to repair/warn of the carpet hazard as well as enduring the unreasonable hazing by the casino manager, which will be set forth below. As for damages, which are a required element in the negligent infliction of emotional distress, it is clear that Austin suffered damages. We are told that he begged to be taken to the hospital and that he endured an assault by the casino manager himself. His knee was severely twisted.

Negligence for the actions of the ambulance and the drunk driver

Once a defendant sets in motion a series of negligent actions, the defendant will be liable for any reasonably foreseeable injuries that occur even after his negligent actions have ended. For instance, medical malpractice is presumed to be a foreseeable injury that may be suffered if a defendant negligently injures someone and they must be treated. Here, we have Austin while riding in the ambulance, being rear-ended by a drunk driver. He was knocke off the gurney and broke his arm. Was TT's torts the legal or the proximate cause of this broken arm? A reasonably prudent person would not find that a drunk driver slamming into an ambulance on its way to the hospital was not a foreseeable injury within the chain of injuries initiated by TT. It was a supervening event and the chain of injury was cut off by the negligent actions of the drunk driver. Therefore Austin will not have a claim against TT for this and TT will have such a defense.

However if the ambulance employees were neglignet in failing to strap Austin in so that he could not fall off the gurney and break his arm, then this would be akin to medical malpractice following an injury--it is a foreseealble injury after TT's negligent actions and Tt can be liable.

Regardless, someone was negligent and perhaps Austin can sue both the ambulance company and TT as when it is impossible to decipher which defendant was the culprit that caused Austin's injuries, then he can sue both of them and let them litigate the facts. Austin could get a judgment against one or the other and then the other could recoup via indemnification any extra monies that it paid to

Austin above qn beyond it's own negligence.

DEFENSES:

TT would have the following defenses to the above negligent actions:

1) Shopkeepers Rule: a business is allowed to detain someone on it's premises if it reasonably believes that they have committed a crime on the premises or if they otherwise have information to assist the casino. This belief must be reasonable and the detention must be for a reasonable time and in a reasonable manner. Here, Austin's detention was for an unspecified reason. There are no facts to suggest what the detention was for, other than the fact that he was injured. Therefore, this detention itself may not have been reasonably based in fact. Furthermore, he was detained for an hour, which appears to be in excess of any time necessary to interrogate Austin while he was injured and asking for a hospital. The manner of the detention does not appear to be reasonable either--he was assaulted. This defense will not work.

2) TT can claim that Austin has failed to meet his prima facie case on the negligence actions above. However, those elements have been stated and have been met. TT will lose.

3) TT can claim that Austin was contributorily negligent or comparatively negligent and thus any award must be reduced by his negligence. Contributory negligence is a defense theory that deems if a Plaintiff is at fault at all, then they are not entitled

to a judgment. Comparative negligence theories simply apportion the percentage of negligence between the plaintiff and the defendant. Some states allow plaintiff to win even if they are 90% at fault. In Nevada, a Plaintiff cannot be more than 50% negligent to win his case. This means that Austin must not have been 51% neglient and TT 49% negligent --otherwise Austin would not win his negligent cases. Here, Austin was not more than 50% at fault.

4) TT will claim that it is Not vicariously liable (as shown below, TT is vicariously liable for the intentional tort damages borne by Austin) as well as for the negligent torts as a business is vicariously liable for the negligent torts of its employees when they act within the scope of their employment and for the benefit of their employer. Although TT might try to argue that the manager's actions were a frolic and detour--he overstepped the scope of his employment and he was off duty--TT is vicariously liable as analyzed herein.

5) TT will claim that it had no notice of the carpet. This defense will not win inasmuch as an innkeeper must act as a reasonably prudent inkeeper and inspect for such hazards. Furthermore, an employee tore the carpet with a luggage cart and thus notice will be imputed to TT for the actions of its employee.

6) TT will claim that the municipal code did not intend to protect a class of people such as Austin, and that even if it did, his injuries were not within those type that were meant to be protected. As analyzed herein, TT will not win with that defense.

7) TT will argue that Austins injuries were pre-existing and as a result it should not be liable for his knee injuries. HOwever, a defendant takes the plaintiff as he finds them. That simply means via the eggshell thin plaintiff theory, whether or not a plaintiff has a high susceptibility to an injury over someone else's susceptibility, he still can recover damages for those inuries. TT will lose on this theory.

8) TT will have the defense of intervenining supervening cause that cut it's chain of liability for purposes of any claims Austin may have for his injuries while riding in the ambulance and being struck by the drunk driver. HOwever this defense will not work for his broken arm caused by falling off the gurney if the ambulance was negligent in not strapping him in.

Intentional Tort actions:

Assault-

An assault is the intentional act that causes a reasonably prudent person to be apprehensive of an immediate harmful and offensive contact--a battery. An intentional act need not be exactly meant to cause the assault, but it must be intentional in nature and not caused by a malady or other reflex that defendant has. Here, we have the casino manager raising his fist as if her were going to punch Austin. While we don't know exactly whether Austin was aware of this intentional act that would make him apprehensive of an immediate harm, however it appears as if they were in a small room, an employee break room, and as a result, Austin probably was aware of this act. A person must be aware of the actions creating

the assault in order to have an action for it. (Unless the person was injured without the awareness, and here we have no facts to establish that Austin was injured by this assault by the manager.)

vicarious liability--as a general rule, an employer is not vicariously liable for the intentional torts of its employees, However, an exception to this rule is when the employee's actions are within the scope of his employment, or whether the actions were for the benefit of the employer. So, too, can the employer be liable for the intentional torts of its employee when the employee's duties involve stress and friction such as a bouncer at a bar, and perhaps those of a casino manager. So TT would be liable to Austin for these intentional torts by the casino manager as the manager, even while off duty, was acting for the benefit of his employer TT and his duties regularly would involve stress, danger and friction.

So Austin would have a claim against TT for assault.

Battery

A battery is an intentional act that causes a harmful or offensive touching to another human. Here, Adam can claim that not only did the casino manager batter him by touching him while injured and taking him to the break room (with TT being liable vicariously--see above), but he could also claim that by intentionally allowing all the extra people on the casino floor that bumped into him over and over, that TT caused these harmful and offensive batteries to occur over and over.

False Imprisonment

False imprisonment is an intentional act whereby someone is held in a confined space with no reasonable means of escape or retreat. Here the casino manager (and TT vicariously) held the begging Austin in the break room for an hour while Austin begged to be taken to a hospital. As Austin more than likely was unable to move voluntarily as his knee was severely injured, he had no reasonable means of escape and had to wait for the manager to do something with him. Austin was held in this confined space through the intentional acts of the manager.

Intentional Infliction of Emotional Distress (IIED)

A defendant can be liable for the intentional infliction of emotional d istress if, as per the 2nd Restatement: its actions exceed all bounds of decency. The actions must be so outrageous that any reasonable person would be severely emotionally distressed. Here we have a business invitee, Austin, who is severely injured, and he had to endure an hour of the casino manager interrogating him and acting as if he were going to punch Austin. This manager confined Austin to the break room and refused to get him medical attention. It is clear here that any reasonable person would be severely emotionally distressed by these actions of the manager, and thereby by TT.

Vicarious Liability

vicarious liability--as a general rule, an employer is not vicariously liable for the

intentional torts of its employees, However, an exception to this rule is when the employee's actions are within the scope of his employment, or whether the actions were for the benefit of the employer. So, too, can the employer be liable for the intentional torts of its employee when the employee's duties involve stress and friction such as a bouncer at a bar, and perhaps those of a casino manager. So TT would be liable to Austin for these intentional torts by the casino manager as the manager, even while off duty, was acting for the benefit of his employer TT and his duties regularly would involve stress, danger and friction.

DEFENSES:

TT would have the following defenses:

1) Tt's defenses to intentional torts would include the fact that it is not vicariously liable for the intentional torts of its' employees. We have shown above that this defense will not work here as an exception to that rule applies.

2) TT will argue that Austin impliedly consented to being jostled by the crowd in the casino and this caused his fall. A person can impliedly consent to intentional torts by his actions and the totality of the circumstances surrounding them. Here, we have Austin participating within the casino floor games and walking through the crowd. However any consent can be tempered by the SCOPE of the intent, Austin's actions of being in the crowd may have indicated that he consented to being around many people, however the scope of his consent was exceeded. A

reasonable person under the circumstances would understand that once the overcrowding began, his consent was not to be virtually carried through the crowd so much so that he tripped. Furthermore, the length of his consent had more than likely expired as a result.

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QUESTION 2

2) Please type the answer to Essay Question 2 below When finished with this question, click to advance to the next question.

1. Valid Contracts:

In order for there to be a valid contract, there must be an offer, acceptance of the offer, and consideration in exchange for that offer (consideration is the bargained for exchange or legal detriment in exchange for a service or good). Each of the aforementioned contracts have consideration, because they all have a bargained for exchange for either services or the sale of goods. Consideration therefore is presumed in each of the contracts below.

Liz and Olivia

This contract is for services, which means that the common law will apply.

A. Formation of the contract

Offer. In this matter, Liz provided Olivia with an offer for a contract when she told Olivia that she would do the job for $35,000, and for reimbursement of all materials. Olivia's initial presentation of her architectural plans to Liz would not be considered an offer because it was an invitation for an offer.

Acceptance. Olivia's response to Liz, "Let's do it!" signifies an acceptance to the offer. The statute of frauds (SOF) states that any service contract that cannot be

completed within one year must be in writting and signed by the parties. Here, we are not told whether this project would take more than a year to complete, nor are we told whether Liz's offer and Olivia's acceptance was done via email or in writing. Assuming that the contract will be completed within one year, the parties have a contract.

Consideration. As indicated above, there is a bargained-for exchange here because Liz agreed to do the work in exchange for $35,000 and reimbursement for materials.

Therefore, a contract exists.

B. Terms of Contract

The terms for the contract are that Liz will complete the job for $35,000 and reimbursement for all materials, and that the job should not cost more than $50,000. Terms required in a service contract are the price term. Here, the price term is pretty straight forward, in that the price for the job will be $35,000, and that Liz will not spend more than $50,000 for materials.

When a contract is silent as to whether assignment or delegation is allowed, it is presumed that the parties may assign or delegate their duties so long as the contract is not a personal/ special service contract. A personal/ special service contract is one in which the the party to perform the service cannot be replaced because they are so special that no one could replace them (such as a famous

singer or performer). Here, Liz is Olivia's contractor, but she is not a special contractor that could not be replaced by another contractor. Therefore, it will be presumed that the parties may assign or delegate their duties to a third party.

Olivia and John

This is also a service contract, which means the common law will apply.

A. Formation of the contract

Liz validly assigned her duties to John by asking him to take over the job. The difference between an assignment and delegation is that a delegation means that the original person is still associated with the job, but that they are delegating some of their duties to another person. Assignment means that the original contractor is assigning all of their duties to the third party. In an assignment, the assignor does not need to get permission of the other contractor in order to make the assignment, so long as they do so reasonably and in good faith. Here, Liz did not get Olivia's permission to assign her duties to John; however, she did so in good faith because she knew that she could not complete the job on time. Therefore, Liz did not need Olivia's permission to assign her duties. Furthermore, because Liz and Olivia's contract was silent as to prohibition of assignment, Liz was able to assign her duties to John.

Therefore, Olivia and John have a valid contract.

B. Terms of the contract

The terms of this contract will be the same as those between Liz and Olivia. Modification of any service contracts require new consideration which is lacking here, so the terms of the contract will remain. (See below).

Liz and Store

This is a sale of goods contract, in which the UCC will apply.

A. Formation of contract

Offer. In this matter, Liz sent an offer to Steve, the store manager, via email, with Olivia's plans, and asking if h'ed provide the building materials. Building materials are goods, therefore making this offer for a sale of goods.

Acceptance. Steve's response, "Store will supply what you need. Prices to be agreed upon." is a valid acceptance of the offer. The SOF states that any sale of goods contract for $500 or more must be in writing and signed by the parties. Nevada allows for the writing requirement for the SOF to be via email, so the emailed contract is valid. However, in a sale of goods contract, the quantity term is required in order for the contract to be valid. Here, the quantity term in the contract is very vague, and possibly misleading. The contract does not describe what supplies will be sold, nor does it state how much supplies will be sold. The fact that it says "what you need" is very vague as it does not indicate what is actually needed. Therefore, this may not be a valid contract based on the

vagueness of the terms of the contract.

Consideration. As indicated above, consideration is a bargained for exchange. Here, it is unclear whether we have consideration, because the price term indicates that it will be agreed upon. However, it can be presumed that the Store will provide goods in exchange for money that Liz will provide, indicating consideration.

Therefore, because there was an offer; the offer was accepted; and there was consideration, depending on whether the terms of the contract were too vague, there may be a valid contract between Liz and the Store (through Steve).

B. Terms of the contract

Because the terms of the contract are so vague, it is unclear what terms are included in the contract. However, when a contract is silent as to the delivery of the goods, the default is a shipment contract (see below).

Store and John

This remains a sale of goods contract, in which the UCC applies.

A. Formation of contract

Novation. A novation occurs when the parties of a contract agree to substitute a third party for one of the contracting parties. To have a valid novation, all of the parties must agree that the third party will take over in the contract. Here, Liz had

assigned her contract with Olivia to John (thereby giving her permission), and John informed the Store of the change. Steve indicated that he was ok with the change, but that John had to pay each order in advance. This proves that Steve was ok with the change, and therefore, a novation was made. This means that the Store and John had a valid contract.

B. Terms of the contract

The terms of the contract will be the same as those in the contract with Liz.

Suretyship. A suretyship occurs when a third party agrees to pay for the debts of another party. Under the SOF, a suretyship contract must be in writing and signed by the parties. Here, Liz guaranteed John's payments in the event that John doesn't make them. This constitutes a suretyship that is subject to the SOF. Because the suretyship was agreed to over the phone, the suretyship is not valid, and Liz will not be responsible for paying John's missed payments.

Modification. In a sale of goods contract, no new consideration is needed for a modifcation of terms in a contract; but the modification cannot be for a material matter. Here, Steve's requirement that John pay in advance would be a modification to the contract. This modification is on a material matter, because it requires John to pay Steve up front for the goods rather than after the delivery. This modification, unless agreed to by both parties would not be added to the contract.

2. Olivia will not be liable to John for the amount of the final invoice.

In a service contract, modification of the contract requires new consideration. Here, while the assignment from Liz to John was proper, the new price term is not because there was no new consideration on Olivia's part. Olivia did not know about the assignment to John, and therefore gave no new consideration for the new price. Therefore, she will not be liable to John for the final price.

However, because the assignment was proper, Olivia will be liable to John for the original contract price with Liz. When there is an assignment, the original terms of the contract stay.

3. Store may or may not recover for the damaged materials

Shipment contract. If a contract is silent as to delivery, the default is a shipment contract. In a shipment contract, the seller is responsible for getting the goods to a common carrier, and must notify the buyer upon delivery to the common carrier. Once the buyer is notified that the goods have been delivered to the common carrier, the risk of loss shifts from the seller to the buyer. Here, while Steve got the goods to the common carrier, he failed to notify John or Liz that the goods were delivered to the common carrier. Because John was not notified about the delivery, Steve (or the Store) remains liable for the risk of loss.

Therefore, the Store would not be able to collect for the damaged materials.

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QUESTION 3

3) Please type the answer to Essay Question 3 below

1. The Home

Generally property acquired by either spouse before marriage is separate property and property acquired during the time of marriage or registered domestic partnership, other than by gift, bequest, or devise, is community property. Each spouse is entitled to a one-half interest in the community property estate. The title of the property is not conclusive as to character but may provide evidence especially if it was titled as the separate property of one spouse and remains titled in that spouse's name after marriage such that no transmutation (change in character) of the property occurs. Here, the home was purchased a year after Chris and Andy began living together. The deed and mortgage were titled in Chris' name alone and apparently remained titled in his sole name upon divorce. There are no facts to indicate who contributed to the downpayment or if there even was one. Normally, since the home was acquired before marriage, it would be characterized as the separate property of Chris and an allocation of principal rule would apply to allocate any principal payments made between separate property and community property and then a pro rata portion of the appreciation would be allocated to each the separate property estate and the community property estate. However, the facts indicate that Andy and Chris lived together, pooled their income, opened a joint account, and shared in all aspects of the living expenses.

Based on these facts, it appears they may have had a contractual arrangement/agreement, albeit unwritten, regarding sharing in their assets and expenses and cohabitating as if married. A California case Marvin affords cohabitating individuals equitable rights, which are often similar to the rights of married spouses, in situations such as these. As such, the home will likely be considered community property. Andy and Chris would each be entitled to a one-half interest in the home.

2. Personal injury award used to remodel the kitchen

Generally, a personal injury award received by one spouse is the separate property of that spouse unless it is commingled or transmuted. Here, Andy received a personal injury settlement in 2005 prior to the registered domestic partnership and prior to the marriage. Even under the Marvin rights discussed above, Andy's personal injury settlement would be considered his separate property. However, use of separate property funds for the benefit of the community is deemed a gift to the community unless an intent otherwise is indicated. Here, Andy's use of his personal injury settlement funds to remodel the kitchen would be deemed a gift to the community and he would have no right of reimbursement.

3. Pension, IRA, Social Security Benefits

Federal law preempts state law with regard to certain matters. This specifically includes social security benefits. As such, federal law will apply regarding the entitlement or allocation of the social security between the parties.

The pension may also be subject to federal law preemption. If so, then federal law would apply to determine the allocation between the spouses. Generally, a pension would be allocated between the spouses such that the time period of pension earned prior to marriage is calculated and the portion of the pension earned during marriage is calculated and an allocation is made between the spouses accordingly. Here, if the pension falls under federal law, the laws may not recognize any Marvin rights and may only allocate to the community the portion of the pension earned after the date of the registered domestic partnership.

Registered domestic partners are treated like spouses for purposes of community property laws and dividing assets. As such, assets acquired during the partnership are considered community property. The IRA was created and funded after Andy and Chris became registered domestic partners. Therefore, the IRA is considered community property and Andy and Chris will be entitled to a one-half interest each in the IRA account.

4. Gambling Losses

Generally, debts incurred during marriage are the community debts of the spouses. The facts here indicate that the cash advances for gambling were taken from the joint credit card of the spouse. Normally, the credit card debt would be allocated as community property one=half ot each spouse. However, if Chris fraudulently concealed the gambling problem and hid the losses from Andy, which

it appears he did since Andy knew nothing about it, then the debts could be allocated entirely to Chris.

5. Alimony

The court may allow alimony to one spouse when it is reasonable and fair to do so. They will take into account, the length of the relationship, the efforts expended by each, the standard of living during the marriage, the income or potential to make income of each, and the skills, resources, and earning ability of the spouses. When one spouse remained in the home and contributed more in the form of household management and care, thereby enabling the other spouse to focus on their career, the court will sometimes allow special temporary alimony for the purposes of the homemaker spouse obtaining an education or skill to aid in future support of themselves. Here the court will evaluate the earning potential of each spouse and the fact that Chris earns over $200,000 and Andy earns less than $15,000, which will not be enough for him to support himself and certainly not in manner that he was supported during the marriage. The court will likely come up with an equitable amount of alimony and perhaps temporary alimony for Andy.

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QUESTION 4

4) Please type the answer to Essay Question 4 below

1. Daniel's possible defenses to the charge of attempted murder with use of a deadly weapon:

Attempt- Attempt is an inchoate crime that requires the party to intend to perform a criminal act, and the criminal act intended not be completed. Attempt is a specific intent crime and therefore it must be proven that the party had the specific intent to commit the crime.

Lack of Mens Rea- Mens Rea is required in all criiminal acts and must be combined with Actus Reus at the time of the crime. Here Daniel had no intent to murder Virginia at the time of the accident or based on the facts at any time before. Murder is the unlawful killing of a human being by a human being with malice aforethought. First degree murder requires premeditation of which no evidence is presented here that Daniel had any pre planning actions to shot Virginia. Malice can be show either through reckless disregrad for human life or a desire to cause great bodily harm. Here we have no evidence Daniel was intending to cause great bodily harm and firing upon an intruder would not meet the requirements necessary for reckless disregard for human life necessary for depraved heart murder. Therefore since at no time did Daniel intend to murder Virgina there is a complete lack of Mens Rea necessary for a crime. Therefore Daniel can argue the lack of Mens Rea as a valid defense.

Self Defense- Self defense isa valid affirmative defense available when a party reasonably believes they are under threat of death or great bodily harm. Self defense is not available to initial aggressors, and the amount of force used by the defender must be in proportion to the threat posed by the attacker. If the attacker is not using a deadly weapon the defender may not immediately resort to deadly force. Under Nevada law a party who is attacked in their home has no duty to retreat and may use deadly force to defend themselves against an invader. Nevada does not allow for imperfect self defense. Here Daniel may validly use deadly force to defend himself as he is in his own home. Virginia kicked in the door and charge Daniel yelling and screaming. A reasonable person would believe their life was potentially in danger, and since Daniel was in his own home he was under no duty to retreat and could defend himself using deadly force. Therefore Daniel can argue that his actions were a reasonable self defense.

Home Invasion- Virgina was shot during the commission of the crime of home invasion. In Nevada home invasion occurs when a party breaks and enters the dweling of another. Here Virginia kicked in Daniels door and charged toward Daniel. Therefore Daniels self defense actions were a response to the commission of a felony. Therefore his self defense arguement will be even stronger due to the threat of force against himself and the damage to property due to the underlying felony.

Burglary-Burglary is the entering of the dwelling house of another with the intent

to commit a felony therein. Burglary in nevada is a general intent crime. We do not know exactly what Virgina intended to do upon entry but as above her commission of a felony would further insulate Daniel from being found guilty as he was defending himself against her felonious conduct.

Defense of Property-In Nevada a party may not use deadly force to protect property. However a party may respond with deadly force to an intruder in their home as an intruder can be assumed to be a threat to their life. Here Daniel was defending himself and not his property.

Specific Intent Crime- Lack of Specific Intent- Attempt is a specific intent crime requiring that the party have the specific intent to perform the criminal act either before or during the commission of the act.Absent specific intent a party may not be found liable for a specific intent crime. Here Daniel had no intent at any time to murder Virginia merely to defend himself from attack as above. Therefore without the specific intent necesssary for the crime of attempt, Daniel cannot be guilty of attempted murder.

Voluntary intoxication- Voluntary intoxication is a defense to specific intent crimes, and voluntary intoxication can destroy the ability for a defendant to from the intent necessary for a specific intent crime such as Attempt. Here Daniel was at home drinking a bottle of whiskey. At the time of the incident he had consumed about half the bottle. A person in Nevada will generally be considered intoixicated after about a single shot of whiskey depending on body type and tolerance. A half bottle

of whiskey would be sufficient in order to render most human beings legally intoxicated. Since Daniel was voluntarily drinking the whiskey this would be voluntary intoxication and not involuntary as he was deteremining the amount of intake along with the substance. Alcohol does take some time to enter the blood steam and affect the brain. Here we have no evidence to suppot the level of intoxication Daniel was at when Virginia broke down his door and appeared to attack him. Nor do we know how much later the police took Daniel into custody, but he appeared coherent from his interactions with police. Depending on the time involved his coherance may impact his defense of Voluntary Intoxication but given the amount of alchohol involved it is likely Daniel will be able to raise a successful voluntary intoxication defense to the specific intent crime Attempt.

2. Whether Daniels statements to police were legally obtained:

5th Amendment Rights-Miranda- Anytime a defendant has been placed in custodial interrogation they must be read their Miranda Warning. Custodial interrogation requires two elements in order to be a custodial interrogation and both must be present. First the party must be in custody. Custody is determined by if a reasonable person would feel free to leave and if the environment is one which would have a coercive nature. Here Daniel was in the police station which is considered to have a coercive nature and a reasonable person likely would not have felt they could leave of their own free will. Therefore Daniel was in custody.

The second element is interrogation. Interrogation occurs when a party is asked questions that are reasonably likely to provoke an incriminating response. Here Daniel was specifically interrogated for over an hour about the shooting of Virginia.

Therefore Daniel would have needed to have been read his Miranda warning prior to interrogation. Daniel was in fact read his Miranda warning and he chose to waive it.

Initial Waiver of Miranda- Daniel chose to wave his Miranda warning during the first hour of interrogation but then asserted his right to Miranda after he felt the officers were putting words in his mouth.

Invoking Miranda- An invokation of a parties MIranda rights must be clear and unequivocal. Statements such as perhaps i should stop talking are insufficient. Merely remaining silent is insufficient. A party must clearly state they are evoking their MIranda rights. Here Daniel clearly stated "I do not want to talk to you anymore. Leave me alone" At that point all questioning should have ceased. Officers must honor a suspects right to remain silent. Here the officers chose to ask Daniel if he was sure, which would be a clear violation of his rights as the purpose of the question would be to allow them to resume questioning. Even after he requested to be taken to his cell the officers continued to question Daniel in violation of his Miranda warning.

Lack of Clear invocation of Miranda- Officers may attempt to argue that I do not

want to talk anymore was not a clear evocation of Daniels 5th Amendment Miranda Rights and that his answers to subsequent questions constituted a waiver of his Miranda rights. A waiver of Miranda must be knowing and here the officers failed to have Daniel sign a waiver of his rights. Additionally while he continued to respond to questions this would not be a valid waiver of his Miranda rights as it would not have been knowing and the questions came after he had invoked his right. The officers should have respected Daniels invocation of his right to remain silent.

Exclusionary Rule- Under the exclusionary rule any evidence gathered in violation of a subjects Miranda rights will be excluded from use in trial. Here Daniel stated he wished to be silent, and the officers continued to question him. Therefore his statements will not be admissible in trial.

Sudden outburst- The police may try and argue that Daniels statements to their questions were a sudden outburst and therefore would waive their violation of Daniels miranda rights. Given the statements were in response to specific questions this is unlikely to be upheld by the court.

Intervening act of free will- A violation of a suspects miranda rights can be overcome if the suspect has an intervening act of free will such as resuming questioning of his own volition. Police must studiously respect a suspects invocation of miranda, which the officers did not do here. Since they continued questing Daniel this would not be a n intervening act of free will sufficient to break

the violation and avoid the exclusionary rule exclding all evidence gathered.

Conclusion: Daniels statements to the police were not legally obtained as they continued to question him after he stated he wished to remain silent. Therefore since this statements were ilegally obtained they will be excluded from use against him at trial.

3. Whether the gun will be admissible as evidence at trial

Fruit of the Poisonous Tree- Under the exclusionary rule as above not only will all statements evidence obtained be excluded but all evidence gathered from sources learned about in those statements will be excluded. Here the police only learned of the location of the gun based on Daniels illegaly coerced statements. Without those statemetns the police may not have located the firearm and therefore it would not be admissile at trial under the doctrine of the fruit of the poisonous tree.

Inevitable discovery- A defense to the fruit of the poisonous tree is that the evidence would have been inevitably discovered regardless of the testimony. Here the police may argue a search of the home would have turned it up. As Virgina survived she would be able to provide the basis for a valid warrant which would require probably caused from first hand knowledge listing the place to be searched and the things to be seized before a neutral magistrate. SInce she was shot in Daniels home, a search warrant for his home may have been lawfully obtained. However in this case given the polices actions inviolating he exclisionary rule the court will likely exclude the evidence.

4th Amendment Search And Seizure- Under the fourth amendment a party shall be secure in their persons against all unreasonably searches and seizures. To raise a 4th amendment claim a party must have standing in the place to be searched and the object to be seized. To have standing a party must have a reasonable expectation of privacy in the place searched. Here Daniel has standing as the place searched was his home and he has a reaosnable expecation of privacy in his hime, secondly the item seized was his gun which he had a reasonable expectation of privacy as it was his personal property. Threfore the search of his home would have required a valid search warrant. A valid search warrant would require probably cause created from first hand knowledge listing the place to be searched and the things to be seized before a neutral magistrate. Here based on Daniels statements, and virginas statments a valid search warrant could be obtained.

INperfect warrant- Items found from an imperfect warrant can still be admitted

END OF EXAM

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QUESTION 5

5) Please type the answer to Essay Question 5 below When finished with this question, click to advance to the next question.

The picketers

The First Amendment of the U.S Constitution restricts the government's ability to infringe on the free speech of citizens. The First Amendment applies to state and municipal governments through the Fourteenth Amendment.

In this case, the city ordinance prohibiting picketing on City property and the arrests conducted by the Silvertown police are both government actions. Therefore, the First and Fourteenth Amendments are applicable.

Under the First Amendment, prior restraints on speech are subject to a strict scrutiny review, meaning that the restraint has to be necessary (i.e., there are no less restrictive means available) to achieve a compelling government interest. Public forums (i.e., forums that have been traditionally used for public speech) receive the broadest protection for speech. However, governments are permitted to reasonably restrict the time, place and manner of speech on public forums, provided that the restrictions are viewpoint and content neutral, are narrowly tailored to achieve an important government interest, and leave open sufficient alternative channels of communication. Limited public forums (i.e., forums that are not traditionally public forums, but that the government chooses to open up to

public speech) are treated like public forums. In nonpublic forums (i.e., forums that are neither public forums nor limited public forums), the government can restrict speech as long as the restriction is viewpoint neutral and reasonably related to a legitimate government interest. Finally, laws that regulate speech that are substantially overbroad (i.e., that regulate a great deal of protected, as well as unprotected speech) are invalid and cannot be enforced against anyone. Laws that are only slightly overbroad can be enforced against those making unprotected speech, but not against those making protected speech.

In this case, the Silvertown ordinance prohibits picketing "on any property owned or leased by the City." This is a content and viewpoint neutral regulation because it prohibits all picketing regardless of the subject matter or viewpoint of the picketing. It is a time, place and manner regulation because it prohibits only the place and manner (i.e., picketing on City property) of speech. However, it is overbroad because it applies to all City property, including both public forums and nonpublic forums, and it is likely not a valid regulation of public forums.

The inside of City Hall is a nonpublic forum because it is not a location that public speech was traditionally allowed, and it is not a limited public forum because there is no evidence that the city has permitted public speech in City Hall for any purpose. Therefore, as applied to the inside of City Hall, this would likely be a valid regulation of speech because it is viewpoint neutral and is reasonably related to the legitimate government interest of ensuring that City employees and politicians can perform their jobs without the distraction of picketing. In contrast, the

sidewalks outside City Hall are public forums because sidewalks have traditionally been used as centers of public speech. While the government does have an important interest in ensuring that city employees and politicians can work without significant distractions, it is not clear that this regulation is sufficiently narrowly tailored to achieve that interest. For example, this regulation prohibits picketing on the sidewalk at all times, when it could just restrict picketing to periods in which important work was occuring in City Hall. Therefore, the regulation is not sufficiently narrowly tailored and does not leave open sufficient alternative channels to qualify as a valid regulation with respect to public forums.

Because the city ordinance regarding picketing on City property invalidly prohibits a substantial amount of protected speech (i.e., <u>any</u> picketing on <u>any</u> property owned or leased by the city), it is substantially overbroad. Therefore, it is invalid and cannot be enforced against anyone. As such, even though one or more of the picketers could have been validly arrested under a narrower and valid ordinance, it was a violation of the First Amendment to arrest any of the picketers for violating this invalid ordinance.

<u>The group seeking a permit to march</u>

As with the picketing ordinance, the ordinance regarding marching permits was issued by the city government and enforced by the City Manager, so the government act requirement is satisfied and the First and Fourteenth Amendments are applicable.

A law can require demonstrators to obtain permits before demonstrating, but the law must not leave any discretion to the government official whose job it is to grant or deny permits.

In this case, the ordinance requires the City Manager to approve or deny permits based on "considerations of public welfare, safety and maintaining order." It also permits the City Manager to charge different amounts based on the "costs of maintaining order," which could be read to permit the City Manager to make decisions based on the type of speech. Therefore, the ordinance provides the City Manager with a substantial amount of discretion to decide what speech should be granted a permit, or to charge more for certain speech than other. As a result, the ordinance is invalid under the First and Fourteenth Amendments and cannot be enforced.

Can the Court Hear the Case?

A federal court can only hear controversies and claims. In order to qualify as a controversy or claim, there must be standing and ripeness, and the issue must not be moot or a political question.

Standing

An plaintiff has standing when (1) the plaintiff has suffered a concrete and particularized injury, (2) the injury was caused by the defendant and (3) the court

could redress the plaintiff's injury by ruling against the defendant. A group has standing on behalf of its members when (1) at least one of the group's members has suffered a concrete and individualized injury, (2) the injury is germane to the group's purpose and (3) the inclusion of the group's members in the lawsuit is not necessary.

In this case, the group and its members have suffered a concerete and particularized injury because their First Amendment right to march has been infringed by the government, the injury was caused by the city denying their permit, the court could redress the injury by requiring the city to grant the permit, the injury was germane to the group's purpose of protesting the proposed development, and the group's individual members are not necessary for the lawsuit. Therefore, the court will find that the group has standing to bring the claim.

Ripeness

A case is ripe when there has been injury in fact or an injury is imminent. In this case, the group has already been injured, so the case is ripe.

Mootness

A case is moot when there is no longer a case or controversy before the court. There is still a case or controversy here because the group's permit remains denied.

Political Question

A political question is an issue that the courts will not hear because the Constitution has left to other branches of government. No such issue appears here.

Advocates for Restricted Growth

As discussed above, the permit ordinance is invalid under the First and Fourteenth Amendments because it grants the City Manager too much discretion in approving or denying permits. Furthermore, for the same reasons as discussed above, there are no ripeness, mootness or political question concerns with the lawsuit brought by Advocates for Restricted Growth ("Advocates"). However, Advocates likely does not have standing to bring this suit.

As discussed above, standing requires the plaintiff to have suffered (or be at imminent risk of suffering) a concrete and particularized injury. An plaintiff does not have standing simply because she is a citizen or a taxpayer, because such a plaintiff's injury is generalized rather than particularized. In this case, although Advocates has a generalized interest in limited development, it has not suffered any concrete or particularized injury from the denial of the group's permit because it has suffered no particular harm. Furthermore, even if it had suffered some harm to its interest in limited development, the city's denial of a permit to the group did not cause that harm. Nor could the court remedy any such harm by requiring the city to issue the permit, because the permit would only permit the group to march--it would not have a direct effect on the development.

Ed

The Supreme Court has held that government organizations do have an interest in ensuring the efficient operation and administration of their organizations, and that this interest can serve as the basis for regulating the speech of employees of government organizations. However, where a government employee is speaking outside of his role in the government and on a matter of public importance, the government organization's ability to regulate such speech is subject to strict scrutiny, and the organization is prohibited by the First and Fourteenth Amendments from punishing the employee for such speech unless such punishment is necessary to achieve a compelling government interest.

In this case, Ed works for the Silvertown planning department, which is a government organization. However, his statement was made in a letter to the local newspaper, so it was made outside of his role at the planning department. Furthermore, given the number of citizens who have expressed strong views on the development, the development is clearly a matter of public interest. Therefore, in order to punish Ed for this speech, the planning department must prove that the action was necessary to achieve a compelling government purpose. In this case, the planning department would have difficulty showing that the efficient operation and administration of its department is a compelling government purpose, because that is a very high standard. Furthermore, it would have difficulty showing that punishing employees for statements made outside of work is necessary to achieve that purpose because it could find less restrictive means for doing so.

Case of Controversy?

Ed has standing because he lost his job, the lost job was caused by the city firing him, and the court could redress the harm by requiring the city to revoke the firing. The issue is ripe because the harm has occured and it is not moot because the harm is still occuring. There is no political question.

Due Process

Under the Fifty Amendment (as applied to the states through the Fourteenth Amendment), when the government infringes on a citizen's life, liberty or property interest, it must give the citizen due process of law. A property interest includes any present interest (as opposed to a mere expectancy) in retaining his current job, which the citizen will have if he can only be fired for cause. If the government infringes on such an interest, the question of whether it has accorded the citizen sufficient process of law will be determined based on a test that balances the strength of the citizen's interest and the value of additional safeguards against the government's interest in fewer safeguards (which is usually an interest in efficiency).

In this case, it is not clear whether Ed can only be terminated for cause, though the fact that the City had a policy authorizing dismissal for conduct detrimental to efficient operation suggests that employees can only be fired for cause. If so, then Ed's due process rights have been infringed. Indeed, Ed's interest in his job would

be quite strong, and, since there were no safeguards used here, any additional safeguards would provide significant value. The city would have difficulty showing that its interest in efficiency would outweigh these factors. Therefore, the city was probably required to give Ed at least a post-termination hearing and violated Ed's Fifth and Fourteenth Amendment rights.

City Council Member Smith

Under the First and Fourteenth Amendments, when a public figure sues for defamation, the public figure must prove both (1) that the alleged defamatory statement was false and (2) that the alleged defamatory statement was made with actual malice (i.e., with knowledge of its falsity or reckless disregard as to its falsity). A public figure is one who is at the center of issues of public importance or who puts himself in the public eye.

In this case, City Council Member Smith is a public figure because he is a city council member. Therefore, in order to win in his defamation suit against Ed, he needs to prove (1) that the council members are not lining their pockets and (2) that Ed made this statement with actual knowledge of its falsity or reckless disregard as to its falsity.

END OF EXAM

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QUESTION 6

6) Please type the answer to Essay Question 6 below

This is an evidence question. Because it arises in NV state court, the Nevada Rules of Evidence (NRE) apply.

In order for evidence to be admissible, it must be relevant. Relevant evidence is evidence that tends to prove or disprove a fact material to the case. If a statement's unfair prejudice substantially outweighs probative value, NV courts must exclude the evidence. If statement's likelihood to waste time substantially outweighs probative value, NV court may exclude it.

Hearsay is generally inadmissible. Hearsay is an out of court statement offered to prove truth of matter asserted. Exceptions apply.

EVIDENCE OFFERED BY BILL'S ESTATE

1) Statement from Bill's manager

Relevance

This statement is relevant because it could be used by Bill to show that Pete rushed and therefore ignored safety guidelines used by We Paint w/r/t ladders. That could be used to show Pete was negligent.

Hearsay

Hearsay is an out of court statement offered to prove truth of the matter asserted.

This statement can be hearsay depending on what it is offered for. First, the statement was made out of this court (in this proceedings) by Bill's manager at Bill's funderal. Second, if it is being offered to prove that Pete "was always rushing to get the job done" and that that was why he was fired, then it falls under the hearsay definition. However, if it is not being offered for truth of the matter asserted (i.e. it is being offered to show that We Paint was on notice that Pete was always rushing and therefore negligent), then this statement does not fall under hearsay definition.

Exception: statement by party-opponent

Further, if this statement is offered to prove truth of matter asserted (that Pete was alway rushing), it likely falls under an exception to the hearsay rule and therefore is non-hearsay. An exception to the hearsay rule are admissions by party-opponent, i.e. any statement made by a party's opponent. Here, because Bill also worked at We Paint, his boss was an employee of We Paint, who is now being sued by Bill. Further, statements by employees, especially managers, are attributable to a company. Therefore, Bill's statement is an admission by a party opponent to Bill. Therefore, it is admissible as an admission by party opponent as well.

This statement is admissible as non-hearsay if 1) offered to prove We Paint was on notice or 2) as an admission by party opponent.

2) Testimony from first-responder

Relevance

This statement is relevant to show that We Paint/Pete "never lock[ed] that door" which is a violation of We Paint's safety code and may be used to show both were negligent.

Hearsay

This statement is hearsay because it is an out of court statement (Bill said it in the ambulance) offered to prove truth of matter asserted (that door was never locked).

Exception: dying declaration

Under NV law, "dying declarations" are exceptions to the hearsay rule under the following circumstances: 1) declarant thought he/she was under threat of imminent death and 2) statement concerned cause of death and 3) it is offered in a civil trial or a criminal homicide trial.

Here, 1) Bill thought he was about to die. He was in very weak condition having lost a lot of blood and said "I don't want to die." Therefore, the first prong of the exception is met. 2) The statement concerns cause of what he thought would be his death (ladders were not maintained properly because door was not locked and that is why he was going to die, as he said). 3) The statement is being offered in a civil trial.

Therefore, Bill's statement is admissible as a dying declaration exception to hearsay rule.

3) Quote in We Paint's incident report

Relevance

The quote here would be very relevant to showing that Pete was negligent because he was drunk.

Hearsay

This quote is hearsay because it is an out of court statement (made right after accident) and is being offered to prove truth of matter (that Pete was impaired at time of accident).

Hearsay exception: present sense impression

An exception to the hearsay rule is the present sense impression. This exception applies to a hearsay statement made 1) contemporaneously or immediately after an event and 2) comments on the event.

Here, first, Bill would have to show that the witness made the statement almost immediately after the accident. If the person made the statement within 5 minutes, the exception may apply. However, there is no evidence here about when exactly it was made. That the witness observed Pete's behavior immediately after is not

relevant to this analysis.

Second, this statement does concern the event.

In conclusion, this exception will not apply unless Bill can show that the statement was made immediately after accident.

Hearsay exception: business records

An exception to the hearsay rule applies to records kept in a standard course of business and made by someone with a duty to make records accurately.

Here, the incident report may be such a record. However, this exception would not get the witness's statement in because Bill would not be able to show that the witness had a business duty to make that statement and to make it accurately. Therefore, this exception would not get witness's statement in

Hearsay exception: statement of party opponent // double hearsay

As previously noted, statement of party opponent takes statement out of hearsay. While Pete's conduct (if assertive) may be a statement by party opponent, there is a double hearsay issue of justifying admission of witness's statement. Double hearsay arises where there are two layers of hearsay as there are here: 1) Pete's assertive conduct and then 2) witness's statement. In order to get Pete's assertive conduct in, both hearsay statements need to meet exceptions. That is not the case here.

Therefore, this quote will not be admitted.

4) A police report detailing Pete's arrest for driving under influence

Relevance

There will be a debate whether or not this is relevant. Bill will argue that it is relevant to show Pete had been drinking in the time leading up with accident. Pete will argue it has no bearing on the case. Bill will have to show that its probative value is not substantially outweighed by unfair prejudice. Because this does seem extremely prejudicial to Pete and has low probative value, the NV will likely be required to exclude it.

Character evidence

If found to be relevant, Bill will also have to show it is not character evidence. Character evidence is evidence introduced to show a party acted in conformity in this case with a way that person has acted before. Character evidence is typically not admissible, unless an exception is met. Those exceptions are if introduced to show 1) motive, 2) intent, 3) lack of mistake, 4) identify, or 5) common scheme or plan.

None of those exceptions appear to apply here. Therefore this evidence will be inadmissible character evidence.

Hearsay and Public Records Exception

Further, this report is hearsay. It is an out of court statement (police report made after the arrest) offered to prove truth of matter asserted (Pete was arrested for drunk driving).

Bill may attempt to argue that this falls under public records exception because it is a record made by a public official under his/her duty. However, it is widely accepted that police reports do not fit into public records exception.

Criminal conviction

This is not a felony conviction, simply an arrest, so it may not be admitted under that guise.

Conclusion

As a result, the police report is inadmissible.

5) Certified copy of conviction

Relevance

This evidence is likely not relevant. It relates to a past conviction for theft. I cannot foresee what Bill would even argue to show this evidence has a tendency to prove that Pete was negligent the day of the accident.

Hearsay: public records

The certified copy of conviction is hearsay because it is an out of court statement (made at the time of Pete's conviction in that court) offered to prove truth of matter asserted (that Pete was convicted of that crime).

However, the certified copy would be admissible as a public record because, as discussed above, it was made by a public official (court clerk) who is under a duty to make these documents and the creation of such documents is part of regular course and conduct of that public official.

Best evidence rule

Best evidence rule requires that when discussing a document, the document itself should be admitted before any testimony about its contents can be given, unless the document cannot be found. Further, photocopies of original documents meet the best evidence rule.

Because this is a certified copy, it meets the Best Evidence Rule standard.

Misdemeanor conviction

Ultimately, this evidence will be excluded because it is evidence of a misdemeanor conviction. In NV court, evidence of misdemeanor convictions is inadmissible (different from federal court where misdemeanors relating to crimes of moral turpitude -- usually crimes relating to false statements -- are admissible).

Conclusion

Evidence of Pete's misdemeanor conviction is inadmissible.

EVIDENCE OFFERED BY PETE

Relevance:

This evidence is relevant because it tends to prove that Bill's accident happened as a result of his dizziness, not because of Pete or We Paint's negligence.

Hearsay:

This evidence is hearsay because it is an out of court statement (made by Bill at the golf course) offered to prove truth of matter asserted (that Bill suffered from dizziness).

Hearsay exception:

The hearsay exception of admission of party opponent applies because this is a statement made by Bill who is the party opponent of Pete and We Paint (technically, his estate is the party opponent but they are in privity with Bill). Therefore, this statement will be admissible barring any relevant privileges.

Privileges:

A testimonial privilege may apply here. Nevada, unlike federal court, recognizes the patient-doctor privilege. The requirements to meet the patient-doctor privilege are 1) confidential statement made by patient 2) to doctor for the purposes of diagnosis or treatment. The privilege may apply because Dr. Fox is Bill's podiatrist. Only patient can waive privilege.

Here, Bill will argue that this statement was confidential because it was just Bill and Dr. Fox on the golf course and that no one could hear them. Pete will likely not have sufficient facts to refute this exception to argue to Court that this is very broad definition of confidential and usually made in doctor's office or hospital, etc.

Next, Pete will argue that this statement was not made to Dr. Fox for purposes of diagnosis or treatment because Dr. Fox is a podiatrist (foot doctor) not a neurosurgeon or someone who could diagnose dizziness. Bill will counter that Dr. Fox asked him about dizziness because he saw Bill stumble and thought he had a foot problem and that Bill talked to him about this to rule out that he had a problem with his feet.

Because of the fact that Dr. Fox is a foot doctor and this statement was made on a golf course, the court will likely find that a privilege does not apply.

<u>Conclusion</u>

Court will find that this statement is admissible as admission by party opponent and is not subject to any privileges.

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QUESTION 7

7) Please type the answer to Essay Question 7 below When finished with this question, click to advance to the next question.

This question is governed by Nevada property law, as the relevant property, Blackacre, is located in Nevada.

Rights and Obligations as to Blackacre among Bob, Carol and David on January 2, 2018

As the facts state, on January 1, 2018, Anne ("A") validly conveyed her interest in Blackacre to Bob ("B"), Carol ("C") and David ("D") as joint tenants with the right of survivorship. Typically, the default tenancy between multipe tenants is a tenancy in common in which each tenant owns a percentage interest in the property but has the right to occupy the whole. Joint tenants with right of survivorship, however, enjoy an interest in the property and have a right to occupy the whole and are entitled to receive the share of a co joint tenant at that joint tenant's death.

To properly create a joint tenancy, the grantor must pass to the joint tenants with the "four unities": time, title, interest, and intent. The joint tenants must all take at the same time. They must all have the same title. They must have a similar interest in the property (that is, a right to occupy the whole with joint ownership). And there must be a clear intent to create a joint tenancy in the conveyance. There must also be a clear indication to create a right of survivorship.

Here, B C and D appear to have received from A as joint tenants with right of survivorship. B C and D took at the same time. B C and D received the same title. B C and D each have the right to occupy the whole. A clearly intended a joint tenancy with right of survivorship among them, as that was set forth in the conveyance.

As a result, B, C and D owed each other the rights and obligations of joint tenants. Chief among those rights is the right if survivorship, which applies at death of a joint tenant. Thus, if B dies, C and D receive his interest, and if C dies, then D owns Blackacre outright.

Each had the right to occupy the property in full. If one was not present, he or she could not charge the present tenants for rent for occupying the property (although a proportionate share of any third party rents would have to be paid). Each could be held liable for the costs of repairs made to the property, but only if such repairs were reasonable, necessary, and notice was provided. B C or D could convey their interest, but that would destroy the joint tenancy as to that portion and leave a joint tenancy with the remaining joint tenants.

They have a duty to avoid the major types of waste: voluntary (affirmative destruction), permissive or ameliorative. They must not exploit Blackacre's natural resources unless there is a prior use (i.e., others have used the resources in a similar manner in the past) , they are necessary for repairs, a specific grant (no facts given that support that), or exploitation is the only reasonable use (if, for

instance, Blackacre is a mine). They must pay property taxes, mortgages, and other special assessments necessary to maintain the property. They may freely convey their interests to others, including one another.

Which Parties Held an Interest in Blackacre on November 1, 2018 and How Each Such Interest Was Obtained

As of November 1, 2018, the property is held as a tenancy-in-common, which a 1/3 interest in Ed ("E") and a 2/3 interest Hank ("H") (due to Gina's ("G") bona fide purchaser status and H's invocation of the shelter rule to avoid the Foundation ("F") claim). A discussion of the interests is below.

Note that L likely does not hold a mortgage interest in H's interest in the property because the mortgage was extinguished from C's portion of the joint tenancy when it passed to D by right of survivorship at her death. If, however, there are facts showing that the mortgage did not extinguish (like D's consent to it), then L would have an interest in the 2/3 of Blackacre held by H.

A basic assumption of below is that B, C and D recorded their conveyance from A. No facts are given that suggest they did or did not; the problem is silent. But, since there is no collateral attack on title--e.g. another person to whom A conveyed claiming that he or she has superior title to the B/C/D grant--that fact is likely irrelevant for the below discussion.

E's Interest Arose Because B's Conveyance to E Severed the Joint Tenancy as to

B and Made E and Tenant-In-Common with C and D

As the facts state, B conveyed his interest in the joint tenancy to E on February 2, 2018, with closing to occur two weeks later. Then, B died prior to the closing.

A joint tenant may freely convey his or her joint tenancy interest; however, the person receiving the interest does not take as a joint tenant, but takes instead as a tenant-in-common of the existing joint tenants. That is because the four unities are not present--namely, time--when the conveyance happens after the fact. Here, B executed a valid contract conveying his interest to E. E therefore became a 1/3 tenant in common with C and D, who held the remaining 2/3 interest in the property as joint tenants.

Had B died without conveying the land, then his interest would have passed equally to C and D due to the right of survivorship, result in a 50/50 joint tenancy between C and D. But, since B executed the contract before his death, E received his interest as a tenant-in-common.

The fact that B died prior to closing does not change the outcome. When B validly executed the contract (which presumably was in writing and satisfied the statute of frauds), E gained equitable title to B's portion of Blackacre under the doctrine of equitable conversion. That act destroyed the joint tenancy as to B's interest (while leaving it intact for C and D only) and properly gave title of the property to E.

Application of the Bona Fide Purchaser and Shelter Rule Demonstrates that H Has a Valid Interest

C's Execution of the Mortgage Did Not Destroy the Joint Tenancy

After B conveyed to E, E was a 1/3 tenant-in-common with C and D, who held a 2/3 interest as joint tenants. Then, on March 1, 2018, C borrowed money from Lender ("L"), who promptly recorded a deed of trust on C's interest in Blackacre.

Whether C's actions destroy the joint tenancy is determined by application of either the title or lien theory of mortgages for joint tenancy. Under the title theory, a joint tenant's execution of a mortgage on the joint tenancy interest severs the joint tenancy and renders the joint tenant a tenant-in-common with no right of survivorship. If the title theory applied, then the March 1, 2018 mortgage would have severed C's interest in the joint tenancy, leaving E, C, and D as 1/3 tenants in common.

But Nevada does not apply the title theory. It instead applies the lien theory of mortgages. Under that theory, a joint tenant's execution of a mortgage does not sever the joint tenancy. The mortgage holder may have a valid interest in that tenant's portion of the property.

Here, because C executed the mortgage in Nevada, and the lien theory applies, execution of the mortgage did not destroy the joint tenancy between C and D. Thus, as of March 2, 2018, the property was held 1/3 E as a tenant in common and

2/3 C and D with joint tenants with right of survivorship.

C's Death Passed the Joint Tenancy Interest to D Via the Right of Survivorship

In September 2018, after defaulting on her mortgage on her interest in Blackacre, C died. By right of survivorship, C's interest in the property passed to D, her joint tenant. Because D was the final joint tenant (E was a tenant-in-common not entitled to take by right of survivorship), the joint tenancy ended and D became E's tenant-in-common. Thus, the property was owned 1/3 E and 2/3 D as tenants-in-common.

The facts make reference to a "foreclosure sale," presumably initiated by C's mortgage lender due to C's default. More facts would need to be known as to how this affects the ownership, but it likely does not. The mortgage may continue to stay on the property after the joint tenant's death when the property passes to other joint tenant(s) by right of survivorship, but that may only occur if the other joint tenants know of the mortgage and approve of it when made. There is no evidence that D knew of or approved of C's mortgage. Thus, L's interest in the property likely died with C (although L may seek recovery from C's estate). And since there was a right of survivorship with D, C's estate has no interest in Blackacre.

The Wild Deed to F, G's Bona Fide Purchaser Status, and H's Application of the Shelter Rule

Thus, as of October 1, 2018, Blackacre was held by E and D as tenants in common, with E having a 1/3 interest and D a 2/3 interest.

D then conveyed his interest by gift to F on October 1, 2018. (That it was a gift does not defeat F's interests, because gifts of property are enforceable.) F failed to record. F's mere failure to record did not invalidate the deed it received from D; it did, however, make it susceptible to D's additional conveyance to a bona fide purchaser for value, who would not have notice of F's interest.

That is precisely what happened. On October 15, 2018, just two weeks later, D conveyed to G for $100,000, and G promptly recorded. F's unrecorded interest is frequently referred to as a "wild deed," because it is outside the properly-recorded chain of title.

F and G's actions raise the effect of recording statutes. Recording statutes are public records that permit grantors and grantees to record their various interests in property. There are two basic kinds of statutes: notice, and race-notice. In a notice jurisdiction, an interest in property is not enforceable against a bona fide purchaser for value unless that purchaser has notice of the interest. Recording an interest is presumed to place a future purchaser on record notice of the transaction, even if he or she does not actually know. In a race-notice jurisdiction (like Nevada), an interest in property is not valid unless it is first recorded; the first to record, therefore, wins.

G would defeat F in either a notice or race-notice jurisdiction because she is a

bona fide purchaser ("BFP") for value who recorded her interest before F. To be a BFP, a party must pay substantial value for the property and must be unaware of other, competing interests. Notice may be actual, inquiry (e.g., the purchaser visited the property before closing and saw someone else living there), or record (i.e., the deed is validly recorded under a recording statute). G appears to meet both criteria. She paid substantial value of $100,000 for a 2/3 interest in Blackacre. G had no actual notice (the facts say she "was unaware of [D's] conveyance to [F]"). She likely did not have inquiry notice; no facts are supplied indicating that F occupied the property, and since the conveyance to G was only two weeks after the conveyance to F, there likely was nothing that would put G on inquiry notice of F's interest. Finally, G did not have record notice because F did not record the earlier gift from D. Thus, G was a BFP and has a superior interest over F in a notice jurisdiction, and, because she recorded, has a superior interest over F in a race-notice jurisdiction.

G then conveyed her interest in Blackacre to H for $150,000 on October 30, 2018. H knew of F's interest, but paid anyway. F would unquestionably argue that H's knowledge means that he was not a BFP and therefore cannot defeat F's interest.

F is incorrect, because H gets the protection of the shelter rule. The shelter rule applies to shield those who take from BFPs with the same rights and status as the BFP would have had against other claimants. Here, H received from G, a BFP. F would challenge H's knowledge, but the question under the shelter rule is whether F

could defeat G's interest in the property. Because it cannot, H would take possesion of the 2/3 interest in Blackacre that D conveyed to G and G conveyed to H.

Thus, on November 1, 2018, Blackacre would be held as a tenancy in common by E (1/3) and H (2/3).

The Relative Rights and Obligations as to Blackacre Among the Holders of the Interests in Blackacre on November 1, 2018

E and H have the rights and obligations of tenants in common to each other. These duties are similar to those with joint tenants, except that, unlike joint tenants, tenants in common do not have a right of survivorship. Instead, at death of a co-tenant, that tenant's interest passes to his or her heirs, not to the other tenant.

E and H have rights and obligations to each other. They may each occupy the whole. They may not seek rent from each other if one is off of the property and the other occupies, but if they rented the property to a life tenant or a similar arrangement they would split rent 2/3 H and 1/3 E.

They are obligated to each other for repairs that are reasonable, necessary, and for which notice is provided. They may not seek contributions for improvements, but could credit those improvements at partition.

They have a duty to avoid the major types of waste: voluntary (affirmative destruction), permissive or ameliorative. They must not exploit Blackacre's natural

resources unless there is a prior use, they are necessary for repairs, a specific grant (no facts given that support that), or exploitation is the only reasonable use (if, for instance, Blackacre is a mine). They must pay property taxes, mortgages, and other special assessments necessary to maintain the property. They may freely convey their interests to others, including one another.

If L's mortgage is presumed to stay on the property, then it is only as to the 2/3 interest H holds. H would not be personally responsible for that mortgage, but, if there was a lien, then a foreclosure could occur as to his interest. However, as explained above, the mortgage is likely extinguished.

END OF EXAM

FEBRUARY 2019
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

QUESTION 8

8) Please type the answer to Essay Question 8 below

1. Issues Regarding Smith's Will

Ann is a licensed attorney in Nevada so she is subject to the state's rules on professional responsibility and must fulfill the duties the require she owes to her clients. When Jane and Smith first visited with Ann they made an appointment about Smith's will. Smith was the client here, as she was the one seeking legal services from Ann. Jane was not a client. Despite this, Anne followed Jane's instructions and never attempted to ask Smith what she actually wanted in the will. Ann violated her duty of loyalty to Smith and her duty to communicate with her. Ann should have determined whether Smith was suffering from some form of incapacity because Jane was speaking in her place. Even when a client has some form of incapacity a lawyer has a duty to maintain as normal of a working relationship as possible with them and to respect them. Ann violated this by never attempting to ask Smith any questions herself. Even if Smith were incompetent and Jane had to speak for her, Ann should have also considered whether Jane was truly acting in Smith's best interests. If not, Ann should have taken protective action by means such as appointing a guardian to protect Smith's interests. Ann should have asked Smith what she wanted in her will, and determined whether Jane was impeding her wishes. Ann should not have begun drafting the will until she actually learned Smith's wishes.

When Smith visisted Ann the second time she told Ann she wanted her son and daughter to share equally in her estate. Ann properly disregarded the previous instructions for the will from Jane and drafted a will that conformed to Smith's desires. However, Ann is not entitled to leave a substantial gift for herself in the will. Ann and Smith are in an attorney client relationship. This is a type of confidential relationship because it involves an unusual level of trust and reliance in the relationship. When someone in a confidential relationship with the testator plays a substantial role in drafting or procuring the will, and leaves themselves a substantial gift, a presumption of undue influence applies. Ann is drafting the will herself so it is improper for her to include the $20,000, even though Smith wishes to give it to her. If Smith truly wishes to leave Ann the money she should have someone else draft the will. A presumption of undue influence can apply to the entire will, or to an individual gift. Influence is undue if it is such that it overpowers the free will and mind of the testator so that they leave a will or gift that they would not have left but for the undue inlfuence. Ann's action will needlessly complicate probate of the estate and harm Smith's interests. Ann also has a duty to uphold the integrity of the legal profession and her action will tarnish the reputation of the legal profession as a whole.

Ann violated her duty of confidentiality by sending a copy of the will to Jane. Smith, not Jane, is Ann's client. Smith returned to Ann and made changes in the will without Jane's presence. This shows she does not want Jane to learn the details of the will. Ann must not reveal confidential information she learned in the

course of the representation, such as who Smith wants to benefit in the will, to others. She must take reasonable care to prevent such information from being disclosed. Ann may not disclose the contents of the will without Smith's permission to do so.

2. Issues Regarding the Representation of John

Smith asked Ann to represent her son John in a crimnal case. However, John himself never asked Smith to defend him. Ann should have sought John's permission before accepting the case. Instead, Ann behaved as if Smith were the client, not John. John is in jail, but Ann could still contact him to ask whether or not he accepted her representation. Ann also knew that John already has lawyer, he is represented by the public defender. She should not have proceeded without contacting John and his counsel. Ann owed a duty to other lawyers as well as to clients.

Ann owes a duty of competent representation to her clients. While Ann should not have accepted John as her client she did so, so she still owed him the duties an attorney owes to her client. She may only take a case if she is competent to do so based on her legal knowledge, time available for the case, and mental and physical health. Ann works in wills so she may not be competent to take a criminal case. This is a very serious case involving robbery and use of a deadly weapon. If she

is not competent, she must decline to take the case, or she must be able to reasonably become competent in the area through means such as legal research or assistance of a criminal attorney.

Ann breached her duties of loyalty and communication to John by allowing Smith to control the course of the representation. While a person other than the client may pay for legal services, this does not give them the right to control the course of the representation. The client, not the person paying, has the right to confer with the lawyer and make decisions regarding their case. An attorney owes all of the same duties to a client, no matter who is paying for the representation. A lawyer also has a duty of confidentiality to clients. Ann may not reveal confidential information relating to the representation to Smith without John's permission, even though Smith is paying for the representation.

A lawyer has a duty to allow clients to decide certain matters in a case. Lawyers may decide matters based on procedure, strategy, or trial tactics. However, these can be vetoed by the client where costs are concerned. Clients are empowered with the ability to decide matters that have a substantial impact on their case, such as whether to settle, whether to testify as a criminal defenant, whether to ask for a jury, or whether to plead guilty. Here John has indicated that he wants to accept the plea deal negotiated by his public defender and forego a jury trial. These are the types of substantive decision a client is entitled to make so Ann must respect his decision. Ann cannot instead substitute her own decision as to what he should do, or use Smith's decision on what John should do. Ann also has a duty to

expedite litigation by acting reasonably and promptly, taking into account the client's interest. John has decided that his interest is better served by a plea deal, not a jury trial. Asking for a jury trial would unneccessarily delay the litigation to the detriment of John's interests.

Ann also has a duty of candor towards the tribunal. Ann has not actually met with John to discuss the details of his case. Smith believes that John is innocent, but Ann should not accept her story that the charges are all just a big understanding without speaking with John. Ann cannot reasonably rely on Smith's story alone without asking John about the facts of his situation.

A lawyer's fee must be reasonable. This can take into account many factors such as the lawyer's skills, amount of time necessary for the case, rates usually charged for such matters, or the difficulties in a client's individual case. Here Ann demanded $100,000 to represent John and take the case to the jury. She has not shown any justification for this extremely high fee so it is unreasonable. A jury trial was against John's wishes so she accepted the fee against the wishes and interest of her client. Smith wants her son to be proven innocent, she may be willing to pay such a high fee in the belief that Ann can guarantee success. If this were true, contingent fees are not allowed in crimnal cases.

Ann deposited Smith's check into her operating account. In Nevada a lawyer is required to maintain a client trust account and an operating account. A client trust account must be an interest-bearing account in a qualified bank. An operating

account is a more general acccount for the lawyer to use for a firm's expenses. The check here was for an advance fee so Ann was required to deposit it into a client trust account, not an operating account. If Ann properly put the advance fee money in a client trust account she would only be entitled to remove the money once she actually earned the fee. Once this occurred she could move it to her operating account. Ann breached her duty by placing the money in an operating account before she actually earned any fees from it.

END OF EXAM