FEBRUARY 2021
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

QUESTION 1

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Is there a contract between DrugCo (D) and Beautyland (B)?

- **Applicable law**. In analyzing any contracts question, the first issue is which law applies. The UCC governs all contracts for the sale of goods. The UCC also has special rules that govern transactions between merchants. Merchants are persons that regularly buy and sell goods. Here, the contract involves face cream, which is a good. Therefore the UCC applies. In addition, B and D are regular buyers and sellers of goods and therefore are merchants. Thus, special merchant rules of the UCC also apply.
- **Requirements to create a contract**. In order for there to be a valid contract, there must be an offer, acceptance, and consideration.
- **Offer.** An offer is defined as a reasonable manifestation of an intent to be bound. Under the UCC, offer terms do not have to be completely spelled out (unlike common law contracts where all contract terms must be definite). Here, it is likely that D's phone call to B was simply a request for a bid, not an offer. However, B's response to D constituted an offer because B was offering to supply D with a clear amount of product for a price for a certain time period. Thus, the terms are reasonably definite, and B's offer to D constitutes a valid offer.
- **Acceptance.** The non-offering party (in this case, D) must accept the offer in order to create a valid contract. D did send B an email accepting the proposed terms, but D added additional terms with respect to when the face cream is to be delivered and how disputes are to be resolved. This raises two questions- (i)whether D's response adding the terms constituted a counteroffer and therefore was not an acceptance and (ii) whether the additional terms areo be respected as part of the contract. These questions are answered as follows:
- Under the UCC (as opposed to common law contracts), there is no "mirror image rule"- a purported acceptance that changes terms can still be deemed a valid acceptance. A merchant can make a reasonable expression of acceptance with additional terms as long as (i) both parties are merchants, (ii) the additional terms are not materially different changes, and (iii) the other party does not object within a reasonable time.
- In particular, the UCC "battle of the forms" rule applies here. This rule provides that the proposal of additional terms between merchants in a definte and timely acceptance is effective as an acceptance unless the acceptance is expressly made conditional on assent to the additional terms.
- In this case, both B and D are merchants, the additional terms are arguably not material because it is expected that delivery would occur on a reasonably predictable date early in the month and arbitration provisions are common in commercial contracts, and B did not object. In fact, B performed, which indicates that there was acceptance of these terms. Finally, B's response was not expressly made conditional on assent to the additional terms.
- Therefore, not only was there a full acceptance by B, but the additional terms are deemed part of the contract.
- **Consideration**. Consideration is defined as bargained for exchange of legal value. In this case, D is to pay B a sum certain for the facecream. Therefore, there is consideration.
- **Defenses to contract creation.** Despite the fact that there was an offer, acceptance, and consideration, there still might be defenses to the creation of the contract.
- **No meeting of the minds.** First, B could argue that there was no contract because the terms were not reasonably definite and agreed upon by the parties. However, as set forth above this argument is unlikely to succeed because there was a clear acceptance by D despite the missing terms. And B's conduct indicates acceptance as well.
- **Statute of frauds.** There is also a potential argument that there was no legal contract created because the statute of frauds requirement was not met. The statute of frauds requirement is that all contracts for sales of goods over $500 must be in writing. Here, the total contract price is well over $500. And, arguably the entire contract was not in writing as the "deal points" were determined in D and B's phone call. Therefore, there is a risk the statute of frauds was not complied with since both parties (in particular B did not sign the contract). However, D's follow up email likely constitutes a "merchant confirmatory memo," an exception to the statute of frauds requirements whereby an oral agreement between two mercahnts and be memorialized by one party (in this case D), which outlines the terms (including, importantly, quantity) as long as the other party (in this case, B) does not object within 10 days. Here, the merchant confirmatory memo exception applies as set forth above, so failure to comply with the the statute of frauds is not a defense to contract formation.

In conclusion, there was a contract because there was an offer, acceptance, and consideration and no defenses apply.

Assuming a contract, what are the terms? As set forth above, the terms of the contract include the requirement that B provide D with one case per month of the face cream with retinol, 10 jars per case at $40/jar for the next 12 months. D's additional terms concerning date of delivery and arbitration apply and are part of the contract.

During the course of performance (or lack thereof), there were arguably a few additional terms added to the contract. However, as set forth below, these terms likely are not in fact part of the contract.

- **Are the "as is" and "lack of warranties" provisions part of the contract?** B added these provisions in its packing slip. These were not included in the contract terms nor did D had notice of these terms. These are material provisions, in particular the lack of warranty. Therefore, under the "battle of the forms" rules, they cannot be included without D's acceptance. D did not accept so they are not part of the contract.

- **Do the new cost requirements apply?** Before shipping the replacement products, B called D to raise the price. This is deemed a contract modification. Under the UCC, modifications of contracts between merchants do not require consideration as long as they are done in good faith. However, this modification was not done in good faith as D had no other options and B's costs had not in fact changed so B was simply raising the prices to take advantage of D. Therefore, the modifications were invalid and the increased price is not deemed part of the contract.

Claims D can assert against B. D is entitled to terminate the contract and claim damages.

- **Breach of contract due to failure to provide perfect tender.** Under the CC, the seller (in this case B) must deliver perfect goods in the right place at the right time. If not, the buyer (D) can reject the goods. The perfect tender rule does not apply to installment sales if the imperfect tender can be cured. This is only permitted if there is time remaining for performance. If there is no time remaining for performance, no cure is permitted unless B reasaonably believed an imperfect tender was acceptable. Here, the products were not perfect because they did not contain retinol. B had no time to cure because the case was received on the due date (April 5). And B could not reasonably believe that non-retinol facecream was acceptable, given the contract terms expressly contemplated retinol facecream, meaning retinol as an ingredient in the facecream was a material term of the contract and therefore there was a breach by B.
- **Breach of warranty of merchantability.** As stated above, B's disclaimer of all warranties is not to be respected as part of the contract. Therefore, B is liable for breach of the warranty of merchantability. This is a warranty by a merchant that the goods are fit for their ordinary, foreseeable purpose. Here, B violated that warranty because the goods are not fit for their purpose given they don't contain retinol.
- **Breach of warranty of fitness.** B is also liable for breach of warranty of fitness for a particular purpose. Here, B was aware of D's special needs in purchasing retinol facecream. Yet B did not provide the product that D needed. Therefore, B breached this warranty.
- **Damages:** due to the breach, D is entitled to damages from B as follows.
- **Expectation damages:** The goal of expectation damages is to put the injured party in as close as possible to the place he or she would have been if the contract had not been breached. Here, D is entitled to any damages for loss of product and the "cover price" - namely the difference in what D was to pay B and what D had to pay B due to B's bad faith contract modification and what D had to pay to the other retailer to purchase the facecream if it cost more than the contract price with B ($40/jar).
- **Consequential damages:** D may also claim consequential damages for lost profits. These are permitted if the damages are reasonably foreseeable at the time of the contract. It is likely that the loss of profits would be foreseeable and therefore D may claim these damages.
- **Incidental damages:** D may also claim damages for costs incurred as a result of the breach, such as transporting the items and arranging for the new contract.

Defenses B can raise.

- B may state that the warranty waivers were part of the contract and therefore there was no breach of the warranties.
- B may claim there was no contract to begin with (this is a very weak claim, given the arguments above).
- B may claim that D's damages should be reduced due to D's own negligence, given that D failed to comply with the warning that excessive heat destroys the product. B should not be liable for any lost profits and costs due to D destroying the products given they were stored outside.

Claims B can assert against D.

- B can claim damages against D for failure to store the products properly. If D had complied with B's instructions, the products could have been returned to D and resold by B.
- B can claim that D improperly terminated the contract, given it was a twelve-month contract. B can show that it was ready, willing, and able to perform.
- B can argue there was no contract to begin with based on the issues noted above, in which case it does not owe any damages.

Defenses D can raise.

- **Failure to give adequate assurances:** D has a strong defense to the claim that D improperly terminated the contract. Not only did B breach the contract, which is an excuse for performace by D, but D appropriately requested assurances for B's performance, and B failed to provide those assurances. This also excuses D's performance.
- **Quasi-contract**: Finally, even if there was no contract, D can argue that B unjustly benefited from the deal given that it failed to deliver.

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QUESTION 2

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1. Authority:

Subject matter jx: Federal courts must have subject matter jurisdiction to hear a case.

Federal Question: Federal courts have jurisdiction to hear cases raising federal questions in the complaint. Patent law is entirely federal. NVS's complaint raises claims of patent infringement. The federal court has jx to hear the patent infringement claims.

Supplemental jurisdiction: Federal courts have supplemental jx to hear claims over which the court would not ordinarily have jx if those claims arise out of the same transaction or occurance as a claim over which the court does have subject matter jx. Here the state law unfair competition claims arise from the same occurance (appearance at the trade show) as the patent infringement claims so jx over these claims is proper.

Diversity jursidiction: Diversity jx is lacking because Dan and NVS are both citizens of Nevada. Diversity jx requires complete diversity. However, the court has jx based on federal questions and supplemental jx.

Personal jx: A court must have personal jx over the defendants. Here Dan is a citizen of NV so the court has general jx over Dan. Xtinguish is a citizen of Texas (place of incorporation). X also has all manufacturing and employees in IX (principal place of business). To have personal jursidiction over X, X must conduct substantial business in NV or have minimum contacts with NV. Substantial business is a high bar and requires that X is essentially at home in NV. THis is not likely met by attendance at a trade show. Under the minimum contacts analysis, X must have a minimum contact with NV, the claim against X must be related to that contacts, and the exercise of jx over X must not offend traditional notions of fair play and substantial justice. Here X did business in Nevada, attended a trade show and displayed its products. That is sufficient for minimum contacts. X's conduct at the trade show is the basis for NVS's claims. And asserting jx over X will not offend traditional notions of fair play and substantial justice beacuse X purposefully availed itself of the trade show in NV. Therefore, the court has personal jx over both defendants. It also appears that X was served in NV, which gives the court personal jx over X.

Service: the summons and complaint were served on X's sales and marketing VP at the trade show booth. The US Marshalls can serve the complaint and summons. Dan must be served by delivery to Dan personally, to his usual place of abode with a person of suitable age and discretion who resides there, or to Dan's registered agent. It appears Dan was not properly served, though he was later provided the PI motion. He still must be served with the complaint and summons, or he can waive service. X can be served by delivering the complaint to an officer of X, a managing agent or general agent, or any other agent authorized to receive service of process. Service on the VP of sales and marketing as an officer or agent of X is adequate service on X.

Venue: NV is a single federal district. Venue is proper in the district in which a substantial part of the events giving rise to the claim took place, here the trade show, and venue is proper in the district of Nevada.

Conclusion: the Court has authority over X. It appears Dan was not properly served, but if Dan was served or waived service then the Court also has authority over Dan.

2. TRO: A court may issue a temporary restraining order (TRO) without written or oral notice to the adverse party (FRCP 65(b)(1)) only if there are specific facts in an affidavit or verified complaint that clearly show immediate and irreparably injury, loss, or damage and the movant's attorney certifies in writing any efforts made to provide notice or why notice would should not be required. Here we have a verified complaint but it is not clear why notice should not be required. Usually notice is not required if there is a risk X is going to destroy evidence or it is a matter of great urgency. Here it appears X could have received some notice of the TRO without a risk of destruction of evidence and in time to stop activities before the next day of the trade show.

A TRO (and preliminary injunction) require showing a sbustantial likelihood of success on the merits, irreparable harm absent an injunction, the harm to the plaintiff if the injunction/TRO is denied is greater than the harm to the defendant if the remedy is granted, and the provisional remedy will not be adverse to the public interest. Here, since NVS and X/Dan are competitors in the specialized fire suppression market and NVS holds valid patents on its technology, a court is likely to grant an injunction. X/Dan could argue that the public interest is not served by an injunction because of the need for fire suppression technology, but would probably have to show great public need that NVS could not meet to defeat the injunction.

An order granting a TRO without notice also must include certain facts (date and hour issued, describe the injury and why irreparable, state why the order was issued without notice) and must be promptly filed with the clerk's office. Here it appears the TRO was not properly issued without notice.

A court must also require a security "in an amount that the court consideres proper to pay the costs and damages substained" by X/Dan. We need more facts to decide if $10,000 is enough to cover the damages sustained by missing the trade show. It appears not if NVS cannot now pay the $50,000 bond for the PI based on X's sales at the trade show.

3. PI: The court granted the preliminary injunction (PI) without a hearing and set a 1 year duration. A preliminary injunction may only be issued with notice. Dan and X had notice when they received the motion for PI. NVS must post a bond for the PI.

However, because the TRO was received without notice, the PI must have a hearing at the earliest possible time. FRCP 65(b)(3). The PI here was improper because there was no hearing.

Typically a PI lasts until a decision on the merits (i.e, summary judgment or trial). Here a PI with a duration of 1 year is acceptable and NVS could file another PI motion when this one expires.

4: NVS enforcement: NVS should not enforce the PI unless and until it posted the security bond or moved for relief from bond requirement with the court. NVS can argue that the bond is too high and ask for a lower amount (e.g. the $10,000 it paid to support the TRO) or ask for some other form of security to secure the PI.

5. Dismiss or Transfer: THe court correctly denied the motion to dismiss or transfer. As discussed above the Court has personal jx over both Dan (as a citizen of NV) and X (under the minimum contacts analysis) (and possibly based on service in the state). The court corerctly denied the motion to transfer venue. A court may transfer a case to any other district in which it could have been brought "for the convenience of the parties and witnesses, in the interest of justice." Here, there will be important facts in NV relating to the trade show. Courts usually give substantial deference to the plaintiff's choice of venue and X and Dan must show NV is significantly inappropriate as a forum for the case. They cannot meet this burden here given the signfiicant events that took place in NV, and the court correctly denied the motion to transfer.

6. Motion to set aside: Entry of deafult must be entered on behalf of a party against whom a judgment for affirmative relief is shought when the party has failed to plead or otherwise defend the claim and that failure is shown by affidavit or otherwise. The default judgment was not proper because it was only 20 days after service at the trade show. First, it is unclear that Dan was ever properly served the complaint or waived service (the motion to dismiss was filed only on behalf of X, not X and Dan; an objection to service must be in the first motion to dismiss/responsive pleading). Second, if Dan was properly served, Dan had 21 days after the date of service to respond to the complaint. The default was also not proper because it is not for a sum certain. The court should promply set aside the default against Dan.

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QUESTION 3

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As a preliminary matter, Andy and Beth are both domiciled in Nevda because they apparently live in Nevada. Jurisdiction over a divorce action is proper in the state where plaintiff is domiciled. Andy is a domicile of Nevada because he lives in Reno with his children, and until now, Beth, so the Nevada court has jurisdiction over the divorce. Further, the divorce court has PJ over Andy and Beth because they are both domiciled in Reno, Nevada, so the court can enter orders for child support and alimony against either party. Because the action was filed in Nevada state court, the Nevada rules of evidence apply to the proceedings at trial, and the below evidence will be analyzed accordingly.

1. Beth's Testimony

Relevance

Evidence is relevant if it has any tendency to make a fact of consequence more or less likely than it would have been without the evidence. Evidence is legally relevant if its probative value is not substantially outweighed by the danger of unfair prejudice. In Nevada the court *must* exclude the evidence if probative value is substantially outweighed by prejudice, misleading of the jury, or confusion of the issues. The court *may* exclude the evidence if it is substantially outweighed by the danger for undue delay, waste of time, or cumulativeness of evidence.

Here, B will argue that A's former feelings about their first baby shows that he is not truly a loving father, that he didn't want children, and that he should therefore not receive custody of the children. But A will argue that this not relevant because they ultimately decided to have the child and he is now actively involved and did agree to have two more children. However, the testimony does have a tendency to make A's devotion as a father slighly less likely, though the probative value is low.

Competency of Witness

A witness is competent to testify if she has (1) personal knowledge, (2) adequate memory of the events testified to, (3) the ability to communicate, and (4) the ability to take an oath for truthfulness. In Nevada, even an insane person can testify so long as they meet these requirements. Here, B had personal knowledge of the statements because A made them to her during high school and while deciding what to do with the baby. She remebers this vividly likely because it was a stressful time in her life and she is testifying in detail to what he said. She appears to be able to communicate these facts and understand the obligation to tell the truth. A will argue that she has "mental health issues" and therefore cannot be trusted to testify. However, it is his burden to impeach her sanity on cross examination and B will be able to testify as she meets the eligibility requirements set out above.

Hearsay

Hearsay is an out of court statement offered for the truth of the matter asserted. It is considred out of court if it stated outside the current trial, only humans can make statements, and if it is not offered for its truth, then it is not hearsay.

Here, A's statement is hearsay because he made it out of court and outside the current trial 15 years ago, and A is a human declarant who made the statement. B appears to offer it for its truth, that A did not want children and wanted to terminate the pregnancy.

However, B may be able to offer this statement for the nonhearsay purpose of impeachment. A claims that he is a loving and actively involved father. He likely will testify as to these traits at trial. B may use this prior statement to impeach A's committment as a father by showing that he never wanted the baby and wanted to either terminate the preganancy for place the baby with adoption services.

Hearsay Exclusions

Further B's testimony likely falls under an exclusion from hearsay for party admissions. The statement of an adverse party is admissible if offered against him. Here, B seeks to offer A's statement against him, and is likely admissible as a party admission.

Further, as stated above, A's prior statement is inconsistent with his potential trial testimony. In Nevada, a prior inconsistent statement is admissible for its truth even if not given under oath as an exclusion to hearsay if the witness takes the stand and testifies and is subject to cross examination. Here, it is unclear whether A will testify at trial to the matters he has

included in his complaint, but if he does, then B may admit his inconsistent statement both to impeach and for substantive purposes under the hearsay exclusion.

Character Evidence

Character evidence is a general statement about a party that conveys a moral judgment about the person. Character evidence is generally inadmissable in a civil aciton unless character is directly at issue, for impeachment purposes if the party takes the stand, and for certain substantive purpoess. Character is at issue in certain situations including defamation, negligent entrustment, loss of consortium, and child custody cases.

Here, B's testimony about A's statement is likely character evidence because it conveys a moral judgment about A, namely, that he is selfish and wanted to terminate or give up the child rather than keep it so that he could puruse college. Such evidence is inadmissible in a civil case to show A's propensity in this case to be selfish and prioritize himself over the needs of his children. However, this is partially a child custody matter, and A's character and fitness as a parent is at issue because the court must consider the best interests of the child, including the parent's ability (and desire) to care for the child. Therefore, B's testimony about A's statement is likely admissible character evidence. A may argue for a jury instruction that limits consideration of this statement to the child custody matters only, and the judge must deliver such an instruction if timely requested.

Confidential Marrital Communications Privilege

Andy will attempt to prevent B from testifying under the confidential marrital communications privilege. This privilege applies in all civil and criminal cases if the communication was made while the couple was married. Both spouses hold the privilege and both must consent to the privilege being waived. But the privilege does not apply if it is a civil action between teh spouses. Here, this is a divorce action between B and A, so the privilege does not apply, and A cannot prevent B's testimony. Further, B and A were not married at the time of the statement because A made this statement before they had the baby and got married. The privilege does not apply.

Legal Relevance

The probative value of B's testimony is extremely low because this statement was made while A and B were still in high school and before their first child. A was thinking of his future at this time and had no children. A later went on to marry B and they had a 15-year relationship with two other children, and A's statement in high school while in fear of his first child is not especailly probative of his devotion to his three children now, 15 years later. Further this statement is highly prejudicial because it is emotionally charged and portrays A poorly beause he wanted to terminate the child and did not speak particularly kindly to his girlfriend while navigating a sensitive situation. It confuses the jury and invites them to make a decision on emotion based on A's actions 15 years ago as to a potential child and not his current love and engagement for his three real children. Therefore, assuming that the judge determines that the evidence is logically relevant, she likely must exclude this testimony because its probative value is substantially outweighed by its potential for prejudice and confusion of the issues.

2. Judicial Notice

The court may take judicial notice upon request of the party of notorious (well-known in the community), manifest (readily verifiable from a source that cannot be reasonably questioned), or legislative facts (laws and legal reasoning that need not be capable of community or readily verifiable knowledge). Judicial notice establishes a fact without the party producing evidence to establish the fact at issue. The court must take judicial notice of state statutes and regulations. And the court will instruct the jury in a civil case that it must accept judicially noticed facts as conclusive in a civil case.

Here, the court must take judicial notice of the Califronia regulation because it is a valid state regulation. However, the court need not take notice of the regulation's impact on CA apartement property values. Because the judge owns property near the building, the judge might have notice of this item; however, the value of such buildings and the regulation's effect are not likely well known in the Reno community where this case was filed. And because real property values vary significantly, the impact of the regulation cannot likely be verified quickly and from a single source of undisputable authority. Therefore, the court will not likely take notice of the impact of the regulation on the value of the building, and A will need to produce evidence of this impact.

Relevance

Here, the CA regulation and its effect on property values is relevant because the couple owns a CA aparment building and this regulation would cover the building. The couple will seek a division of property and the regulation's effect on the property's value will be relevant to determining how much it is worth. Because the real estate is outside of Nevada, the court will likely award the other spouse the value they would have received from the sale because it does not have jurisdiction over the out-of-state realty, so its cash value is immediately relevant.

This evidence does not inspire prejudice because it is numbers-based and does not inspire emotion. It is tailored to the issue at hand, the value of the building, and does not confuse the issues. Therefore, the judge will not likely exclude it because it is highly probative value and does not present potential for prejudice.

3. The Letter

Under the rules above, the letter is logically relevant because it shows A's financial assets and will be relevant to his ability to pay alimony, support, and the division of assets. Like the CA regulation, this does not inspire prejudicce because it is just numbers and shows A's wealth, which is directly relevant. Further, this evidence makes A look favorable, as a kind grandson that cared for his grandmother in her final days and may endear the jury. Therfore, the letter is logically and legally relevant.

Authentication

All documentary evidence must be relevant and authenticated. As stated above, it is relevant. To authenticate a document, a lay witness may verify the handwriting only if she became familiar with the handwriting before litigation and not for purposes of litigation. The document must be authentic enough for a jury finding of authenticity. Here, B exchanged letters with A's grandmother in the past, and she can verify that the letter to A was written by his grandmother because she already knew grandmother's handwriting and did not become familiar for the case. So, B can show that the letter is authentic and from the grandmother sufficient for the jury to believe that it is from the grandmother and what B purports it to be.

Hearsay

Under the rules above, the letter is hearsay because it was made out of court by the grandmother and is offered for its truth, that she gave A $10M. However the dying declaration exception likely applies. In Nevada, a dying declaration made in the face of death is admissible, even if it doesn't concern the circumstances of the death, in all civil an criminal cases if the declarant is unavailable. Here, grandmother is seemingly passed, and at the time she wrote the letter she was terminally ill and knew that she would die soon because she indicated that she knew she would die in hospice. It does not matter that she did not discuss her death, and the statements as to the $10M disposition are admissible under the exception because she is now unavailable to testify.

4. Andy' Expert

In Nevada, expert testimony is admissible if it is helpful to the jury (here it is because B is seeking support and may be incompetent), the expert is qualified, based its knowledge on adequate facts, reasonably believes in her opinion, and employed reliable principles with articulable standards.

Here, the expert is qualified because she is a psychiatrist, a medical doctor who diagnoses and treats mental disease. She used testing on the parties and children at issue to make and form her opinion, and hse appears to believe in it to reasoanly certainty because she is willing to offer it in court. She used generally accepted principles, which is the most important factor as to reliability in Nevada. B might argue that the expert cannot testify to an ultimate issue, but

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QUESTION 4

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Question 4 - PR.

Please fully discuss the ethical issues under the Nevada Rules of Professional Conduct (NRPC) raised by the conduct of each attorney in the situations described above.

As a threshold matter, Adam (A), Brooke (B), and Cody (C) are bound by the NEvada Rules of Professional conduct because they are licensed in Nevada. The must comport themselves according to the rules in their practice in order to maintain the dignity, trustworthiness, and integrity of the practice of law. If conduct falls below prescribed standard of conduct, they may be subject to disciplinary actions.

Adam

Firm names:

The issue here is the firm name "rental legal aid foundation" allowed under NRPC.

A lawyer shall not use a firm name, letter head, or other professional designation that make a false or misleading communication about the lawyer or the lawyer services. Rule 7.5

Here, Adam, named his additional office in California, Rental legal aid foundation. A reasonable person would interpret that name as a "legal aid" firm, implying that it provides a probono or low bono services. The use of "legal aid" in legal profession implies that the services are offered for free to the clients or in the least at a great discount. The organizations that run legal aids are generally non profit organizations.

Therefore, the firm name is misleading because it communicates that the services may be provided free. Furthermore, the term foundation, is generally used for non-profit organizations.

Here, by using legal aid and foundation, Adam provided a misleading firm name.

Moreover, rental legal aid foundation, could be confusing because it does not clearly indicate that it is a lawfirm. An unsophisticated person may find it to be a place to get help for rental assistance, that would be false representation.

Hence, all in all the firm name is mileading, and confusing in the least if not false. Therefore, Adam has violated the rule for firm names.

Competence

The issue here is if Adam was competent to practice California real estate law.

A lawyer shall provide competent representation to a client. Competent representation requires legal knowledge, skill, thoroughness, and preparation reasonably necessary for representation. An attorney can remedy this by acquiring the knowledge without undue expense or delay or associates with another lawyer competent in the field. Rule 1.1

Here, Adam has practiced solo in Las Vegas Nevada. He opened an office in California.

Real estate law is specific to every state and certain nuances may be specific to the county they practice in. Therefore, Adam, who has practiced in NV may or may not be well versed with real estate laws of CA.

He may however, learn the rules and to become competent.

Hence, Adam may be able to show that he made efforts to become comptetent by learning.

Responsibilites regarding nonlawyer assistants - vicarious liability.

A lawyer who posseses managerial authority shall make reasonable efforts to ensure that the firrm has in effect measures giving reasonable assurance to all employees conform to teh rules. The lawyer will be subject to disciplin if he ratifies conduct and aware of the conduct that could have consequences and did not mitigate it. Rule 5.3 The lawyer will be vicariously liable for actions of non-lawyers if tehy violated NRPC rules.

Adam violated his duty because he did not make reasonable efforts to train teh non lawyer,

He hired the clerk and transferred the files without apprising the clerk about the rules of confidentiality, the duty of diligence and proper practices in electronic data storage. He did not follow with File clerk regarding his progress on the project of electroning storage.

Furthermore, he did not mitigate or evaluate the consequences when he recieved the notice regarding hacking.

Hence, Adam has violated this duty and may be disciplined because he will be vicariously liable for his clerks actiiviies.

Confidentiality

A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent or permitted other wise. Further, a lawyer hsall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of information relating to client. Rule 1.6

Adam, had the affirmative duty to take upmost care to protect clients confidentiality. When clerk dropped of files to the storage company, storage company who are not part of the firm had access to the information. Adam did not get a written consent from teh client to transfer their information to the storage company.

Therefore, this would constitute as unauthorized disclosure, hence violate the rule of confidentiality.

Duty to communicate

A lawyer shall prompltly inform the client on the progress of the case, circumstances with respect to which client informed consent is required, consult the client for means by which the clients objectives are to be accomplished, settlements, plea bards etc. Rule 1.4

Adam had a duty to communicate to all his clients prior to sending their files to the storage company and after he learned about the breach. Adam violated this rule because he did not communicate the progress in clients data and he did not ccommunicate about the breach and apprise the clients about the remedial measures he is taking in the aftermath of the breach.

Hence, Adam violated his duty to communicate.

Duty report to tribunal - candor to profession .

A lawyer has a duty to report to the state bar regarding any breaches in the duty.

Here, Adam had a duty to report the breach in confidentiality to the bar. However, he did not report it.

He has violated the candor to profession.

Registration of mutijurisdictional law firms:

NRPC requires that multijurisdictional firms follow certain registration requirements.

Here, Adam did not follow the registration requirements which includes providing documents that describe the managerial structure and functions of all lawyers etc. Rule 7.5 A

Unauthorised practice of law:

A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of legal profession in that jurisdiction. Rule 5.5. A NV lawyer is subject to regulation in NV even if the misconduct occurred in another state. In the instant case Adam's activities in CA.

Here, unauthorized practice would be setting up an office, offering legal advice, participating in any law practice as defined by NRPC. Mediation meetings would be considered a practice of law under NRPC. Further, Adam has an office, an employee and clients. That would meet all requirements for a law practice. The facts do not indicate that Adam has admission to bar in california.

Therefore, Adams practice in california would be considered unauthorized practice of law.

Brooke

Attorney client relationship and scope of representation.

A lawyer shall abide by a clients decision concerning the objectives of the representation and consult with the client as to means by which they are to be purused. Rule 1.2**.**

Here, Brook had duty to inform abide by the clients wishes and she violated the rule when she did not approach the clients with settlement conversations (discussed further in duty of diligence).

Duties to former clients:

Rule 1.9.

Duty of Diligence:

Ruby:

A lawyer shall act with reasonable diligence and promptness in representing a client by conducting thorough investigation, adequate preparation, comply with requests of information, return calls and emails and keep clients informed of settlement and plea deals. Rule 1.3

Here, Brook breached the duty to his clients when she did not communiate the settlement offers to her clients especially Ruby. Further, she could have mitigated the first violated by bringing the actual settlement offer to Ruby. Moreover, the facts do not indicate that she had done a thorough invetigation and preparation in the best interest of her client.

Therefore, Brook has violated her duty of diligence of Ruby because he has not kept ruby informed.

Conflict of interest - former clients

A lawyer sho is formerly represented a client ain a matter shall not thereafter represent another person in the same or substantially similar matter in which that person's interests are materially adverse to the intersts of former client, unless client gives an informed consent in writing.

Here, Brook had worked on prosecuting the same cable company that her clients are suing. While the prosecution and her clients are both on the opposing side of her case...as in cable company was a defendant in her role as a prosecutor and cable company is a defendant in her role as plaintiff lawyer.

Therefore may not obvious conflicts. However, NRCP requires an informed consent from all parties when there is an appearance of conflict. HEre, the rule of goverment lawyers applies as described below.

Special conflicts of interest for former government employees.

A lawyer can represent a private party against a government agency for which the lawyer worked unless the matter invovles exactly the same subject matter in which the lawyer participated personally and substantially while working for the government unless teh govt. consent. Rule 1.11

Here, as described above the conflict is not adverarial, however, B should have obtained a consent from the goverment.

Fees -contingent fee

Contingent feels must be in writing, must include the methods of fee calculation and other costs to be borne by the client and whether expenses are deducted before or after the fee is calculated. Contigency fees are prohibited in domestic relations and criminal cases. Rule 1.5.

HEre, Brook agreed to enter into contigent fees, but it is unclear that it was in writing and Ruby was aware of how the fees are calculated.

Therefore, Brook has violated this rule.

Communicate - settlement

A lawyer shall abide by a client's decision whether to settle a matter.

Here B did not communicate the settlement matter with Ruby, therefore she violated the rule.

Aggregate settlements and Joint representation::

Teh NRPC advises against representing multiple marties in one matter. The conflict may be overcome by informing the clients of all potential risks and obtaining an informed consent in writing.

A lawyer who reprsents two or more clients shall not participate in making an aggregate settlment of claims of or against clients, unless teh clients give informed consent in writing after lawyer disclosed the nature of claims and settlement offers.

HEre, B did not communicate the matter of aggregate settlemesnt with any of her clients. She should have a written informed consent from all clients in the matter prior to engaing in the settlement for aggregate settlements. Facts show that

her clients were unaware of the joint representation andaggregate settlements.

B did not have the written consent therefore B has violated the rule for aggregate settlemetns and joint representation.

Fairness to opposing party and counsel

A lawyer has duty reveal and inform the opposing counsel of any inadvertant and unintended communication and destroy the communication. Rule 3.4.

B did ot inform the oppsing counsel when she received an attachment that included a strategy memo which was not intended for her.

B violated her duty to the opposing counsel and fairness to opposing counsel.

Settlement of accounts.

Upon recieving funds or other property in which the client has an interest in, the lawyer must notify theclient and must promptly deliver the funds.

The facts indicate that B dpositied settlement accoutns into client trust account properly. However, she divided among all clients, which is not proper for reasons discussed above.

Cody

Fees.

A lawyer may not make an agreement for, charge or collect an unreasonable fee/amount for expenses. Factors to be considered are guided by rule 1.5. The time and labor required, the novelty of questions, the likelihood of taking the time away from the attorneys regular employemnt, the results obtained the nature and lenght, experience and time limitations and if it s contigent based. The lawyer shall communicate the basis or rate of the fees and expenses.

HEre, the fees that he in lieu of his fees he would be paid by the assignment to Cody of the media rights to a movie based on the case and the conveyance of Defendant's $10 million private jet, for his represenation in a murder trial may be unreasonable. While murder trials are time consuming and challenging, it is unrealistic to expect getting paid that amount for oen trial

Furthermore, the rules for gifts and media rights may find this agreeement prohbitive.

Gifts

A lawyer shall not solicit any subtantial gift from a aclient, including a testamentary gift, or prepare on behalf of a client an instrument giving the the lawyer or a personal related to the lawyer.

Here, C violated the rule when he participated in getting an agreement specifying the assignment of movie rights and a private jet.

Private jet would be considered a gift and when C participated in drafting the agreeemnt without advising his client to get another lawyer, he violated NRPC.

Media rights: A lawyer shall not make or negotiate an agreeemnt giving lawyer litereal rights to a portrayal or account based on substantial part relating to representation. HOwever, they may agree that the lawyers fee shall consist of a share of ownership in the property as long as the arrangement is not adverse to the clients interests and does not constitute a cuase of action or litigation and conforms to rules.

As described above it is unclear if C was getting full assignement of the movie rights or a portion which would be equivalent to a reasonable fee calculation. IF it is found the full assignment would not be considered reasonable fee, he may have violated this rule.

C may have violated the rule for gifts and media rights.

Plea deal

A lawyer shall not make a plea deal without clients consent becuase it is the clients right (as described above0.

Here C violated the duty when he did not comunicate the plea deal to his client it was ddecision for client to make and not the attorney.

Impartiality and Decorum of theTribunal and Relations with jury.

Cody's statement to Jury

Cody's statement to jury may not have violated rules based on teh facts presented however, if the preceeding or later statements add other statemtns taht may violated NRPC he may be disciplined.

Social media post

Rule 7.2.

A lawyer may advertise her legal so long as the communicatio nis not false and misleading the lawyer of legal services and satisfy certain requirements: a copy of any advertisement should be sent to the state bar within 15 days of the first use of the ad, and the lawyer should keep a copy of any advt. for the 7 years of initial use.

Furthermore, an online advertisement should include a disclaimer that this is not a legal advice and does not create an attorney client relationship.

A indirect advertising through circulars and communciations should include a warning that NOTICE THIS IS AN ADVERTISEMENT in red ink.

Here, Social media post would be considered an advertisement because it implies solicitation of new clients. It may be improper because it indicates that all his clients will be winners. Futhermore, the post did not include a disclaimer to indicate that it is an advertisement. He did not report the advertisemnt to the bar as required.

Therefore, C may have violated advertising rules.

Here, A, B, C and have violated several rules and may be disciplined.

******* State Essay 4 ENDS HERE *******

FEBRUARY 2021
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

QUESTION 5

NV 2/2021 State Essay 5 237

******* State Essay 5 STARTS HERE *******

Intentional Torts required a voluntary act with the intent to cause harm. A voluntary act is somethign that is concious or will as opposed to an act that is purely reflexive. Intent can be shown when the defeand either desires to act to cause harmful results or knows with substantial certainty that the result will arise. Causation is when the defendant's act or force set in motion by the defeant must cause the plaintiff's injury.

1. Bob v. VSE

a. Assault

Assault is an itentioanl tort where the defendant intentionally causes the plaintiff to be in reasonable apprehension of an immediate harmful or offensive contact. Defendant must have the requiesite intent to act with the desire to cause immediate or harmful or offensive contact or the apprehension of such contact or know that the result is sbustantially certain to result. Reasonable apprehension is based upon a reasonable person standard, meaning it does not matter whether the defendant could actually courry out the threat so long as the apprehension is reasonable in the plaintiff. There must be apprehension of an imminent battery and it must occur almost instantly.

Here, Bob was watching a hockey game at VSE's indoor arena. While seated in his rightful seat, so he was legally in the place he was supposed to be, he was hit by a pubck that came off the ice during play. The facts are not clear whether Bob saw the puck, but it states that Bob was watching the game so it is likely that Bob was also watching where the puck was going, which eventually came at him. Because he was watching the puck coming at him, he had an apprehension that he was about to be hit by it. The hockey player, who would essentially be an agent for VSE, knows that hitting a hockey puck towards a fan in the stands will likely hit that fan and create an offensive contact with that person by hurting that person. The player will also know that by hitting the puck that way it will certain result in hitting the fan. Thus intent is satisfied. Finally, the imminent battery is satisfied because after the player hit it, Bob was hit by the puck.

However, VSE will argue that the hockey player is not an agent of VSE and also that even if the hockey player was an agent of VSE, that the hockey player did not have the requisite intent because the player was just trying to score a goal.

b. Battery

Battery is an intentioanl tort by a defenant that cuases harmful or offensive contact with teh plaintiff's person or somethign closely connected to the plaintiff. The requisite intent must be that defendant acted with the desire to cause an immediate or offensive contact or know that such contact is substantially certain to occur. Plaintiff need not be aware of the contact. Harmful or Offensive contact requires that pain be inflicted or an impairment of any body function that is offensive to a reasonable person.

Here, as above with assault, Bob will argue that the puck was hit by the hockey player (an agent of VSE) with the intent to cause contact between Bob and the hockey puck. The offensive contact would be the puck hitting Bob in the head. There is no necessity for the puck to be known by Bob will hit him as in assault. And there is an offensive contact because Bob was hit by th epuck and was knocked unconscious by the puck that came off the ice during play.

Again, VSE will argue that there is no intent because the hockey player is just trying to hit the puck at the goal and did not have the intent to want to cause harmful or offensive contact to Bob. VSE will also argue that the hockey player is not acting on behalf of VSE so this action would not survive against VSE.

c. Vicarious Liability / Respondeat Superior

An employer is liabile for injuries caused by negligence or strict liability of employee if occured within the scope of employment. An employer can be directly liable for the intentioanl torts of an employee if the employee is using the force in their duty.

While there is unlikelihood that the hockey player who shot the puck at Bob that hit him is seen as an agent or employee of VSE to impute liabilty, there is a strong likelihood that Bob has a case against VSE based on the actions of the VSE security guard.

Here, the secuirty guard is an agent/employee of VSE and his actions may be attributable to VSE for any causes of actions Bob may bring against VSE.

So, the below torts that are committed by the VSE security guard are attributable to VSE because they occured while the secuirty guard was in the scope of his employ with VSE and also while the security guard was on duty and working for VSE as VSE's agent/employee.

Additionally, as outlined below, VSE may also be on the hook and liable for the negligence of its employee based on respondeat superior as well as negligent hiring supervision and retention. Employers may be liable for their own negligence by negligently selecting or supervising their employees.

Defense - VSE will claim that these intentional torts are outside the scope of vicarious liability and that they are only attributable to the security guard. However, intentional torts are only outside the scope of vicarious liability when they do not have to do with the duty of the employee. Here, the secuirty guard is a secuirty guard and he had to use force and inteintioal torts during his duty, therefore, this defense will not survive and the security guard is definitely and agent of the VSE and vicarious liability and respondeat superior will apply and attribute any torts to VSE.

d. False Imprisonment

False Imprisonment is an intentional tort where the defendant intentionally causes the plaintiff to be confined in a bounded area against the plaintiff's will and plaintiff knows of the confinement or is injured thereby. The requisite intent required is that the defendant desires to confine or retrain the plaintiff in a bounded area or knows that such a confinement is virtually certain to result. The bounded area confinement requires phsycial barries, threats of force, failing to release the plaintiff when requested or an invalid assertion of legal authority. There is no duration requirement but if the plaintiff knows about a reasonable means of escape, there is no confinement. The plaintiff must also be aware of the coninement or injured thereby and it must be against his will.

Here, after being knocked unconcious, Bob was moved, assumably by VSE and VSE personnel and security guard, to the VSE security office on a couch. When he woke up, Bob was told not to move by the security guard when he attempted to sit up. The security guard, who is VSE essentially, has the intent to keep Bob in the bounded area of the office when he tells Bob that Bob is under concussion protocol and he has to remain in the office and stay laying down. Further, the office is a confined space and there is only one door that Bob knows of and it was locked so he could not escape. Additioanlly, Bob is bounded because there is a threat (and eventual actual occurance) of force from the security guard when the security guard pushes Bob back down as Bob tried to leave and guard commanded him to stay still. We also know that it is against Bob's will because he stated to the security guard that he felt fine and wanted to get back to the game. But the security guard ignored this and locked Bob in the room and shut off the lights. Bob heard it was locked from the outside.

Defense - VSE will argue that Bob was only in the room for five minutes and the security guard's supervisor released Bov. However, this will not survive because duration does not matter.

Defense - VSE will argue that Bob was not injured by the imprisonment and that he was actually still in pain with a headache and it was consent because he said he had a headache. However, this will not survive because injury is not a requirement unless the plaintiff is not aware. Here, Bob is aware so injury is not necessary so this defense will not survive.

e. Assault

Rule for Assault incorporoated by reference from above.

Bob will have another claim for Assault against VSE and the VSE security guard for assault when the security guard pushed Bob back down when Bob tried to get up from the couch in the security office. Bob is sitting up so he can see the guard come at him when the guard comes to him to push him back down for the concussion protocol. Further, the guard had the requisite intent because the guard wanted to make the offensive contact to Bob to push him back down on the couch and to stay down. This is further evidence when he commands Bob to remain still. Bob's apprehension is reasonable because any reasonable person will be apprehensive of a battery that is coming from a security guard who has already told you to sit down once and then is coming at you to push you down back on the couch. The guard was also certain that an offensive contact was to occur, in fact that was his desire was to get Bob to get back down and was certain that approaching him to push him down would do it. The battery is also imminent because it did actually happen seconds later.

f. Battery

Rule for Battery incorporoated by reference from above.

Bob will have another claim for Battery against VSE and the VSE security guard for battery when the secuirty guard pushed Bob back down when Bob tried to get up from the couch in the security office. The security guard has the requisite intent to cause harmful contact to Bob because he pushes him down back to the couch. He makes contact with Bob when he pushed Bob back down and commanded him to remain still. Further, he was certain that this would cause pain to someone who had just been unconcious. Pushing someone down who is sitting up on a couch is not something that a reasonable person does to a person who was just knocked unconcious and says he has a headache. So the guard knows that this contact is usrely going to result in pain and that it would be offensive to a reasonable person.

Defense - VSE will claim the privilege/defense of consent. This defense can be implied or express or by mistake. VSE will argue that Bob impliedly consented to this concussion protocol because he was unconcious and needed medical care and because he had a headache he did not know what was good for him. But this is not likely to survive.

Defense - VSE will claim privilege/defense of authority. This defense is where like the shopkeeper's privilege or a landowner to detain someone for a necessary reason. VSE will claim the necessary authority was the "concussion protocol" that they use when someone uses a hockey puck to get hit in the head. But this will likely not survive either.

Defense - VSE will claim privilege/defense of necessity. This defense VSE will say is because it was necessary for them to do this in the best interest of Bob's health and it was against his own judgment. This will not survive iether.

g. Intentional Infliction of Emotional Distress (IIED)

IIED is an intentional tort where the defendant engages in intentional or reckless acts amounting to extreme and outrageous conduct that causes the plaintiff severe emtoinal distress. It must be intentional where the defendant acts with the desire to cause the emotional distress or certain that it will occur and the recklessness wit with regard to a high egree of probability that emotional distress will follow. The conduct must be extreme and outrageous so that it exeeds bounds tolerated by

civilized society. The emotional distress must be severe, no phsyical injury, but more distress than a reasoanble person would expect.

Bob will have this claim against VSE because the security guard engaged in a voluntary act of pushing Bob back down towards the couch to keep him confined there for the concussion protocol and not let him leave. He also locked him in the room and turned off the lights as if it was prison cell to keep Bob in there becasue because Bob didn't want to listen to the security guard when Bob said he was fine. The security guard operated with recklessness becasue he didn't have a regard for Bob's feelings or what would follow if he locked him in a room in the dark. He also should hav eknown that this was certain to cause emotional distress to any person. Further, the conduct is extreme an doutragous because he exeeds the bounds by locking Bob in a dark room when Bob needed medical attention. Further, Bob has severe emtoional distress because his headaches got worse and he bagan to develop memory problems so tht eissues were long lasting.

h. Negligence

A plaintiff must show a duty on the part of the defendant to conform with specific standards of conduct or duty, breach of that duty, actual and proximate cause of the palintiff's injury and damages.

i. Duty - Landowner Responsibility

Landowners have a duty to the individuals who they bring onto their property. There are different types of Plaintiff's characterizations on the landowners land: invitees, licensees, and trespassers. An invitee enters on the defendants land at defendant's express or iplied invite for a prupose relating to the defendant's interest or activties. A licensee enters the defendants land with the defendants express or implied premission and who's not there for a purpose benefiting defendant or defendant's activities nor is land held to the public.

When a plaintiff is an invitee, the landorwner and defendant has a duty to exercise reasonable care to prevent injuries caused by activites conduct on his land. When a plaintiff is a licensee, the landowner must warn of known or conelead dangers on their property. In addition the Standard of Care necessary is that of a Reasoanble prudent person under the same or similar circumstances to exercise reasoanble care. However, an objective standard of care may also be applied where the defendant's conduct is measured against the expectation against the conduct within the community and rise to level of the average person in the community.

Here, Bob can be classified mainly as an invitee. He is an invitee because VSE invited the public to buy tickets for a hockey game and Bob rightfully entered the property the first time with his ticket as a spectator of the hockey game to the beneift of himself to enjoy the game. The benefit is also to D because the ticket is paid for by Bob and VSE is making revenue based on Bob being there. Therefore, VSE owes a duty to exercise reasoanble care to Bob and the standard of care of a reasonable prudent person and objective as well.

If Bob was to be classified as a licensee, it woudl be because it is not for the benefit of VSE at all but only for Bob to be enjoying the game.

Additionally, Bob will likely want to argue that because there were signs in the stands already stating that "VSE is not responsible for accidents or injuries due to flying objects or otherwise." that VSE was already on notice that these types of accidents may occur or that flying objects may go over the plexiglass. Thus, they have a duty to ensure that no hockey pucks go over the glass because of the duty they already owe to take reasoanble precautions and reasonable care to prevent injury.

ii. Breach

Breach occurs when the standard of care and the duty that are owed are violated and not met. The questions to ask are what is the probability of harm occruing from the defendant's conduct. what is the likeley magnitutde of the harm going to be and what is the burden on defendant to avoid the harm.

Here, since Bob is an invitee and is owed a reasonable care to prevent injuries, Bob will argue that VSE breached this duty because it did not have plexiglass partitions that were in conformity with the industry standard. Therefore, what kicks in is the objective standard of care where VSE will be held to the standard with others in that community. That means other arenas that have the partitions in the industry standard.

Because the plexiglass was not in conformity, VSE will be deemed to have been in breach of the duty to exercise reasonable care for its invitees i.e. to ensure that the plexiglass is safe for Bob and other fans who are attending hockey games.

Bob will also argue that there was a breach because the magnitude of harm is very high for such a harm, as evidence by him falling unconcious and having memory problems and headaches. Further, bob will argue that the burden was not so high and it only needed to raise the plexiglass 20 inches which is not a very unreasonable action for VSE to do since they own an indoor arena.

However, VSE is likely to argue that the plexiglass was pretty close especially since the pubck barely cleared the plexiglass when it Bob. VSE will state that the probability of harm was very low because they were so close and so they are not in breach. But this will not survive.

iii. Causation

Causation is required to show that the breach of duty actually cause the plaintiff's damages. There are two types of causation: cause in fact (actual cause) and proximate cuase (legal cause).

First, cause in fact requires tha showing that defendant's breach leds to plaintiff's injury. Plaintiff must show that more likley than not, but for defendant's breach and neglignece, plaintiff would not have been injured.

Here, it will be easy for Bob to show that but for the plexiglass being 20 inches shorter, the puck would not have cleared the plexiglass to hit Bob in the head. Especially since the plexiglass barely cleared the plexiglass. Using the "but for" test as above, he will prove that the low plexiglass was the but for cause of his injury.

Second, proximate cause is the policy reasons to cut off liability to VSE. Meaning a plaintiff has to be injured by a superseding or intervening cause that shows the extent of the harm was unforseeable.

Again, here, the proximate cause has to still be the hockey puck just barely clearing the plexiglass because it was only 20 inches shorter. Because the signs already show that pucks to go out above into the stands, it is forseeable that a puck will go out into the stands to cause this type of injury. The type of harm is foreseeable because a puck that hits someone in the head is lilkely to cause them to go unconcious and a puck that goes into the stands will injure someone.

VSE will argue that there may be another cause in that it was the hockey player who did it but at th esame time, this is not likeley to surive because it was VSE's duty to provide partitions that will protect fans from any hockey players hitting pucks. Additinoally, as discussed above, VSE is likely already on notice that pucks will go flying into stands since it put signs out already to warn away any danger or liability. Therefore, it knows that players will shoot sometimes and it will go into stands and that is what may cause injury to fans or invitees. So it cannot be put on the players to do all this.

v. Damages

Damages are the final prong to negligence. A plaintiff must show that they have suffered damages from the neglience of another party.

Here, Bob is very easily going to show his damages since he can show taht he has worse headaches and also memory problems.

VSE will likely claim that an intervening caused the worse headaches (security guard) but this is a weak defense.

Ultimatley damages are there.

Thus, Bob will have a claim for negligence against VSE.

i. Negligence Per Se

Rules for neglignece are incorporated by reference from above.

Negligence per se is similar to negligence except that the standard of care and breach are implied upon a showing that a rule or standard of conduct is in a law and that the statute or rule is intended to protect that type of plaintiff who was harmed.

Here, Bob will be able to show that VSE vioalted a rule/law when he found out that the plexilgass partition was 20 inches lower than the industry standard. Bob will also show that this rule is meant o tprotect fans just like himself.

The above analysis for neglignece is also applied and incorporated by reference here.

VSE will claim that pursuant to subsequent remedial measures that cannot show that they increased the plexiglass by 2 feet and that it was always that height. This is a policy consideration that excludes this information to be admitted.

j. Strict Liability - Product Defect

A products manufacturer may be held liabile for harms that are cause by products with manufactuirng desing, and/or wanring defects. A manufacturer is liable fo rany product that it puts into the stream of commerce which leaves its possion with adefect. Those in the of distribution are also stricly liablity. A manufacuteres liability isn't limtied to the specifc intended use of htep roduct, but any foreseeable use of the product.

Here, it is not clear whether VSE designed this plexiglass, but assuming that it did, VSE and the manufacturer of thep lesiglass could be held joinltly liabl by Bob for a disgn defect becasue fo ronly a little mor ein cost, VSE could hav emade the plexiglass taller so the hocky puck would not breach over the plexiblass barely. In additon to VSE bieng held liabile as ne tnitty in the chian of distribution, the manufactuerer of th eplexiglass and the installer may also beh held liabl ein a matter of recoursre.

k. Other Matters

While not an outliend tort, VSE sent a letter to Bob after Bob had already retained an attorney. Parties are not allowed to contact represented aprties.

Defense - contributory neglignece

VSE will likely try to argue contributory or partial comparative negligence. When a plaintiff shares in some of the fault for a tort, they are barred from recovery. Nevada recognizes a dfense of contributory neglignece wehn the plaitniff's own negligence is determine to hav ebeen more than 50% at fault fo rth einjury.

Here, VSE will claim that Bob was liable for sitting there or that because he was in that exact locaiton. Also VSE will state that Bob shoudl not have gotten up from the couch when he should have been in "concussion protocol". This defenses will not surivve.

Defense - Assumption of Risk

When a plainti impliedly assumed the risk through action or written or oral words, they are barred from bringin any action. VSE will likely try to argue that Bob assumed the risk of a hockey puck hitting him because he came to ahockey game and sitting in that seat.

Defense - Warning Signs

VSE will claim that as a landowern and part of it's duty, it warned of dangers and exercised reasonable care for its ubisness invitees. The signs that were put into the stands VSE will claim are all to prevent this harm. However, this defense is not likely to surive because then all landowners would be able to just warn away any dangers in their property.

2. VSE v. Bob

a. Trespass to Land

Trespass to Land is an intentional tort where the defendant causes an invasion of the plaintiff's land, interfering with the plaintiff's possessory interest in the land. The intent must be that the defendant desired to enter the land and knew that entry was certain to result. The etnry requires the defendnt to actual enter the plaintiff's land.

Here, despite receiving a letter from VSE that he was no longer permitted to enter the arena, Bob still went to another game at VSE's arena. He had the intent to enter this arena and he did so in order to measure the plexiglass. He had a desire to enter the land even though he knew he wasn't allowed to enter and he knew that by entering entry would result.

Defense - Bob will claim that he was only entering the land in order to measure the plexiglass in the pursuit of litigation. He may be able to assert with his lawyer that he is allowed to do so in proper discovery and that has the right to know about this information in pursuit of litigation. Though this is not likely to survive.

b. Defamation

Defeamtion is a defamtory statement of or concering the plaintiff, published to a 3rd party that causes damages to the Plaintiff.

Defamatory Statement

The defamatory statement is one that tends to lower the palintiff's reputation within the community. Here, Bob stated that the VSE Area is unsafe, Accusing an arena for being unsafe would tend to lower one's reputation within the community and lower ticket sales because VSE owns and operates a presumably safe multi purpose indoor arena. Patrons expect to be safe whe coming into the arena and a hocky game, espeically since, as detailed above, they are invitees and licensees.

Of or Concering Plaintiff

A reasonable person msut ahve understood that the statement was of or concering the Plaintiff. Here, Bob specifically used VSE by name and calle dthem out specifically in his statemnt on ihs soical media account.

Published to a 3rd Party

The statement must have been published to a 3rd party who understood the statement. Here, the statement was publsihed on Bob's soical medai account. Presumably soical media accoutns are public forums where the gnereal public can view statemens. Howeve,r this was a "new" soical media account and Bob did not have any fllowers. Bob will argue that he did not publish as presumably nobdy saw his comments. VSE will argue that if Bob's social media account is public, the public can view it as a 3rd party regardless of them being a follower. The question the n begs that if nobdy saw or read the statement, does it count as bieng published to a 3rd party. Coruts in NEvada have routinely held that publishing a defamatory statement ot your social media account, sans followers, still counts as a publishing.

Damages

Genreral damages are presumed for lible per se (written/printed publication of defamatory statement). Libel is written defamation. Here, bob made his statmenet in written form on the internet on his oscial medai account and it said SE area in unsafe. Therefore, VSE has a common law claim fo rdefamation against Bob.

Constituiontal defamation

Whenever there is a matter of public oncern, then the plaitniff must also prove the addtional elements of fault and falsity. HEre arguably the amtter is one of public concern as it deals with the safety and common well bieng of the gnerael public invited to VSE's arean. Arguably, this area is big and may peopel in the pbulic need to know andr ely on the premise that it is a safe venue. VSE will have to both faul tand falisty to show.

Falsity

Plaintiff is reuqire dto prove falsity of the statement. Here, VSE willa rgue that the claim is false and the arean is safe. They will seek to show that they enver had instances such as this before int he past and that as a whole, the premises is afe. They will likley sue the fact that the puck barely breached the top of the glass partition and this was a rare occurence. Bob will argue that his statement was true.

Fault

The type of fault htat Plaintiff must prove depends on whether plaintiff is public or prive. PUblic firure is on ewho achieves fmae or notiret or is in govt office. Plaintiff is publ, he must prove NEW YORK TIMES malice which requires hsoiwng of knowledge that staement was false or reckles rdisregads as to wheter it was false. This is subjec.t IF the palitinfss ir priavte that he must prove Gertz negligence, which means he nee donly show negligence rgardin falisty of hte statment if the statmenet is that stament invovles apublic conerne.d Where defenan is only englient, only actual injury damages are reocverable. HOever, ia plaintiff can show malice on the aprt of the dfendant damages may be presume dna dplaintiff may be able to reover puntivie damages.

HEre, VSE is mostliyl no ta public figure. VSE is likley a private firue/entite and as such the anlays ifor Gertz Nelgignec ewill apply. VSE only need to prove that the statemetn was false in regards to a matter of public concern. HEre, in regards to the safety of th epatrons of VSE and other eents that it holds, VSE wil likely ba ble to show that the staement was fals ein light of public coner. They have plexiglass to prove that they kep their patrons safe. This is a public concer tat has been tough about considered and hadnle.d There wa slikley no malice becasue a court will likely not find a reckless disregard as to if hte staement was false.

Defense - Consent - is a cmoplete defense to defamation. HEre there is no consent by VSE as to the statement so this defense touwld not apply.

Here, assumign that VSE does not need to prove the statemetn was false, if the tiref of fact decides as to the statement aht it was a compelte truth, this would be a completel defsne to the defamatoyr aciton and bar VSE form bringing this cliam.

Defsne - Absolute Privielge - Defendant may have a qulaifie dpirvilege fo ra dfesne of owe's own actions, proepty or reputation. HEre, Bob may ahv ean aboslute pirvielge if he is calle dto fdefend his own actions, or reputation by way fo bringing the ngeligence claim above. Howeve,r this defens will not liley apply.

Defesne - Qualifie Privielge - As above with the absolut eprivielge, this defesne will likely not apply becasue the speaker Bob was not making a report of official proceedings or statement sin teh itnerst of any publisher.

******* State Essay 5 ENDS HERE *******

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EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
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QUESTION 6

******* State Essay 6 STARTS HERE *******

1) Criminal Liability of Ann

Attempted Murder (Bill): At common law, murder is the unlawful killing of a human being with malice aforethought. Attempt is an act that, although done with the intention of committing a crime, falls short of completing the crime. In Nevada, attempt must go beyond mere preparation and tend to accomplish the crime. Attempt requires the specific intent to commit the crime and an overt act in furtherance of that intent.

Here, Ann sideswiped her ex-husband, yelling at him "I hope you die." Even though she claims not to have intended to kill him but only to teach him a lesson and dent his car, it is likely that the district attorney could and would charge Ann with attempted murder of Bill on these facts.

Murder (John): Murder is defined above.

Transferred intent: If a defendant intended a harmful result to a particular person or object and in trying to carry out that intent, caused a siimlar harmful result to a different person or object, her intent will be transferred from the intended victim or object to the one actually harmed.

In this case, Ann arguably intended to kill Bill (based on her statement that she hoped he would die.) She then sideswiped Bill with her car, which forced Bill's car to the curb where he struck and killed a pedestrian. Under the doctrine of transferred intent, Ann's intent to kill Bill transfers to John and she can be prosecuted for the murder of John.

If the jury believes Ann that she did not intend to harm Bill but only to teach him a lesson and dent his car, then Ann would lack the requisite intent to be found guilty either of attempted murder of Bill or the murder of John.

Voluntary Manslaughter: Voluntary manslaughter is a killing that would otherwise be murder but is distinguishable from murder by the existence of adequate provocation. The provocation must have been something that would arouse sudden and intense passion in the mid of an ordinaryy person, the defendant must have in fact been provoked, there must not have been sufficient time between the provocation and the killing for passions to cool, and the defendant must not in fact have cooled off.

Ann may contend that she was provoked by Bill and accordingly that if anything, she should be prosecuted for attempted voluntary manslaughter. This argument will fail because a long-running dispute with an ex-husband is not the kind of provocation that would induce the requisite sudden and intense passion. Moreover, Ann has had plenty of time to cool off since the divorce. She cannot claim that merely seeing her ex-husband driving his car is sufficient to arouse passion.

Negligent Homicide (Involuntary Manslaughter): If a death is caused by criminal negligence, the killing is involuntary manslaughter. Criminal negligence requires a greater deviation from the reasonable person standard than is required for civil liability. The defendant must have acted with reckless disregard as to the risk of death or serious bodily injury.

Here, Ann certainly acted with criminal negligence in the operation of her car. When she violentely swerved into Bill, she knew or should have known of the risk of death or serious bodily injury to Bill, other drivers, or pedestrians. That other people might be put at risk was certainly foreseeable. Accordingly, Ann can be prosecuted for negligent homicide/involuntary manslaughter. Given the fact that there is some evidence of Ann's lack of intent to kill (see discussion above), this is the charge of which Ann is most likely to be convicted. Even if she lacked intent to kill, she certainly acted with criminal negligence in the operation of her car.

Vehicular manslaughter: In Nevada, a driver or one in physical control of a vehicle who proximately causes the death of another person through an act or omission that constitutes simple negligence is guilty of vehicular manslaughter which is a misdemeanor.

Here, Ann was in control of her own vehicle and she used it as a projectile to force her ex-husband off the road, which proximately caused the death of a pedestrian, John. At the very least, her actions were negligent and she can be charged with vehicular manslaughter.

Battery: Nevada defines battery as a willful and unlawful use of force or violence upon the person of another.

Here, Ann used her car as a projectile aimed at her ex-husband's car. Her actions were willful -- there was nothing accidental about them -- and she used force in shoving her car into Bill's. As discussed above, Ann can be charged with battery of Bill. Under the doctrine of transferred intent, the prosecutor could also charge her with battery of John, however since more serious charges are available, it is likely that those would be pursued first.

Harassment/Stalking: Nevada makes it a crime to stalk or harass a current or former domestic partner. The District Attorney may bring charges for stalking or harassment of Bill on the basis of her threatening calls and threatening texts.

Speeding/Reckless Driving: In Nevada it is a crime to operate a vehicle in excess of the speed limits or in a reckless manner. The fact pattern indicates that Ann was "speeding" and that she violently swerved her car into Bill's car. She can be prosecuted for speeding and reckless driving.

2) Admissibility of Ann's Statement to Police Officer

Fifth Amendment: The Fifth Amendment protects agaist compelled self-incrimination by the government. When in police custody, a defendant must be given *Miranda* warnings before interrogation by the police. Custody is defined as when the defendant is not reasonable free to leae.

Here, Ann was arrested and was being transported to the jail by a police officer in his car when she made a statement to the officer in response to his question of whether she knew that she had made Bill's car hit a pedestrian. Ann's arrest and transport to the jail constituted custody. Ann was restrained and was clearly not free to leave. Accordingly, the police officer was required by the Fifth Amendment to advise Ann of her *Miranda* rights before questioning her. When an officer asks questions that are likely to illicit an incriminating response, that constitutes interrogation. Here, asking the question of whether she knew that she had made Bill's car hit and kill a pedestrian constitutes interrogation. The interrogator was a representative of the Nevada state government. Accordingly, Ann's Fifth Amendment right against compelled self-incrimination was violated when the police officer questioned her without having first given her *Miranda* warnings and obtaining a waiver of those rights.

Exclusionary Rule: The exclusionary rule prohibits the introduction at trial of any evidence obtained in violation of a defendant's Fourth, Fifth, or Sixth Amendment rights. Not only illegally obtained evidence must be excluded -- also, evidence obtained or derived from the illegally obtained evidence must also be excluded. This is what is known as the "fruit of the poisonous tree" doctrine.

Here, the statment by Ann regarding wanting to teach Bill a lesson and dent his precious car was obtained in violation of Ann's Fifth Amendment right and will be excluded under the exclusionary rule.

3) Admissibility of Ann's Statement to Homicide Detective

Fifth Amendment Right to Counsel: The Fifth Amendment right to counsel applies whenever there is custodial interrogation. Whereas the Sixth Amendment right to counsel attaches only after formal proceedings have begun, the Fifth Amendment right to counsel applies before official proceedings have begun (i.e. during custodial interrogation even pre-indictment) and when invoked, prevents all questioning.

A Fifth Amendment right to counsel can be invoked only by an unambiguous request for counsel in dealing with custodial interrogation. The request must be sufficiently clear that a reasonable police officer in the same situation would understand the request to be a request for counsel. Once a detainee has expressed an unambiguous request for counsel, all questioning of the detainee must cease.

The prohibition on asking more questions of the detainee after a request for counsel lasts for the entire time of the detention plus 14 days after the detainee leaves detention. After that point, the detainee can be questioned again once fresh *Miranda* warnings are given.

If a detainee requests counsel, all questioning must cease until counsel is present or the detainee initiates a resumption of the questioning. If the police initiate further questioning, the detainee's statements cannot be used in the prosecution's case in chief but can be used to impeach the detainee's trial testimony if she chooses to testify.

Here, Ann unequivocally requested counsel and the detective was required to stop questioning her. When he resumed questioning after Ann's invocation of her right to counsel by asking her to "cooperate" with him and he would tell the DA that she didn't intend for this to happen, the detective violated her Fifth Amendment rights. Accordingly, the statement is not admissible in the prosecution's case in chief but may be used to impeach Ann if she takes the stand in her own defense.

******* State Essay 6 ENDS HERE *******

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QUESTION 7

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1. Is there a lease between Lou and Mary, and if so, what are its terms?

A Leasehold is an estate in land, under which the tenant has present possessory interest in the leased premises and the landlord has a future interest. That future interest can be looked at as a reversion, such that when the lease ends, the right to the property reverts back to the landlord.

A Lease is a contract that governs the landlord-tenant relationship. At common law, covenants in the lease were independent, such that is one party breached a covenant, the other party could recover damages but still had to perform his promises and could not terminate the landlord-tenant relationship. However, the doctrines of actual and consturctive eviction and the implied warranty of habitability are exceptions to this rule. Also, in most states, the landlord may terminate the lease for the nonpayment of rent.

In this case to determine if there is a lease, we need to make sure a contract to lease the property was formed. A contract requires an offer, acceptance, consideration, and definite terms. Here, there was an offer from Mary to Lease the house on 8th street from Lou. Lou accepted the offer. The terms included a lease of the property for $12,000.00 per year rent, payable monthly, with Mary responsible for repairs. The Consideration is the payment of said rent, which Mary satisfied by providing a check for the first month's rent and security deposit, that was deposited in Lous bank account. Thus, a valid contract appears to have been formed to lease 8th Street in Minden, Nevada.

As this is a contract, there is also a question if it is invalidated by the statute of frauds. Typically, to satisfy the statute of frauds the contract would need to be in writing if it is for one year. However, there is an exception to such requirement of the statute of frauds for leases of one year or less. The exception indicates that short-term leases can satisfy the statute of frauds with part performance. To show part performance the tenant must be in the possession of the property, make some payment, or make improvements to the property. Two of those three must be met to satisfy part performance.

In this case, the lease does not have a fixed period of time written in the agreement or discussed between the parties. Thus, it is posssible this may be considered a lease of 1 year or less. Therefore, once Mary made payments, and moved in, two of the three part performance prongs of the statute of frauds were satisfied. However, she also made repairs by painting the outside of the house. Thus, it could be argued she satisfied all 3 elements of part performance, though only 2 were needed. If this is considered a short-term lease, or that performance is possible within 1 year, the statute of frauds would be satisified and there is a valid lease.

However, if it turns out this is a lease for more than 1 year, then there may be an issue. It is possible this could be looked as a tenancy for years as the terms indicates "$12,000.00 per year rent." However, a tenancy for years is created by written lease that indicates a fixed period of time. Where the lease must include how long it lasts for. Such lease would terminate automatically on the date when it ends per the lease. Here, no such date was listed, thus, this cannot be a Tenancy For Years, and any such limitation by the statute of frauds on same is not applicable.

What was created was a periodic tenancy between Lou and Mary. A Periodic tenancy continues for successive periods until terminated by propert notice by either party. Here, Mary included the terms "$12,000 per year rent, payable monthly; Mary responsible for repairs." Mary, as the party to be charged, bound herself to these terms. The Language payable monthly establishes that such is a periodic tenancy, whereas she would pay $1,000.00 a month, for a total of $12,000.00 per year. No fixed date of termination was included. This appears to be created through an express agreement. It could also be implied that a periodic tenancy was created by implication so long as Mary continued to pay rent on a monthly basis. As a periodic tenancy was created, and it could end within 1 year, and part performance was completed, there is a valid lease between Mary and Lou for a periodic tenancy at $1,000.00 per month, for a total of $12,000.00 per year, with Mary responsible for repairs.

2. What is each party's obligation, if any, with respect to repairing the gaps around the windows and eliminating the bees?

Though the lease indicates Mary is responisble for repairs, there still remains an implied warranty of habitability for the landlord Lou. Such covenant of habitability is in residential leases and is nonwaivable. The Landlord has a duty tied to the standards of local housing codes. In the event of a breach, the tenant may terminate the lease, make repairs and offset the cost against future rent, abate the rent to an amount equal to the fair rental value in view of the defects, or remain in possession, pay full rent, and sue for damages.

However, the tenant also has a duty to repair, as the tenant cannot damage the lease premises. This is sometimes known as the Doctrine of Waste. There are three types of waste. Voluntary or affirmative waste, which is when the tenant intentionally or negligently damages the premises. Permissive Waste, which is when the tentant fails to take reasonable steps to protect the premises from damage from the elements. The tenant is responsible for all ordinary repairs, excluding ordinary wear and tear, unless any duty shifted, then they have to make the landlord aware. Then there is Ameliorative waste, which is when the tenant alters the propety increasing its value.

Here, Lou will argue Mary is responsible for making the repairs to the gaps around the windows both based on the sticky note to the check, which he would argue are the terms of the lease, and also based on her duty to repair. He woudl argue the gaps are considered permissive waste, and she is responsible to take reasonable steps to protect the premises from damage from the elements. Such that gaps around the windows could result in damage to the premises from the elements such as rain or snow, let alone bees.

Mary would argue that Lou is responsible for the repairs to the gaps around the windows under his implied warranty of habitability. She would argue that yes, she may be responsible for repairs, but those would be for things beyond normal wear and tear, or those tied to the standards of the local housing code. Such that she would be responsible for any damage she caused. However, here, she would argue that repairing gaps around the windows, which existed before she moved in, falls under a wear and tear issue, that Lou is responsbile to repair. Further, she would argue that it is likely the local house codes would require Lou to have made this repair to the windows well before Mary moved in, evidenced by her reporting building code violations to the local building authority.

She would argue her allergy to bees, and well a house being infested by bees itself breaches the implied warranty of hability and Lou would be responsible for these repairs. She would argue he is aware of same as he would not put the house on the market due to the issue. Thus, as the gaps around the windows appear to be something predating Mary living in the home, likely regular wear and tear, or well not something caused by Mary or permissive waste, and likely in violation of the building code since it makes the house not habitable, Lou would be responsible for the repairs.

Claims and defenses of Mary and Lou regarding the eviction proceeding.

Mary will argue that Lou breached his implied warranty of habitability as outlined above. She will argue that due to this breach she was entitled to terminate the lease, make repairs and offset the cost against future rent, abate the rent to an amount equal to the fair rental value in view of the defects, or remain in possession, pay full rent, and sue for damages. Here, she chose to terminate the lease due to the breach, and thus she would argue the termination was proper and she is not responsible for further rent.

Lou will argue that Mary was responsible for the repairs to the gaps in the windows as she agreed to make them all per the lease. He will argue they are more than just normal wear and tear and Mary would be responsbile as such is permissive waste. He will argue that she breached her duty to pay rent when she left the property and seek damages for same.

Mary will also argue that she is entitled to the cost of repairs done to the house for the painting to update its condition. She would argue this falls under the doctrine of Ameliorative waste as it increased the value of the property. She would argue that she was planning to be a long-term tenant and therefore making the repairs reflects changes in the neighborhood.

Lou will argue that Mary was not a long term tenant and is responsible for the paint herself. He will argue there was no evidence by the lease she intended to stay for a long term and the painting was her choice. He will argue that though it may have improved the home, it may not be reflective of the neighborhood. He will argue he is not responsible for reimbursement.

Mary will argue that Lou breached his duty of quiet enjoyment to Mary. She will argue every lease has an implied covenant that neither the landlord nor the paramount title holder will interfere with the tenant's quiet enjoyment and possession of the premises. She will argue this was breached by constructive eviction when he breached his duty to repair the gaps allowing the bees to enter the home, rendering the the premises unsitable for occupacy. She would argue the duty of implied warranty of habitability was breached, which substantially and materially deprived her of her use and enjoyment of hte premises by allowing bees she is allergic to into the home, she gave him notice to repair with reasonable time, which she did as she waited a month, and then she vacted the premises. She will argue she could terminate the lease based on such eviction and seek damages.

Again here Lou will argue that Mary breached her duty to pay rent when she moved out of the house. He will argue he did not accept her surrender and she unjustifiably abandoned the property. He would argue she did not give notice and seek damages and the rent as filed based on her breach of duty to pay rent and abandoning the property.

Mary would counter this for the reasons indicated above, but also argue that Lou had a duty to mitigate damages which he did not. She would argue he had a duty to attempt to relet the property, and he did not do so by failing to put the house on the market for lease or sale. She will argue that his resumption of hte property is acceptance of her surrender and she is not responsible for any further rent. She will further argue even if she was found responsible, since this was a periodic tenancy, she would only have had to give notice 1 month before vacating the property. Thus, even if she was found liable, she would owe only $1,000.00 not the banlance of the unpaid rent since that is what the rent is.

Mary will argue that this evicition was a Realiatory Eviction. Such that a landlord may not termiante a lease or otherwise penalize a tenant in retaliation for the tenant's excercise of her legal rights, including reporting housing or building code violations. Mary will argue the eviction proceeding was done becuase she reported the building code violations. Such that the eviction proceedings are improper and she is not responsible. Lou would argue that he evicted her for breach as established above, and thus his reasons were valid and not retalitory. He would argue this overcomes the presumption and she is responsible.

******* State Essay 7 ENDS HERE *******

FEBRUARY 2021
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

Nevada Performance Test - 1

******* Performance Test 1 STARTS HERE *******

Bench Memorandum Re Alimony Issues

To: Senior Judge

From: Applicant

Date: 02/25/2021

Re: John Jones v. Betty Jones - Alimony Award to J. Jones

I. Introduction

This memorandum will objectively address the the issue of whether alimony should be awarded to husband John Jones in the divorce case against wife Betty Jones. Further, if any alimony is to be awarded, the memorandum will also address the potential range of the amount and duration of such an award and what the basis is for such an award and it's value and duration.

The controlling law for this issue is based in NRS 125.150 which requires that a Court may award alimony so long as such an award appears "just and equitable." Courts have based this analysis on a series of factors (See Sprenger) and interpretation of case law as outlined below. Overall, while courts are vested with a wide range of discretion, a Court must look at the totality of the circumstances and all relevant factors in making a decision for an award of alimony.

Ultimately, John should be awarded an alimony award of $300,000 annually from Betty until he is able to remarry or adjust to his new economic situation.

II. Points and Authorities re Factors in NRS 125.150 (Legal Analysis)

A. The Financial Condition of John and Betty & Nature and Value of Property of Each Spouse & Award of Property to Each Spouse

1. Pursuant to NRS 125.150(9)(a), (b) and (k), the factors to consider are the financial condition of each spouse, the nature and value of the respective property of each spouse and the award of property granted by the Court in the divorce, other than child support and alimony, to the spouse who would receive the alimony.

2. In Heim, we note a marriage in which one spouse was earning in excess of the other, where the disparty between the financial situations of each spouse after the divorce is in extreme contrast. One was earning $3,000 per month in income after living expenses while the other would be left destitute. Both this case as well as Fondi indicate that the Courts need look at the financial condition the parties will be left in by the divorce. Fondi followed the same reasoning as Heim that divorce would take one spouse in a position of "relative properity" during the marriage to one of "destitution" after the divorce. Because this would be unjust in light of NRS 125.150(1)(a), this ensured a greater alimony award that was greater than the spouse's income.

Here, Betty will receive $3.5 million as part of the evenly split community property estate pursuant to the divorce stipulation, she has also inherited a $10 million dollar sum from her mother, and she currently has an income of $750,000. By comparison, John has no separate property, though he is able to take his half of the community property estate and get $3.5

million. Based on the expert testimony that John put on, he can only earn $75,000 for the next 3 years at which point, if successful in earing his CPA, will earn $100,000. Therefore, there is a large disparity.

Further, Fondi makes great deal of the amount of property and cash award received by one spouse and what that spouse will walk away with when leaving the marriage in comparison to the other spouse. That an alimony award should take into consideration if there is any disparity. There, the spouse seeking alimony left the marital partnership having obtained virtually nothing and doing so would be unjust leaving her destitute. In contrast, Kogod stands for the proposition that an alimony award is not justified even if "a receiving spouse's share of community property will produce passive income sufficient to maintain her marital standard of living." But, Shydler tells us a different story. Shydler states because "property and alimony awards differ in purpose and effect, the post-divorce property equalizaiton payments payble to [spouse seeking alimony] do not serve as a substitute for any necessary spousal support."

As applied here, this may result in a different outcome. John, as noted above, will be walking away with a substantial amount of money from his community property share i.e. $3.5 million in addition to his 2018 Land Rover but not much more. Based on the Fondi findings, this would be more than enough to give John passive income for 3 years until he is able to earn $100,000. However, what is not accounted for in Fondi is that John's expenses include that of taking care of children, and taking care of his mother as well. The couple's accountant testified that the couple's annual expenses exceeded $500,000. Assuming a conservative estimate at $500,000 and split evenly, John's expenses alone woudl be $250,000 and the 3.5 million would not stand to cover those expenses for enough time that John can increase his earning potential from $100,000 to something more. Further, as Shydler pointed out, the mere fact that John is receiving $3.5 million does not substitute for the fact that he would still be owed alimony to maintain the same financial condition he had during the marriage. Even moreso, it is likely that Betty will be able to survive with the $10 million inheritance and has the ability to pay the alimony to assist John (See Kogod stating that "alimony is abased on receiving spouse's need and the paying spouse's ability to pay.")

3. Based on the above law and facts, it is recommended that John receive an alimony award that is in excess of his current income. While John will be left with a substantial money after the divorce, the case law and multitude of factors here supports that he is entitled to more given the situation he will be put into after the divorce financially. He will not have enough to support his mother that he has a moral obligation to and the expenses to finish schooling while maintiang his children's welfare since he has been the main child rearing spouse. This factor weighs in favor of John.

B. Duration of John and Betty's Marriage

1. Pursuant to NRS 125.150(9)(d), one factor to consider in awarding alimony is the duration of the marriage of the parties.

2. In Heim, the spouse that was awarded alimony had a 35 year marriage. Corresponding case law and facts in Kogod as well as Shydler and Sprenger show that marriage durations of 15+ years and 20+ years all turn in favor of asserting an alimony award. However, no case law suggests that duration of the marriage has a considerable effect on the amount of alimony.

Here, John and Betty Jones married int he fall of their senior year of college in 1991 and remained married for 25 years until their divorce. This is a constant and repeated factor in every analysis undertaken by every Court and has long been established since 1974 (Buchanan). It seems that based on the duration of the marriage of 25 years, John had supported Betty in most endavors. The longer period of time ensures that John is entitled to some sort of award for his devotion to Betty's career, children, and pursuit of life.

3. Based on the above law and facts, a 25 year marriage is surely certain to result in an alimony award to John but it has no bearing on the amount since no case law would support this. This favtor weighs in favor of John.

C. John and Betty's Relative Income, Earning Capacity, Age and Health & Physical and Mental Condition of John and Betty as it Relates to the Financial Condition, Health and Ability to Work

1. Pursuant to NRS 125.150(9)(e) and (k), another set of related factors is the relative income of the parties, earning capacity, age and health & their physical and mental condition re their financial condition, health and ability to work.

2. The case of Heim is direclty on point because there a spouse pursued his own professional advancement and earned a PhD and achieved a position. The other spouse was unemployed. In that situation, the Court awarded an alimony award to the spouse seeking alimony because she would have been left economically disadvantaged. Heim also indicated that when examing the merits of the partis the courts might look at the parits' good actions or good behavior or lack thereof in determining what either husband or wife justly deserves.

Here, John gave up everything while Betty was able to advance her career. She increased her earning capacity to $750,000 while John remained a UPS worker. He only earns now $75,000. The disparity is huge. It would support finding that John is entitled to some alimony in order to advance his career that he gave up during the marriage.

Further, John and Betty are both good health. Though they are not young anymore, they still have a lot of life left to live at ages 45 and 49, respectively. But John especially, who is not settled in his job yet, is not especially marketable sinc ehe still has to earn a degree and most companies may not want to take someone who is further along in age.

3. Based on the case law and facts, because John will only be able to earn $100,000 -- that is his earninc capacity in three years. Whereas Betty's is in a higher amount almost 10x more. And in addition, his age is getting older and he will need to market himself harder because of that. Also do due the fact his financial condition is not as great as Betty's (Betty has a 10 million inheritance and John has no spearate property), John will need an amount of alimony in order to maintain these requirements.

D. John and Betty's Standard of Living During the 25-year Marriage

1. Pursuant to NRS 125.150(9)(f), the Court should consider standard of living during the marriage in order to form a ruling on alimony awards.

2. In Kogod, the couple who were the subject lived a life that was quite scandalous and luxurious. Given one of the spouse's incomes and seaprate families, the spouse seeking alimony was still awarded an amount in line with the amount to maintain the same luxurious lifestyle. Even though the spuose seeking alimony had well paying job, that spouse was still awarded a separate property award as well as the millions in her share of the community property estate given that was necessary to maintain the standard of living they had created. "A large gap in income alone does not decide alimony. The award must meet the receiving spouse's economic needs or compensate for economic losses resulting from the marriage and subsequent divorce."

Here, the standard of living for John and Betty was mainly focused on working and raising their two children. It was clear tha John, despite obtaining work at UPS, and moving his job in order to be with Betty wherever Betty's profession took her, John was doing the financial support by working to support Betty's degree and professional goals. John was also

Further, the standards of this couple were high. They drove luxurious up to date cars with a 2020 BMW and a 2018 Land Rover and also owned a 10,000 square foot home in a gated community which likely required payments to a home owners association and upkeep fees. They also travelled twice a year in Europe and Hawaii and these were vacations for four people if including their two children.

In Kogod, it is stated that "the reciving spouse's inability to maintain the marital standard of living or the reciving spouses' decreased income-earning potential as a reulst of the marriage." In this case, issues of infidelity arose thought the Court did not specifically address that infidelity would be a reason for an alimony award. The court focused more on income-parity and economic loss.

One additional thing to consider is that John's complaint asserts infidelity and that Betty was not faithful during the marriage. However, this is not likely to hold any merit given the above case law.

3. In order to upkeep a luxurious and well-off lifestyle that was enjoyed during the marriage, this supports a finding that John should be awarded an alimony amount in order to maintain this same lifestyle. This is especially important considering his current income, property awarded from the community property amount, and total living expenses for his children and taking care of his mother will not be enough to sustain this lifestyle that he help build while he was married. This factor weighs in favor of John.

E. John's Career Before the Marriage

1. Pursuant to NRS 125.150(9)(g) and (f) as well as 125.150(10), the career before the marriage of the spouse who is to receive the alimony and the need to grant alimony to a spouse for the purpose of obtainign training or education relationg to a job, career or profession are considered in granting alimony.

2. The factors listed above indicate that when a spouse is to pay alimony has obtained greater job skills or educaiton during the marriage and the spouse reciving the alimony provided financial support while the other obtained job skills or education, alimony is entitled and the need for alimony is granted to the spouse in order to obtain training or educaiton relating to a job.

In Fondi, it was noted that the spouse seeking alimony indeed had no marketable skills and while one spouse had walked away with a signifcant profession and income, the other spouse was left having virtually nothing. But, what was considered was whether marketable skills by the spouse seeking alimony were obtained. If so, then this factor weighs more in favor of the spouse who would pay alimony. But there considerations of separate property and lump some cash were also given to the spouse seeking alimony. Further,

Here, it is clear that John forewent his career aspirations in order to support Betty. John dropped out of school to work to support Betty finish undergraduate degree and medical school after they married. He supported Betty financially. John also followed Betty to Minnesota and found a job there to support Betty financially during residency. Even when they returned to Reno, Nevada, John continued to work in order to support Betty when she went to work with a leading neurosurgery specialist group. He further became a stay-at-home dad when Betty gave brith to their first and second child while Betty would go to work. John has no separate property to take away from the marriage and the only marketable skill she has is that of a UPS driver, those he is almost 50 years old and that may not last.

During this entire time, John was putting of his own aspirations in order to earn a CPA degree. He was not able to finish his undergraduate degree of accounting. Now, after the divorce, he wants to become a CPA.

3. On that basis of law and fact, John is clearly entitled to an alimony award given his long standing dedication to his wife's career to earn job skills and profession in the stead of foregoing his own. John came into the marriage without any job skills or profession as far as accounting goes and he came out the same way. He did have some marketable skills as working for UPS, but given his age, this may be difficult to continue. Therefore, an alimony award is justified. This fator weighs in favor of John.

F. John's Contribution as Homemaker

1. Pursuant to NRS 125.150(9)(i), a factor taken into account for alimony awards is the contribution of the spouse as a homemaker.

2. In Heim, the spouse seeking alimony was the caretaker. The wife remained at home and did not pursue her own employment or career so that she could remain at home as a homemaker and raise the children. There, the spouse seeking alimony was awarded as such.

Here, John gave up working during the entire time that Betty was advancing her profession. Even when Betty gave birth, Betty did not give up her job to be a stay-at-home mom. Indeed, John took over that role and he quite work when their first child was born. Even with the birth of their second child, John was resonbile for being the homemaker. B ecause he was the full-time care giver, he never worked.

3. Based on the above, John was the homemaker and did not have any time to put towards himself like Betty did. Therefore, he should be awarded alimony accordingly in order to advance his career and have someone else be the homemaker while he enjoys life. This factor weighs in favor of John.

III. Conclusion

In conclusion, John should be awarded alimony payments on the basis that he is not in the same financial position as he was during the marriage, he has contributed significantly in the child rearing front as homemaker, he forewent his own professional aspirations in order that Betty could succeed and ascend to her professional statuture, he does not have much time in age to be marketable in his career, he has more living expenses and to maintain his own lifestyle that he was able to build during the marriage.

Applying those facts to the case law and NRS 125.150 factors, John should be awarded an alimony award of $300,000 annually from Betty until he is able to remarry or adjust to his new economic situation and to maintain his

******* Performance Test 1 ENDS HERE *******

FEBRUARY 2021
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

Nevada Performance Test - 2

******* Performance Test 2 STARTS HERE *******

Memorandum

FROM: Applicant

TO: City Attorney

RE: Transit Center Regulations

The following memo addresses the legal validity of the draft regulations proposed for the City Transit Center (CTC), both under Nevada statutes (specifically, NRS 293.127565), and the Nevada and federal constitutions. As requested in your previous memo, to the extent that the legality of any regulation is questionable, the memo proposes potential revisions.

I. General considerations

A. Interaction between NRS 293.127565 and the Nevada, and federal constitutions.

As a threshold matter, the First Amendment to the United States Constitution prohibits a state from "abridging the freedom of speech." The Nevada Supreme Court has have held that Article 1, Section 9 of the Nevada constitution affords no greater protection to speech activity than does the First Amendment to the United States Constitution. *RTC v. NSG* (Nev. 2004). For the purposes of the constitutional discussion that follows, then, the appropriate analyses under the Nevada and federal constitutions are identical. *See id.*

With regard to NRS 293.127565 (the "limited public forum" or "LPF" statute), subsection (1) only opens up certain publicly held property as limited forums during the hours that property is open to the public--it bears emphasis that the LPF statute does *not* purport to extend the constitutional protections offered pursuant to the state or federal constitutions. *See RTC.* Accordingly, compliance with the subsection (1) of the LPF statute only ensures that the government is opening the particular property statutorily identified as a limited forum. It does not bear on the restrictions on speech that might be put in place there, if that area is statutorily designated to be a limited forum.

Subsection (2) places some limited requirements as to notice required to circulate petitions, but, as will be discussed herein, they fall short of those set in the draft regulations. Note though, that subsection (2) does not prohibit more restrictive requirements on notice.

B. Valid restrictions on speech in limited forums.

The scope of constitutional speech protections are somewhat dependant on whether the law in question occurs in a public forum (which is a location that has been traditionally open to speech), a designated public forum (a location that the government opens up for the purpose of public discorse), or a nonpublic forum (all that remains). *RTC*. A limited public forum of the sort that the LPF statute designates, is a subset of nonpublic fora that the government opens up for limited speech by certain groups or on certain topics.

Accordingly, under the state and federal constitutions and as well as the statutory authority, where a limited public or nonpublic forum is at issue, the government make make reasonable "time, place, and manner" restrictions. However, to be upheld, the provision in question must be "viewpoint neutral and related to a legitimate government purpose served by the forum." *RTC.* The Nevada Supreme Court has already held that the RTC area opened under the LPF statute (the "petition area") as a limited public forum because the statute only allows a certain type of speech (signature gathering). Thus, the legality of each specific draft provisions at issue turns on whether they respectively satisfy the standard stated above.

II. Discussion of specific Section 2 draft provisions.

1. Section 2.A. (the "24-hour notice provision").

Briefly, the 24-hour notice provision requires that an individual seeking to gather signatures submit by phone or email, the name and contact information of signature gatherers, the organization of the requestor, the subject of the petition, and the planned date.

Statutory limitations: There is nothing in the LPF statute that would prohibit the requirement of 24-hour notice of the name and contact information of signature gatherers, the organization of the requestor, the subject of the petition, and the planned date. Indeed, this seems only to add aditional requirements--namely, 24-hour notice--based upon subsection (2), which states that "Before a person may use an area designated pursuant to subsection 1, the person must notify the public officer or employee in control of the operation of the building governed by subsection 1 of the dates and times that the person intends to use the area to gather signatures on a petition." As discussed above, nothing in the LPF statute forbids a more stringent notice requirement.

I would note, however, that subsection (2) makes the addtion that the public officer or employee may not *deny the person the use of the area*." That is, this is not an application for permission to collect signatures, but pure notice of the intent to collect signatures. I would recommend adding similar language to the proposed regulations to avoid any implication that the RTC or transit director would exercise discriminatory discretion based on content of speech.

Constitutional limitations: The Nevada Supreme Court has upheld similar guidelines from the RTC. *RTC.* The court described the valid guidelines as follows: "an RTC request form must be submitted three business days before the date of the intended activity. The request form asks for the name, telephone number, and organization of the requestor. It also asks for the subject of the petition, and for the dates on which the activity is to occur." Without having the actual wording of these previous guidelines it is difficult to tell how closely they are in line with the proposed draft regulation. Potential similarities and differences are discussed herein.

The Nevada Supreme Court held that the RTC guidelines at issue in *RTC* (the "RTC guidelines") were viewpoint neutral. Specifically, the court noted that the RTC guidelines did not "discriminate[ ] amongst signature gatherers based on the content of the petition or the viewpoint of the petition circulator." I would argue that the draft regulations are likewise without any reference to viewpoint and are likely to be considered viewpoint neutral. I would note, however, that the 24-hour notice provision here only requires advance notice from "members of the public," which would appear to exclude employees of the RTC. This is, arguably a restriction based on content as an RTC employee is far less likely than a member of the general public to, for example, say that the RTC "sucks." To the extent that the 24-hour notice provision can be brought into line in this respect with the former RTC guidelines already upheld by the Nevada Supreme Court, I would recommend that change to ensure the regulation is deemed viewpoint neutral.

To the extent that the regulation is viewpoint neutral, *RTC* essentially controls the question of its constitutionality. All that is required is a reasonable relationship between the RTC's purpose and the regulation at issue. *RTC.* The Nevada Supreme Court has already identified that advance notice requirements such as the one at issue "serve[ ] a variety of purposes, including enabling building operators to better accommodate multiple signature gatherers and individual petition circulators' particular needs, and to have a chance to make other employees aware of the intended signature-gathering activities so that they will be able to adjust their duties accordingly." Moreover, the Nevada SUpreme Court found the RTC guidelines' requirement of contact information from the requestors was "reasonably related to RTC aims of accommodating all requestors and unusual circumstances while maintaining safe and efficient operations of their affairs." *RTC*.

I would note two potential differences. One is that the instant regulation only requires 24 hour notice, while the RTC guidelines upheld in *RTC* required 72 hours. This supports the constitutionality of the regulation as requiring less notice could only make the provision more reasonable. On the other hand, I would note is that 24-hour notice provision here asks for notification via phone or email, while the former RTC guidelines only asked for submission of an RTC request form, apparently without specifying the mode of communication. The addition of the requirement that notice be sent by phone or email, arguably, makes the proposed regulation less reasonable because it could limit access by people who do not have the means to maintain such modes of communication. To the extent that this was a deliberate change, based on some sort of necessity by the RTC--perhaps, again related to the RTC's aims of maintaining efficient operations"--this is unlikely to be constitutionally fatal to the provision as a restriction need not be "the most reasonable or the only reasonable limitation." *RTC.* If, however, there is no reasonable justification for the change, I would recommend removing the specifications by which the request communications must be sent.

Suggested alterations: As a threshold matter note that there appears to be a typographical error in this provision. The subpart title reads "otice," which I believe should read "Notice." Beyond correcting this, I would recommend removing the reference to "members of the public," and not delineate any category of petition circulator that might be subject to more strict regulation than another. I would recommend further, that a brief examination of the reasons for including the "phone or email" requirement be conducted, to ensure that it is included for a legitimate purpose. I would further recommend adding a sentence to the end of 2.A stating that the government officer responsible for receiving the notices may not "deny the person the use of the area," consistent with subsection 2 of the LPF statute.

2. Section 2.B (the "morale" provision).

Section 2.B. prohibits [t]he use of any language that is demeaning, critical, or disrespectful to employees of the City Transit Center in the petition area.

Statutory limitation: Again, there is nothing in NRS 293.127565 that would impact this regulation.

Constitutional limitations: Because this regulation restricts the content of speech ("demeaning, critical, or disrespectful" language), it is not viewpoint neutral but a content-based regulation of speech. *Griffin v. Bryant*. A similar provision, prohibiting "any negative mention of any [local government] personnel, staff, or of the Governing Body" in a limited public forum (there, the "public input portion of the Governing Body meetings") was challenged before the Supreme Court . *Griffin.* The court determined that the restriction was viewpoint-based "[o]n its face" because it allowed speech that was neutral or favorable to the government and prohibited the rest. *Id.*

In *Griffin* the Court identified a potential limitation that would resolve the problem inherent in that particular statute, exchanging the problematic wording with an equivalent phrase that "would include only personal attacks and breaches of decorum." This is consistent with the other case in the library, *Brees*, where a passenger was precluded from boarding a ferry because he called a ferry driver an explative. The regulation at issue in *Brees* was viewpoint neutral because it precluded all "foul, abusive, or disruptive language." I would recommend revising the draft regulations in line with *Griffin* and *Brees*.

Suggested alterations: I would recommend replacing the phrase "demeaning, critical, or disrespectful to employees of the City Transit Center is prohibited" to say "any foul, abusive, or disruptive language, personal or slanderous attacks, and breaches of decorum are prohibited. . .". This largely addresses the Transit Directors concerns regarding the morale of his employees. I recognize it does not prohibit all negative speech regarding the Transit Center employees, and perhaps stops short of what the Transit Director might be requesting. Note though, that the expression of an opinion as to government operations, i.e. "Transit sucks," is the suppression of political dissent which is "the core evil the First Amendment seeks to prevent, and that the viewpoint suppressed by this restriction is all negative feedback to the government—rather than one side of a single, discrete issue—makes things worse, not better, for the rule." *Griffin*.

3. Section 2.C (the "timing" provision).

This provision limits the period of signature to between noon and 6:00 pm daily.

Statutory limitation: This is in violation of NRS 293.127565(1), which requires that the petition area be open "at any time that the building is open to the public."

Constitutional limitation: This is viewpoint neutral, to the extent it applies to all signature gathering, and is only a limitation on the timing for that speech. It is a time-based restriction. Absent the violation of NRS 293.127565(1), this would likely be a restriction reasonably related to the RTC's goals of "promoting safety and efficiency in conducting their legitimate transportation purpose." *Griffin*.

Suggested alterations: I recommend changing "between noon and 6:00 pm daily" to adhere to the language in NRS 293.127565(1), and be replaced by "only when the building is open to the public."

******* Performance Test 2 ENDS HERE *******