FEBRUARY 2022
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

QUESTION 1

******* Question 1 STARTS HERE *******

1. **Janet's Potential Criminal Culpability**

Janet's potential criminal culpability in the presented facts can be divided into two groups; potential criminal liability stemming from her original plan with Sue and Mary and potential criminal liability relating to her interactions with Officer Smith.

Plan with Sue and Mary

a) Conspiracy - The first crime that Janet potentially committed was that of conspiracy. Under Common Law, conspiracy is a specific intent crime requiring (1) an agreement between two or more people, (2) intent to enter into an agreement, (3) intent to commit target crime, and (4) an "overt act" in furtherance of the conspiracy. In Nevada, however, no overt act is required for you to be guilty of conspiracy, so only the first three elements are required for one to be guilty. Here, Janet committed conspiracy because (1) she discussed breaking into the cars and agreed to meet later that evening (satifying the first prong), (2) they all intended to enter into the conspiracy, as evidenced by their agreement to meet later that evening to carry out their plan (evidence that they did indeed have a plan/conspiracy), and (3) they intended to meet later that night to commit the breaking into the cars. All three elements of conspiracy in Nevada are thus satisfied, and Janet had committed conspiracy.

b) Defense to Conspiracy - Withdrawal - The most likely defense that Janet will assert in connection with the conspiracy to break into the cars is that she withdrew from the conspiracy when she found out that Sue was going to bring a handgun after the initial conspiracy had formed. Generally, co-conspirators are liable for any co-conspirator's crims that are (1) foreseeable; and (2) done in furtherance of the conspiracy. However, one may potentially withdraw from the conspiracy to shield themselves from such future crimes (other than the initial conspiracy itself). To withdraw, a conspirator must make some affirmative act to notify the other conspirators that they are withdrawing from the conspiracy and such withdrawal must be timely (i.e., it can't be after the crimes have commenced). Here, Janet called her other friend, Mary, before the conspiracy had started to be carried out and told her she wasn't coming. This withdrawal was timely, as it was during the afternoon before the plan started to be carried out, but a court may find that such withdrawal was ineffective because she did not notify all other co-conspirators (i.e., Sue) that she was no longer part of the plan; she only notified Mary. However, the fact that Janet did not show up to actually carry out the conspiracy could, arguably, be used to show that she had withdrawn from the conspiracy if her call to Mary is found to have satisfied the affirmative fact element. If a court finds that she properly withdrew,, she would not be liable for subsequent crimes of Mary and Sue; she would only be liable for entering into the initial conspiracy with them. If a court did not find that her withdrawal was proper because she did not notify both co-conspirators that she was out of the plan, she could potentially be liable for the other crimes that Mary and Sue carried out in connection with the conspiracy that were both foreseeable and done in furtherance of the conspiracy.

c) Larceny - If a court denies her affirmative defense of withdrawal of the conspiracy, Janet could potentially have co-conspirator liability for the crime of larceny. Larceny is a speicific intent crime that requires (1) a taking of someone else's property (obtaining control and possession), (2) carrying away (slightest movement suffices), (3) without consent, and (4) the specific intent to permanently dispossess the owner of such property. Here, Sue and Mary broke into several cars and took property, which constitutes larceny because

(1) they took other peoples' property out of the cars, (2) they carried such property away with them when they left the scene, (3) they most certainly did not have consent to do so, and (4) they intended to keep such property as the spoils of their crime. Sue and Mary are guilty of larceny and, as this was the specific crime around which the conspiracy revolved, the crime of larceny was definitely foreseeable and the larceny was committed in furtherance of the conspiracy. As such, unless a court determines that Janet's withdrawal was proper, she could potentially have co-conspirator liability with the crime of larceny.

d) Robbery - If a court denies her affirmative defense of withdrawal of the conspiracy, Janet could potentially have co-conspirator liability for the crime of robbery. Under Common Law, robbery is (1) the wrongful taking of another's personal property, (2) from his person/presence, (3) by force or threat of injury, (4) with intent to permanently deprive the person of that property. In Nevada, Robbery is not a specific intent crime, so you don't need the specific intent to permanently deprive the person of their property. Here, while breaking into several cars and taking property, Sue shot and killed a man who was existing a parked car. It's unclear from the facts whether they took any property from this man (or if he exited the car, scaring them away after he was shot and killed), but if they took any property from him in connection with the force exerted on him (in the force of a bullet from Sue's gun), Sue would also be liable of robbery (and potentially aggrievated robbery, if permitted due to use of the gun, which sometimes makes the penalties harsher when there are aggrievating circumstances). It is foreseeable that someone may get in the way in the commission of the planned larceny and the robbery would've been carried out in furtherance of the original conspiracy. As such, unless a court determines that Janet's withdrawal was proper, she could potentially have co-conspirator liability with the crime of robbery.

(e) Felony Murder - If a court denies her affirmative defense of withdrawal of the conspiracy, it's possible (albeit less likely) that Janet could also be found liable with respect to the felony murder committed in connection with the larceny (resulting from the original conspiracy). Felony murder is a killing that occurs during attempt or commission of a felony (even if accidental) and, in Nevada, a trial judge can potentially find someone guilty of felony murder even if the underlying offense is dismissed for lack of evidence. As Sue killed the man exiting his car in connection with the planned larcenies, it is possible that all three of the conspirators are guilty of felony murder.

(f) Murder - It does not appear from these facts that the murder of the man exiting from the car was "deliberate and premeditated" (a requirement for first-degree murder, other than felony murder described above), so his death may also potentially make Sue (and potentially her co-conspirators for the liability explained above) for second-degree murder. Second degree murder is a general intent crime that is a homicide not arising to first-degree murder. If a court finds that the improvisational murder of the man fits better under second degree murder, Sue's shooting of the man could open the group of conspirators to the crime of murder, as they knew she was bringing a gun to carry out their plan, so it was foreseeable that someone could be killed in the carrying out of their conspiracy. Janet could, potentially be held liable for second degree murder if she's found to not have properly withdrawn from the conspiracy.

(f) Defense to Felony Murder - Not Foreseeable - In order for a person to be guilty of felony murder, (1) the person must be guilty of the underlying felony, (2) the underlying felony must be independent of the killing, (3) the victim's death must be foreseeable result of the felony, and (4) the victim's death must be before the person reaches a place of temporary safety. With respect to Sue, each of these elements are met because she was the person committing the larceny (and possibly robbery, as shown above) and the person was killed

directly in connection with such felony(ies). However, Janet is likely to argue that it is not in the interest of justice for her to have co-conspirator liability with respect to felony murder because she didn't actually carry out the planned larceny/robbery and she was in a place of safety when they occurred (i.e., she wasn't even there). It's likely that a court would find such argument persuasive, as she didn't actually carry out the felony at the time the man was shot.

Interactions with Officer Smith

(a) Failure to Appear for Municipal Court Hearing - Based on the facts, Janet is liable for the crime of not appearing for a municipal court hearing and a court had issued a warrant for her arrest in connection with such failure to appears. Janet is liable for this crime.

(b) Possession of Methamphetamine - As Janet attempted to discard a packages with methamphetamine and the officer saw her drop the package, it's likely that Janet is likely guilty of possession of methamphetamine. Depending on the amount in question and relevant drug laws in Nevada, she may also be guilty of intent to distribute if the amount is sufficient (although it's unclear from these facts).

(c) Larceny - The elements of larceny are the same as those stated above. Janet was found in possession of several items of property taken from nearby cars, so it's likely on these facts that she's guilty of larceny if she didn't have consent to take such items.

(d) Defenses to the Above - Janet may have constitutional arguments to keep out some of the above evidence, as detailed more fully in question #2 below.

2. **Janet's Potential Criminal Defenses**

(a) Detention was Unlawful - A detention of a person is seizure of a person that's less than a full custodial arrest. For a detention to be lawful, reasonable suspicion that a law was violated is required. Here, Officer Smith had a "hunch" that Janet was walking the street and casing cars because there were a number of reported car burglaries in the same area around that same time. Janet could argue that she was just visiting a friend and it's not suspicious for someone to be walking on the street early in the morning. It's possible that a court could find that Officer Smith didn't have reasonable suspicion, but more likely that the string of car burglaries in the area sufficed for him to at least stop her and ask her some questions.

(b) Unlawful Arrest - Janet could also potentially argue that her arrest was unlawful, but here she's almost certain to fail. For an arrest, an officer needs probable cause (trustworth facts sufficient for a reasonable person to believe that suspect has committed, or is planning to commit a crime). She had a warrant out for her arrest and it came up in the warrant check run by the officer. A court is likely to find that the warrant system is sufficient to give Officer Smith probable cause necessary to conduct a lawful arrest.

(c) Invalid Search/Seizure - Janet may argue that Officer Smith didn't have a warrant to search her car (which led to the revelation of the stolen goods), so such search was unlawful. The 4th amendment protects against unreasonable search or seizure by government conduct (police conduct applies). Janet must have reasonable expectation of privacy in the thing of place to be searched, which is determined by the totality of the circumstances. With a car, a person always has a reasonable expectation of privacy for a car they own, but this may be superseded by a valid search under the 4th amendment. When there's a lawful arrest (as there was here, see above), police may search a vehicle interior (including glove box) if (1) arrestee is unsecured and has access to the interior, or (2) the officer has a reasonble believ that evidence of crime for which arrest was made may be found in vehicle. This search does not include a search of the trunk without probable cause or consent. Here, it's unclear whether the goods were found in the trunk or in the interior of the car. If in the interior, Janet may have cause to object to the search if it was conducted while she was already handcuffed and didn't have any further access to the interior. The crime for which she was arrested was the court warrant and not car robberies, so the officer may not have had sufficient grounds to search her car.

(d) Miranda Violation - Janet may also argue that her statement that the drugs were "not mine" is inadmissible against her because she was not read her Miranda rights before she started talking to the police. Miranda rights must be read to a person in custody (she was already arrested) if there's an interrogation. If a court finds that they already started their interrogation, the statement she made about the drugs may not be used against her. As it wasn't really incriminating, however, it's unlikely to have much of an impact.

******* Question 1 ENDS HERE *******

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EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

QUESTION 2

******* Question 2 STARTS HERE *******

Vicarious Liability - An Overall Concern

For all the claims discussed below, Oasis (O) may have liability through the doctrine of resondeat superior, or vicarious liability.

Generally, an emplyer is liable for employees' conduct that falls within the scope of employment. A frolic (a minor deviation) still imposes vicarious liability, whereas a detour (a major deviaiton) will not impose liability to the employer.

For intentional torts by an employee, an employer will generally not be liable for such conduct. In Nevada, an emplyer is not liable for the intentional conduct of an emplyee if the conduct was (i) truly an independent venture of the employee, (ii) not commited in the course of the task assigned to the employee, and (iii) not reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of employment.

Accordingly, if an employee is liable and O is sought to be liable upon the employee's conduct, such rules will apply.

Negligent Hiring of Employees

One tort that all three of Alex (A), Ben (B), and Chris (C) can assert against O directly is the tort of negligent hiring of employees (basically negligence in hiring.

A defendant will be liable for negligence if the plaintiff meets all the following elements: duty, breach of that duty, actual and proximate cause, and damages. These elements will be discussed more fully below in the individual claims against O and its employees.

As for negligent hiring, there is no doubt that an employer of a water park owes a duty of care to all its customers that the water park will hire competent employees. Whether O fell below that duty of care and breached its duty will depend on whether O knew of fact before hiring Danielle (D) and others that would lead a reasonable employer to not hire such people. The facts do not indicate this answer. The fact that Danielle told a manager about the nail a week before Ben's injury does not indicate hiring practices.

Accordingly, there are not enough facts either way, but it is possible A, B, and C could bring a direct negligence claim against O for negligent hiring.

Alex's (A) Claims Against Oasis (O) and Danielle (D)

Negligence for Collision in Pool

A defendant will be liable for negligence if the plaintiff meets all the following elements: duty, breach of that duty, actual and proximate cause, and damages.

Duty of Care

The duty of care element comprises both of whether a duty was owed and what the standard of care is. A majority view is that a duty is owed to all foreseeable plaintiffs (Cardozo view), whereas a minority view is that a duty is owed to any plaintiff that was harmed (foreseeable or not). The standard of care is that a defendant owes a general duty to act as a reasonable person under similar circumstances.

Here, there is no doubt that O's employees owe a duty of care to its customers because if any harm occurred, the customers would be foreseeable plaintiffs. Indeed, if the anyone would be harmed by problems at the wave pool, it would be the swimmers in the wave pool. A duty of care was owed to A. That duty was a general duty to act as a reasonable person under similar circumstances.

Breach of Duty

A defendant breaches the duty of care when its conduct falls below the requisite standard of care.

Here, there is a factual dispute of whether the employees of O should have cleared out the pool when it was extemely crowded. This question depends on how many people were in there and the general craziness surround the wave pool at the time. Notwithstanding this inquiry, which likely cannot be answered as the facts were given, A can alterntively argue that there was a breach under the negligence per se theory.

Negligence Per Se

A plaintiff may meet both the duties of duty and breach by proving negligence per se. Negligence per se occurs when (i) the defendant violates a statute, regulation, or ordinance, (ii) the plaintiff was in the class of persons meant to be protected, (iii) the type of harmed meant to be protected against occurred, and (iv) plaintiff suffered damages.

Here, there is a municipal code prohibitting more than 50 people in the pool at any given time. The protected class of persons are the swimmers of the wave pool because the ordinance is meant to protect those people from getting hurt. A likely type of harm meant to be protected is drowning, but other types of harm are generally injuries when people are in a crowded place without much room to swim and escape injury.

A fits the class of people and the type of harm, which was a collision with another swimmer while in a crowded pool. The only other question remains whether there were more than 50 people in the pool at the time of A's swimming (which appears likely from the facts).

Causation

This elements includes actual (but-for) causation and proximate (foreseeable) causation.

But for a lot of people in the swimming pool, A likely would not have been hurt. An alternatie theory is O's substantial causation to A's injury, which is also likely. And, it is foreseeble that overcrowding in a pool will lead to collisions, so this met.

O may argue A was pushed in the back and thus that is an intervening event, however, this argument will likely fail because the push was foreseeable in an overcrowded pool.

Damages

A suffered damages, to this element is met.

Vicarious Liability

O is liable through its employees' inaction to remove people from the pool to make it a safe amount of swimmers.

Defenses

Assumption of the Risk

O can argue that A assumed the risk of the wave pool when he knowingly and voluntarily went into a crowded swimming pool. This defense will likely not stand because A was simply doing what many others were doing.

Egg Shell Rule A's Gum Disease - not a Defense

Even though A had a preexisting condition that led to his broken teeth, under the Egg Shell Rule, a defendant "takes a plaintiff as is," so this will not be a defense to A's injury.

Comparative/Contributory Negligence

Under contributory negligence, a plaintiff cannot recover if he was any part negligent with his conduct. Most states have adopted a comparative negligence defense, whereby the plaitiff's recovery is limited by his own negligence. In Nevada, there is a partial comparative negligence jurisdiction. So long as the plaintiff's negligence was not greated than the defendant's the plaintiff can recover up to that amount (percentage).

Here, A may be slightly negligent for going to the deep end of the pool while the pool was overcrowded, but in Nevada A will not be barred from recovery so long as he was not more negligent than O's employees, which is unlikely.

Ben's (B) Claims Against Oasis (O) and Danielle (D)

Negligence for Nail

See rules above in A's discussion.

O's employees and O certainly owed a duty to all persons using the slides, moreover it fell below that standard of care when it knew about the nail but did not remove it for over a week. That lack of remedial measure led to and caused B's injury when he slid down the slide, and Ben suffered damages.

Therefore, B has a valid claim of negligence against O through a vicarious liability theory.

Comparative Negligence

See rules above. In Nevada, B can only recover if he was not more negligent than O, and his recovery will be limited accordingly.

B likely will be found to have been at least partially negligent. He was aware that he should not slide down headfirst because D told him. Moreover, he was showing off to some women at the pool by turning. However, B can argue that his negligence was not the cause of the injury. Namely, even if he slid down feet first, his injury would not have been avoided because the nail had come loose before his trip down the slide.

Ultimately, B was likely a little negligent by failing to hede D's warnings and turning, however, the injury would likely have occured anyway even if he went down feet first. Therefore, B will likely recover, but a smaller amount.

O's liabilit to B for intentional torts by Manager

False Imprisonment

False imprisonment is the unreasonable confinement of a person against that person's will, and the plaintiff must suffer injury or know the confinement.

Here, B knew of the unreasonable confinement. It was unreasonable because there was no need to handcuff B to the fence. Moreover, he knew of the confinement.

IIED or NIED

For infliction of emotional distress, whether intentional or negligent, there must be extreme and outrageous conduct, and plaintiff must suffer severe emotional distress.

Here, B clearly suffered emotional distress by not sleeping for weeks after the visit. The manager's conduct was likely extreme and outrageous considering the fact that B did nothing wrong.

Battery

See rule below for C's claim. Here, there was harmful contact by B being dragged.

Vicarious Liability

The ultimate issue is whether the manager's conduct would lead to O's vacarious liability. In Nevada, an emplyer is not liable for the intentional conduct of an emplyee if the conduct was (i) truly an independent venture of the employee, (ii) not commited in the course of the task assigned to the employee, and (iii) not reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of employment.

Here, although the first two elements are likely satisfied, the dragging, taking away, handcuffing, and admittance of sever conduct by the manager were likely not foreseeable events under the scope of the manager's employment, and O should not be held vicariously liable.

Chris's (C) Claims Against Oasis (O) and Danielle (D)

Battery

Battery is the intentional harmful or offensive contact of another person with the intent to cause such contact or apprehension of such contact. This may occur if a defendant causes an object to hit the plaintiff. Proof of actual harm is not required, and nominal damages are permitted.

Here, D (i) called C an "ugly jerk" and (ii) threw a *metal* water bottle at C, hitting C's feet. First, words are generally not enough for a battery claim. Therefore, calling Chris an ugly jerk is not battery. However, second, throwing a water bottle at C is an intentional attempt to cause harmful or offensive contact. Generally, people do not want to be hit with metal objects and find such contact offensive or harmful. Moreover, even if D claims that she did not wish to hit him because she aimed at the feet, that argument will not persuade a court. The throwing of the bottle was at least enough to cause apprehension of contact, and indeed there was contact. D will be liable for damages, and proof of actual harm is not required.

O is likely not liable under a vicarious liability theory because it was an intentional tort by D that was (i) truly an independent venture of D, (ii) not commited in the course of the task assigned to D, and (iii) not reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of D's employment.

Assault

Assault occurs at the plaintiff's reasonable apprehension of an imminent or offensive bodily contact caused by defendant's action or threat with the intent to cause such apprehension of imminent harm. No proof of actual damages is required.

Here, the words calling C an ugly jerk are not enough to produce an apprehension of imminent harm. However, the throwing of the metal bottle will be enough for assault. D is therefore liable for assualt.

O is likely not liable under a vicarious liability theory because it was an intentional tort by D that was (i) truly an independent venture of D, (ii) not commited in the course of the task assigned to D, and (iii) not reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of D's employment.

Trespass of Chattels

A defendant is liable for trespass to chattels if he intentionally interferes with the plaintiff's right to possession by either (i) dispossessing the plaintiff of chattel or (ii) using or intermeddling with such chattel. This tort requires proof of actual harm or deprivation of use for a substantial time.

Although it is clear that D dispossed C of his backpack, what is less clear is whether C lost his backback for a substantial time. The facts indicate that the video surveillance showed D put the backpack in the lost and found. If C found his backpack in a short amount of time, C will be unable to proof actual damages (unless things were stolen or destroyed in the backpack) nor dispossession of a substantial time.

Conversion

A defendent is liable for conversion if he intentionally commits an at depriving plaintiff possession of his chattel or intefering with the chattel in a manner so serious as to deprive the plaintiff of the use of the chattel. A plaintiff may recover full value of the converted property.

Here, although there is little debate that D took and moved the backpack, it appears C was able to collect the backpack soon thereafter. Therefore, this likely does not qualify as a "serious" deprivation of property.

Negligence

See analysis for A above regarding the wave pool.

However, even if O was liable for negligence as against A, there is no indication that C suffered any damages. Therefore, C will not have a negligence claim against O for the wave pool.

Defenses

Consent

For intentional torts, a person may consent to the defendant's actions. Here, D may argue that C's conduct to roll his eyes at D was effectively consent for her to retaliate. This is a weak argument, and C's behavior, though not commendable, was not consent for any of D's intentional torts, including battery, assault, or potential liability of trespass to chattels and conversion.

******* Question 2 ENDS HERE *******

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QUESTION 3

******* Question 3 STARTS HERE *******

Relevancy

As a rule, evidence must be relevant to be admissible, and all relevant evidence is admissible unless excluded by a specific rule, law, or constiutional provision. Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence (probative), and the fact is of consequence in determining the action (material). Relevant evidnce may be excluded if its probabitve value is substantially outwieghed by the danger of unfair prejudice. THis rule applies to each piece of evidenc eoffered at trial and discussed below.

Motion in Limine and admission of the expert testimony

A motion in limine is a pretrial motion used ot exclude evidence prior to the trial.

Here, the expert witness's testimony is relevant because it helps identify what the gun found was and that it was the murder weapon that killed Whitney's husband. Furthermore, the prejudicial effect of the statements is low and woudl not outweight its admissibility and relevance.

Thus the expert testimony and staetments are relelvant.

Expert witness competency

An expert witness may testify provided that he or she is qualifed as an expert. In Nevada, an expert specialized in the relvant field may testify to matters within the scope of such knowledge. THe court will proceed to determine if the indivdiual is qualifed as an expert by knowledge, skil, expereicne, training, or education. It will then look to determine if the wtiness's testeimony is based on sufficient data and the product of reliable principles and methods, that such principles and methods were appleid reliablly to the facts. When tehre is a failure to properly qualify the witness as an expert when the testimony was based on specialized knowledge, the conclusion by the expert should not be admitted.

Purusuant to Nevada statute, if scieintific testimony will help the trier of fact, Nevada allows an expert spcialized in the relvant field to testiyf oaccordingly. In detemrining whether hte expert's testimony is admissible, the court shoudl consider whether the expert's opinon

is within a recognized field of expertise, testimble and has been tested; published and subejcted to peer review, generally accepted in the scientific community, and base don more particulaized facts rather than assumption, conjecture or generalization.

Here, the ballistic experts was testifying about the gun found in the trash bin and say that it was the murder weapon used to kill Whitney's husband. A ballsitic experts is someone who woudl likely know about the tracing on the bullets or other evidence to show that the gun fired and found were the same ones for this case. This is both relevant as perviously discsused adn something that an expert would likely know. There was no evidence presented by the defense that the expert was not qualifeid in this manner.

Defense will argue that the expert is not qualifeid because there was a letter from a prior job for falsifying reports that the expert would like on this report. This is not appropriately determined at this stage and the expert is still qualifed to discuss the ballsitics determines at htis stage.

Thus, the motion in limine and admission of the expert testimony was properly determined by the court.

Brandi's statements to the police

As a preliminary matter Brandi's statements to the police at the restaurant parking lot identifying what the man was wearing and what the man did is relevant because it helps follow the crime and identify the weapon that was used in the commisison of the crime. Furthermore, the prejudicial effect of the statements is low and woudl not outweight its admissibility and relevance.

Thus Brand's staetments are relelvant.

Hearsay

Hearsay is out of court statement offered to prove the truth of the amtter asserted and is inadmissible unles sit falls wihtin an exemption or exception.

Here, Brandi's statements to the police is hearsay because she is not making it in court. The prosecution is also offering it for its truth to help identify what Brandi saw the night of her husband's murder.

Thus to be admissible, it must meet a hearsay exception

Unavailability

Although hearsay generally is inadmissible, there are some situation in which hear say is allwed, such as when the declarant is unavailable. There are five exceptions to the hearsay rule that apply only if the declarant is unavialbe as a witness: former testimony, dying declaration, statement against interest, statement of personal or family history, and statement offered against a party that wrongfully caused the declarant's unavailability. In Nevada, an unavailable declarant is a person who is exempt on the groudns of privileges; refuses to testify despite a court order to do so; is unable to testify due to death, infirmity, or physical ormetal disabiltiy; or is absent and cannot be subpoenaded or otherwise made to be present. Nevada does not recogize a declarant who testifies to a lack of memory of a statement ot be unavailable.

The declarant is not unavialbe if a party wrongfully renderes the declarant unavialbe for the purpose of preventing testimony. The misconduct must be for the purpose of making the declarant unavialble to testify, and effectively render the declarant unavailable. The party then cannot claim the declarant is unavialbe and the door is open to use anything the declarant said against the paryt.

Here, the prosecution will show that Brandi is unavailable. Brandi has left the state and refused to return to testify. This will show that Brandi is unavailable. Further, this will qualify as a statement against a party that wrongfully caused the declarant's unavailability.

The prosecution was able to attach a transcript of a jail call from David to Brandi in which David threatens Brandi from testifying. He tells Brandi that she won't like waht will happen if she comes to the court.

David purposefully threatened Brandi from appearing in court and rendered Brandi fearful of testifyin in court. This would open the door to use anythign Brandi said against David.

Thus, Brandi's statements will be admissible as evidence against David because David is the one who caused Brandi to not come to court to testify about events.

Note that David's call to Brandi is also likely admsisible at trial as a party admission because it is David's statements offered against him.

Confrontation clause

In a criminal trial, the confrontation clause of the 6th amendment requires that in order to admit an out of state testimonial statement of a declarant against a defendant, the declarant must be unavialbe, adn the defendant must have had a prior opportunity ot corss-examine declarant.

Criminal defendants have the right to be confronted with the witnesses against them. Witnesses must testiyfin front of the accused as face-to-face controntaiton is prefered.

A statement is testimony if it is made with the primary purpose of ascertaining past cirminal condcut. A statement made during a polcie interrogation that the hand the primary purpose of ascertaining past cirminal condcut is testimonial.

Here, David will argue that admitting Brandi's staetments violates his confrontation clause because he cannto quesiton Brandi about it in court and the prosecution is offering it for its truth. It is also testimonial because the officers were asking Brandi about it for ther police investigation.

However, David likely waived this defense because he is the one who caused Brandi's unavailability.

Thus admission of Brandi's statements was likely appropriate by the judge.

Whitney's statements during the 911 call

Again, as a preliminary matter, Whitney's statements during the 911 call is going to be relevant in identifying the crime, what happened and what she saw. Furthermore, the prejudicial effect of the statements is low and would not outweight its admissibility and relevance.

Thus Whitney's staetments are relevant.

Hearsay

See rules above. The prosecution is likely offering Whitney's statement of idetification that she saw someone wearing a blue shirt run out the front door for its truth in order to identify who did the crime.

Thus in order to be admissible, Whitney's statement must meet some exception.

Present sense impression

A statetement describing or explaining an event or condition that is amde hwile or immediately after the declarant perceived it is not excluded as hearsay.

Here, Whitney immediatley called 911 after running out and finding her husband dead on the floor. She immediately relayed to the 911 operator what she saw momentarily after. It is likely that Whitney had jsut perceived the event and was relaying it to the 911 operator as it was happening or immediately after it was happening.

THus, Whitney's statements during the 911 call will likely come in under the present sense impression

Excited utterance

A statement made about a startling event or condition while the declarant is under the stress of excitement that is caused is not excluded as hearsay. Under this exception to the hearsay rule, the event must shock or excite the declarant, and the statement must relate to the event, but the declarant need not be participant in the event. There is no overlap between the excited utterance exception and the present sense impression exception, and some statements could fall under both.

Here, Whitney just saw her husband die in front of her which will qualify as the starling event or condition. Whitney was clearly under thes tress of the excitement as she was sobbing and screaming while on the phone with the 911 operator. Moreover, she was asked several times to repeat herself because the oeprator could not understand her possibly due to the sobbing and screaming.

Like the present sense impression, Whitney's statement could come in as an excited utterance.

Confrontation clause

See rules above. If a statement is made for the purpose of getting help it should not be considered testimonial.

Here, David will argue that because Whitney is not testifying it violates his confrontation clause. However, Whitney's statements were made while seh was attempting to get help. Thus, it will not be testimonial and is not entitled to the protections under the confrontation clause.

Thus, Whitney's staements are properly admitted.

Whitney's statements to the officers at the scene of the crime

Again Whitney's statements are likely relevant as it relates to the crime that occurred and what she immediately saw happen. Again, the prejudicial effect of the statements is low and woudl not outweight its admissibility and relevance.

Thus Whitney's statements are relelvant.

Hearsay

See rules above. Whitney's statement about what she saw and what she heard the person say is hearsay. The prosecution will want to admit it for the truth that it did happen.

Note that there are two levels of hearsay here because it is whitney's statements to the plice and the person's statements to whitney and whitney's relay of those statements to the police.

If there are mutliple levels of hearsay, an exception or exclusion for each level of hearsay is required in order for the whole statement to be admissible.

the man's statement

A statement amde by a party to he current litigation is not hearsay if offered by an opposing party. It need no hav ebeen against the party's itnerest whne it was made.

The prosecution may argue that the man's statement is not hearsya because it was David's statement being offered against him. However, it is questionable if that is even David's staetment on these facts.

Thus, party addmission is likely not goign to admit the underlying statement.

Verbal acts or legally operative facts. or efect on listener

Non-hearsay uses of evidence aren ot brought in for the truth of the amtter asserted. A statement offered to prove the statement was made, regardless of its truth is not hearsay. A statement offered to show the effect on the person who heard it is not hearsay.

The prosecution will have a better time arguing that the underlying statement from the man is either a verbal act or to show the effect it had on Whitney. It does not need to prove that the statement itself was true but instead that it was jsut a staetment made. Moreover, it can be introduced to show the effect it had on Whitney about the crime and the fear she had following seeing her husband's death.

Thus the underlying statement will likely be admissible for non-hearsay purpsoes.

Whitney's own statements to the police

Excited Utterance and/or present sense impression

SEe above for rules. Here, Whitney's statements will also likely come under the excited utterance and/or present sense impression. The facts show that the police arrived within minutes of Whitney's 911 call and she immediately told them what happened. The time between the events is minimal. For excited utterance, Whitney was likely still under the stress of the events of seeing her husband die in front of her and she likely did not have time to fabricate the statements minutes after. As for present sense impression it appears that she made these statements right after seeing which direction the man ran in although the defense may argue that time passed and its no longer a present sense impression.

Regardless it will be admissible under these exceptions and excited utterance exception at the very least.

Confrontation clause

See rule above. For the same reasons as above, Whitney's statements to the police is not testimonial because she was attempting to get help from the police and the emergency appeared to be ongoing (whether true or not that the person still had 9 other people they were trying to kill). Defense will argue that it is part of the police investigation and David should be able to cross examine Whitney. However, as part of the emegent nature of Whitney's statements it is likely that it will be admissible.

David's conviction for sexual assault

See rules above. David will argue that the conviction for sexual assualt is not admissible because it does nto relate to this crime at all. The prosecution is just trying to show his criminal propensity and that he committed a crime because he was a criminal. Thus, there is a strong prejudical effect by admiting this crime.

David is on cross-exam Criminal conviction - Character Evidence

Crimes involving dishonesty or false statements may be introduced to show a character of dishonestly. In Nevada, the use of prior convictions is limtied to felony convictions. Evdience of a conviction is inadmissible if a period of more than 10 years has elpased since the date of the relase of the witness from confinement or the expriaiton of the period of his parol, probation , or setnece, whichever is the later date. Nevada does not allow a conviction to be used if it has been subject of a pardon. However, unlike the federal rule the fact that a conviction has been annulled or that the witness has received a certificate of rehabilitaiton does nto prevent use of the convcition.

Here the crime of sexual assault is not a characer of truthfulness. Although the crime was less than 10 years ago, and he was paroleld in 2015. is is likely not admissible because the sexual assualt has nothing to do with the nature of this crime nor does it show any character of truthfulness or untruthfulness.

Thus, on these facts alone, the sexual assault conviction is highly prejudical, and would not qualify as untruthfulness character evidence. Note that it does not appear that David even opened the door? but it is on cross-examination so maybe David spoke about it during his direct examination.

Regardless it does not show untruthfulness and shows just criminal propsensty so is likely nto admissible even though it is a felony within 10 years.

Employment Termination letter of the ballistics expert

See above. The ballistic's prior termination letter is relevant because it helps the jury detemrin the quality of his expert testimony and if it should be admitted. Furthermore, the prejudicial effect of the statements is low and woudl not outweight its admissibility and relevance.

Thus employment termination letter is relevant.

Tangible evidence - authentication and best evidence rule

Tangible evidence must be authenticated and the proponent must produce sufficent ev idence to support the finding that the thing is what it propent claims it to be. The best evidence rule requires the orignal document.

There does not appear to be an issue about the authetnication fo this document and it is the termination letter. There is no facts saying that this is not the orignal either.

Thus, the document is properly authenticated and the best evidence.

Character Evidence - Extrinsic Evidnce

See rule above. This is character evidence for the ballistic's expert untruthfulness as he was fired for falsifying reports.

On cross-examination, the attorney can quesiton the witness about specific acts of dishonesty that are probative of untruthfulness. The attorney, however, must take the answer no matter waht the witness responds. There must aslo be a reaonbel basis for asking the quesitons.

Here, the defense can question the ballistics expert about the previous termination for falsifying the other reports. Hwoever, there is admissibility of the external evidence, the employment termination letter, here to prove that the ballistic experts was lying about him being fired. Thus, while he was able to ask about the untruthful character of the expert witness. They could not use the letter to prove the untruthful nature of the expert.

The court properly excluded the letter.

******* Question 3 ENDS HERE *******

FEBRUARY 2022
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

QUESTION 4

******* Question 4 STARTS HERE *******

1. Adam and Bob's rights and obligations regarding the property.

A&B's Rights

Fee simple absolute

R: In NV to own something in fee simply absolute you do not need the statement "and to his heirs" and ownership is presumed in fee simple absolute unless indicated otherwise.

A: W likely owned his farm in fee simple absolute, there is no indication in the facts to the contrary.

C: W owned the farm in fee simple absolute.

Grant Bargain Sale (GBS) Deed

R: A GBS deed is a Nevada specific deed that does not convey the 6 warranties normally contained in a general deed. Instead, only two warranties are made: that the grantor has not previously conveyed it to any one and the deed is free of any encumbrances made by the grantor. This only conveys what the grantor possess, so there could be prior encumbrances.

A: Here, the facts show W owned a small farm in NV. The facts do not demonstrate W knew of any encumbrances on the title before he conveyed it to A&B and does not indicate W incurred any encumbrances in violation of the GBS deed warranties. W likely conveyed his whole interest to A&B and only warranted that he had not previously conveyed and that he incurred no encumbrances during his ownership.

C: W conveyed his entire fee simple absolute interest to A&B through a GBS deed.

Joint Tenancy (JT)

R: In nevada a joint tenancy does not need the words "with right of survivorship" to create a JT, it only needs the words "as joint tenants". A Joint Tenacy exists when two or more people wone property with right of survivorship meaning if one dies the other tenant receives their share. it must be created with each JT having an equal right to possess the property with equal interest at the same time in the same instrument (The four unities).

A: Here the GBS deed says that A&B are "joint tenants." Both received this interest at the same time in the same GBS deed from W and likely have the equal interest and right to possess the property. A&B are joint tenants with a right to survivorship in the farm.

C: A&B held the farm as Joint Tenants.

Landlords

R: Owners of property may lease that property. Leases can be for years (set for a fixed time created by agreement), periodic tenancy, at will tenancy, or at sufferance. The lease may include rights or obligations for the landlords (LL) and the tenants. A lease does not sever a joint tenancy. A lease for over a year must be in writing to satisfiy the statute of frauds and must identify the parties, the premieses, the specific duration of the lease, state the rent, and be signed by the party to be charged. If the lease does not comply with the statute of frauds it is invalid unless the tenant took possession withthe permission of the LL and may be a tenancy at will or periodic tenancy depending on whether rent was paid. Leases are both contracts and conveyances.

A: Here, A&B chose to lease the property to C under a ten year lease, making them the landlords of the property. The lease was for ten years which is longer than one year meaning it had to be in writing. The facts indicate there was a writing because it states "the lease" had terms requireing the landlord to pay property taxes. To be valid, the lease also needed to identify the parties, the premieses, the specific duration of the lease, state the rent, and be signed by the party to be charged (C). If these terms were all included, then A&B as landlord would be subject to the terms of the lease and would be obligated to pay the property taxes under the lease. If some of these requirements were not met, there still may be a tenancy for C but then A&B would not be liable for the contents of the lease because it would be invalid under the statute of frauds.

C: If all required elements are included A&B are obligated under the terms of the lease to pay property taxes.

A's Secured Loan

R: For a security interest (SI) to be enforceable against a debtor the interest must attach, meaning the secured party must give value, the debtor has rights in the collateral, and the debtor authenticated a security agreement that describes the collateral or the secured party has possession or control in the collateral.Real property is not subject to UCC ARt 9 secured transactions.

A: Here, A obtained a loan from ENB to cover his personal expenses. The value given by ENB, the secured party, was the money sufficient to cover the personal expenses. A secured the loan with a recorded deed of trust encumbering A's interest in the property. As discussed above, A has an interest in the property as a joint tenant so he has rights to this collateral. The facts do not state that A authenticated a security agreement describing the collateral but recording a deed of trust means he is using real property as collateral so the transaction is not covered by Article 9.

Sever Joint Tenancy

R: A joint tenacy is severed when one of the JTs conveys his interest. In NV, a lien theory state, liens taken out with the JT's property interest as collateral does not sever the JT because the mortgage or deed of trust is treated as a lien. But a lien holder may take posession of real property if the debtor abandons the property to protect its interest. and must take reasonablecare.

R: because A did record the deed of trust encumbering his interest, ENB has a lien on the farm. This lien does not sever the JT between A&B.

C: A's loan with the farm as collateral does not sever the JT but does encumber the property with the deed of trust and A is obligated to repay the loan or forfeit his interest.

Accounting

R: A co tenant must account to other cotenants for rent received from third parties. the co tenant may deduct operating expenses, including necessary repairs when calculating net proceeds. Each tenant is entitled to an amount of rents proprotionate to his ownership interest.

A: Here, A&B continued to recieve rent from C after they conveyed their interest to E&F. E&F can seek an accounting from A&B because they are entitled to rent proportionate to their interest and neither A&B had any interest in the property when the collected 3 months worth of rent after conveying their entire interest via a quit claim deed. Because A&B had no right to rent E&F may seek an accounting of all rents paid.

C: A&B are obligated to repay all rent received from C after they conveyed their interest in the farm to E&F.

False pretenses:

R:a theft offense where money is obtained under seemingly legal methods but turn out to be a trick in which the defendant did not have right to obtain the money received.

A: A&B are likely criminally liable for theft by false pretenses because they continued accepting rent from C instead of directing her to pay rent to the new owners adn did not notify E&F that they were receiving rent that should be paid to them as the current owners of the farm.

C: A&B may be liable for theft under false pretenses.

2. Ed and Frank's rights and obligations regarding the property.

Quit Claim deed

R: a quit claim deed conveys the least amount of interest possible in a piece of property, as it makes no warranties as to the health of the title of the property. Recipiants of quitclaim deeds are deemed on notice of encumbrances that are recorded.

A: E&F received title to the farm from A&B via a quitclaim deed, meaning A&B made no warranties that they did not encumber the property like W did when he used a GBS to convey the property to A&B initially. That is because A's loan with his interest in the property as collateral still encumbered the property after the transfer to E&F. The deed of trust was recorded, so if E&F had done a title search they woudl have found the recorded deed of trust. This means that E&F had constructive notice of the deed of trust due to its public recordation. Although A&B did not disclose the encumbrance, they also explicilty used a quitclaim deed such that the burden was on E&F if they accepted the quitclaim deed that they would accept any encumbrances on the property, and could not claim lack of notice if the encumbrances are recorded. A&B made no additional warranites in the quit claim deed and only said "from A and B to E and F," so E&F cannot claim there were any additional warranties within the text of the quit claim deed.

C: E&F took title to the farm subject to A's deed of trust.

Tenancy in Common

R: When two JT conveys their interest and do not again specify that the conveyance is of a JT, the interest is assumed to be received as a tenancy in common (TIC). A TIC is when two or more people own property with equal right to posses the property with no right of surviovorship.

A: In the quit claim deed there was no language "with right of survivorship" or "in joint tenancy," so E&F took title to the farm as joint tenants, likely each having equal right to possess the porperty as the deed also did not deliniate specific percentages to each person but simply conveyed the farm to them both.

C: E&F own the farm as tenants in common.

Notice of Default - E&F liability :

R: When a default on a deed of trust occurs the lender has the option to force a foreclosure sale to satisfy the outstanding debt. If the buyer of property that is encumbered by a deed of trust assumes the mortgage or risk of the loan being defaulted, the transferee is personally liable for the mortgage and both the original mortgagor/debotor and the transferee are liable uopon default. If the deed is silent or ambigous to a liability, the buyer is considered to have taken the title subject to the mortage and is not personally liable on default. Foreclosing and selling is the preferred alternative in NV.

A: Here it is a close question whether E&F took title and assumed the deed of trust or took "subject to" the deed of trust. The fact that E&F took the property via quitclaim deed and the deed of trust is recorded may mean that they assumed the deed of trust and are now liable personally for A's default. But the quitclaim deed did not mention the deed of trust and only said "from A&B to E&F," which may mean that because it was silent as to liability, that E&F took the farm "subject to" the deed of trust and only A is liable on default. Given that the deed of trust was recorded and E&F knowingly took a quitclaim deed without apparently doing a title search, it is likely the court will conclude that E&F assumed the deed of trust in that transaction.

C: ENB may foreclose and sell the property but if after filing the notice of default ENB chooses to file against E&F both would be personally liable and obligated under the deed of trust because they assumed the recorded deed of trust when they took the farm via a quitclaim deed.

Accounting:

R: see rule above.

A: As discussed above, E&F are due an accounting for all rent paid to A&B that should have been paid to them. Furthermore, E paid all the unpaid property taxes. If these property taxes were only unpaid since E&F took ownership of the property, then no accounting is due E&F for property taxes becasue they should have paid property taxes when they acquired the farm. But if some of the property taxes were not paid by A&B while A&B had possession, E&F may be able to seek an accounting from A&B for the balance of those unpaid property taxes that E subsesquently had to pay. A&B could argue they quitclaimed the property to E&F so E&F took subject to those unpaid property taxes, which may be a valid defense.

C: E&F likely wont be able to get an accounting for unpaid property taxes because they took the property under a quit claim deed.

3. Carol's rights and obligations regarding the property and use of the property.

Tenant:

R: See landlord description / analysis above.

A: C was likely a tenant for years because her lease specified that she would lease for 10 years. C would be obligated to pay the rent specified if the lease was demonstrated to comply with the statute of frauds. Regardless, C paid rent regularly which at a mimium created a periodic tenancy where she was still obligated to pay rent.

Recorded Memorandum of Lease

R: Recording a memo of a lease gives notice to subsequent property owners that there is a tenant leasing the property and the terms of that lease.

A: Because C recorded a memo of her lease, and E&F took the property via quitclaim deed, her recorded lease would put E&F on constructive notice that she was leasing the property and the amount of rent she was paying. E&F should have sought rent from C, becuase she was not on notice they recieved the property per the facts. E&F could argue C was on constructive notice becuase they recorded the quitclaim deed, but it is not reasonable for a tenant to run a title check every time she pays rent to see if the property has been sold and it is the duty of the new owner to identify themselves to the current tenants, particularly where there is a recorded memorandum of a lease available.

C: E&F should have given C notice to pay rent to them as new owners of the property

Notice of Eviction:

R: In NV, the landlord must give 5 day notice to terminate and give an additional 5 days before eviction. A landlord may not retake possession upon a tenant's breach of the terms of the lease. After the fact rent payment does not cure the breach.

A: Here, the facts do not show that E&F gave C five day notice to terminate the lease after waiting three months for her to pay them rent. If E&F never saw the lease memo and simply discovered C on the property three months after purchase, they still needed to give the 5 day notice required in NV and then give an additional 5 days before issuing the notice of eviction. C could also notify E&F that she was current on rent payments to A&B and to seek an accounting from A&B if she wanted to stay on teh porperty. However, even if C was able to provide E&F the three months of rent she would not cure her breach to pay rent to E&F but could establish a new periodic tenancy through that payment.

C: E&F did not comply with their obligations under NV law when initiating the eviction of C, C is due more time (at least 10 days) before she could be evicted.

******* Question 4 ENDS HERE *******

FEBRUARY 2022
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

QUESTION 5

******* Question 5 STARTS HERE *******

1. Is there a contract between Andrew and Bart?

Applicable Law - The alleged contract between Andrew and Bart is for landscaping services and would thus be governed by common law. The UCC does not apply, as this is not for a sale of goods.

Contract Formation -

Offer - In order for a contract to have formed between Andrew and Bart, it requires offer, acceptance and consideration. An offer is some form of commitment from an offeror to an offeree containing definite terms. The first call from Andrew to his gardener was just a question (i.e., whether the dates should be removed so they don't fall into the pool) and this would not qualify as an offer because it did not contain definite terms for the transaction. Bart's response was likely a conditional offer because it did contain definitive terms--he was offering to remove the dates for all five trees and perform necessary cleanup, at a cost of $500 per tree, subject to the condition that the temperature stayed below 110 degrees. This was a offer to perform, subject to the condition that he could only perform if the temperature stayed under 110 degrees (which it did). A valid offer was given to perform.

Acceptance - An acceptance is an unambiguous acceptance to the terms of the offer. At common law (applicable here), the acceptance must be the mirror image of the offer. When Andrew said "please proceed immediately," he was accepting the terms of Bart's offer (including the condition regarding performance if temperatures exceeded 110 degrees). The offer was unambiguously accepted. Bart could potentially argue that the additional term adding a requirement that Andrew be "emailed pictures to confirm when he finished the job" violated the mirror image rule by adding a new term into the mix (thus making Andrew's statement a counteroffer, which Bart accepted by starting performance). Either way, a valid contract would have been formed. If the additional term made for a counteroffer from Andrew, that counteroffer was likewise accepted by Bart.

Consideration - The third element for a valid contract requires a "bargained-for" exchange or a consideration substitute such as detrimenal reliance. Here, there was a bilateral contract formed under the UCC where the consideration was the $500 per tree payment that Andrew was going to owe Bart. There was a valid contract between Andrew and Bart.

Statute of Frauds - Note that although this contract if for in excess of $500, it is a contract for services and the Statute of Frauds does not apply. As such, forming the contract over the telephone is fine so long as there's a meeting of the minds as to the terms.

Mistake - One defense to the valid formation of a contract is if there is a mistake as to the underlying facts of the contract. Here, Bart could argue that his lack of performance on the fifth tree was excused by the bee hive that neither Andrew nor Bart knew about at the time the contract was entered into. There's nothing in these facts to imply that either party knew about the bee hive, so this would be a mutual mistake. When there's a mutual mistake, the contract is voidable by an adversely affected party if (1) both parties are mistaken concerning a basic assumption of fact, (2) the mistake materially affects an agreed-upon exchange; and (3) the adversely affected party didn't assume risk of the mistake. Either side, to the extent they were adversely affected by the unknown beehive, could argue that the

contract should be voided because the bee hive position was an unknown danger that made the original terms of the bargained-for exchange no longer valid.

Quasi Contract - Note that if a court found that a valid contract was not formed, it could still enforce a restitution remedy of "quasi contract," which is a restitution remedy designed to prevent unjust enrichment; an implied-in-fact contract that arises when there an unenforceable or non-existent agreement, but one side has realized a benefit. Here, Bart did complete the work, albeit late, so a court may find that he's entitled to the original $2,500 contract term under a Quasi Contract restitution theory.

If so, what are its terms?

Services - The terms of the contract formed between Andrew and Bart obligated Bart to remove the dates from all 5 of Andrew's trees and have all clean-up work completed the week the contracts was made, so long as the temperature in Las Vegas was below 110 degrees (this condition was satisfied). If a court found that Andrew's request that he be emailed pictures of the completed work violated the mirror image rule (explained above), the counterclaim offer of Andrew that included that requirement (and potentially the "proceed immediately" as some sort of implied time is of the essence clause) would also be included in the service terms.

Fee - The service fee in this case was $500 per tree, or $2,500 in total, which fee includes cleanup. Note that the extra $500 fee for "bee hazard" is not likely to be upheld as it was added after the contract terms were already agreed upon and Bart didn't deal with that 5th tree until after the beehive was actually removed.

2. What claims do Andrew and Bart have against each other and what defenses can they raise?

Andrew vs. Bart

Breach of Contract - The original terms had Bart completing the date removal and cleanup that week, which did not occur. Bart only had partial completion of his contract responsibilities in the week originally planned, and the only condition stated (regarding the temperature staying under 110 degrees) was met. Thus, Andrew could claim that Bart breached by not completing all 5 trees that first week and claim damages for the pool pump and filter, as if Bart had performed fully, the substantial number of dates from that fifth tree would not have fallen into the pool and damaged his pool equipment.

Andrew appeared to accept Bart's explanation regarding the 5th tree, as evidenced by his efforts to get the bee hive taken care of quickly. Once the bee hive was removed, it took another two weeks for Bart to come and remove the 5th tree's dates. If a trier of fact (jury/judge) found that this wasn't a reasonable period of time for Bart to complete performance after the bee hive was gone, Bart could be held liable for breaching the contract, ultimately causing damage to Andrew's pool. Andrew may also argue that Bart's failure to send him an email with pictures showing the job's completion is a further breach of the agreement, although a court is likely to find that ancillary to the main object of the contract (if it's even found to be part of the contract--see above).

Defense - Bart is likely to argue that there was an excusable mutual mistake with respect to any breach caused by him not doing the 5th tree that first week because there was a mutual mistake with respect to the bee hive (see above analysis). This could potentially make the contract voidable, although Bart would probably like to get paid for his time and services. Under Common Law, the timeliness of

performance in the absence of a "time is of the essence" clause does not result in a material breach of the contracts so long as performance is rendered within a "reasonable time." Bart is likely to argue that the two week period after the bee hive was finally removed was a "reasonable time" for him to complete performance once the unknown variable (the beehive) was moved out of his way. It's a question of fact whether two weeks is "reasonable" and, given the original condition that the temperature had to be below 110 degrees for him to complete the work, an especially hot period during those two weeks could further excuse his performance as both sides to the bargain understood and agreed that he couldn't perform when it was too hot.

Bart vs. Andrew

Breach of Contract - Bart is likely to argue that Andrew breached the contract by not timely paying him the $2,500 originally agreed (as noted above, the $500 "bee fee" would not be upheld as part of the contract without Andrew's agreement to pay extra).

Defense - Andrew is likely to argue that the original purpose of the contract, the removal of dates before his pool was injured, was explicitly not served because that harm is exactly what ended up happening. A court may find that because the purpose of the contract was to avoid damage to his pool from the falling dates, the fact that the 5th tree was dealt with *after* the pool was already injured frustrates the purpose of the original contract. A court may find that Andrew would be unjustly enriched by getting the timely service of 4 trees without any payment to Bart, so $2,000 for the timely services is warranted, or a court could even find that the two weeks after the bee hive removal was a reasonable time for Bart to correct his breach, entitling him to the full $2,500 originally contracted for (whether under the original contract or quasi-contract, if the court found the contract void at request of Bart). If the court found that Bart acted unreasonably in the way that he performed, he could still hold Bart liable for the damage to the pool equipment.

3. Is there a contract between Andrew and Caleb?

Applicable Law - The alleged contract between Caleb is for bee removal services and would thus be governed by common law. The UCC does not apply, as this is not for a sale of goods. Likewise, the statute of frauds would not apply.

Contract Formation - The rules for contract formation stated above apply to this analysis as well. Here, the first offer was the original email from Andrew to Caleb, offering $500 plus expenses to remove the beehive (i.e, there would have been valid consideration, if the offer was accepted). Here, however, there was no acceptance by Caleb. Until validly accepted, Andrew had the right to revoke the offer, which he did by texting him before he started performance. Revocation is valid upon receipt by the offeree, which in this case happened when Caleb received the text and went home. There is no contract between Andrew and Caleb.

4. What claims do Andrew and Caleb have against each other and what defenses can they raise?

Caleb. vs. Andrew

Breach of Contract - Caleb is likely to argue that there was a valid contract to pay him $500 plus expenses and, as such, he's owed the $750 invoice. As noted above, however, the offer to enter into a contract was validly revoked by Andrew before Caleb started

performance of the job.

Detrimental Reliance - An offer can be held to be irrevocable if the offeree detrimentally relies on the offeror's offer. However, the reliance of offeree must be reasonable, and it's highly likely that a court would find that Caleb's actions here, where he purchased a ladder and new bee suit, were unreasonable when all he would have had to do is email his acceptance of the job to Andrew first. As Andrew purchased the bee suit and new ladder without even properly accepting the job, it's likely that the court would find that Caleb's actions here were not propery.

Andrew vs. Caleb

Andrew could seek equitable relief from the court in the form of a declaratory judgment that he's not required to pay $750 to Caleb because there was no binding contract, his offer was validly revoked before performance began, and Caleb's actions (purchasing gear before accepting the job) were not reasonable under the circumstances.

Defense

Caleb could argue that the offer to take down the bee hive was a unilateral contract and that by starting his research and purchasing gear, he started performance and the unilateral contract could not be revoked for a reasonable time to permit him to complete the job. This is unlikely to succeed, however, because even if the court found that a unilateral contract was formed, the "start of performance" must go beyond mere preparation, which is all he did. It's unlikely that starting to drive to Andrew's house (which Andrew didn't even know about) is sufficient.

******* Question 5 ENDS HERE *******

FEBRUARY 2022
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

QUESTION 6

******* Question 6 STARTS HERE *******

As a threshhold matter, Larry (L) is a Nevada attorney and he is bound by the Nevada Rules of Professional Conduct (NRPC) because he is licensed in Nevada. He must comport himself according to the rules. If conduct falls below the standard of conduct set forth in NRCP, then L is subject to discipline.

L = Larry. B = Bob. C = Charlie. D = Debra. F = Frank.

Conflict of interest - current clients (B and C): A lawyer may not represent a client if they are directly adverse to another client in the same or a separate matter, or there is a significant risk the attorney's representation will be materially limited by responsibilities or relationships with another client, former client, or third party, or by the attorney's own personal interests.

Here, L represents both B and C in business transactions. B communicated that B and C are merely finalizing a contract and they are aware L represents both parties. B is effectively asking L to represent both B and C in the same transaction. Since B and C are not adverse, it is permissible for L to represent both of them, but he must get informed written consent from both B and C. L must reasonably believe he can provide effective representation to both B and C in the transaction, the representation cannot be barred by law, and the representation does not involve one claim against another. Here, it appears all of these are satisfied because B and C are not adverse, L may reasonably believe he can help execute an agreement that effectively benefits both parties, the representation is not barred by law, and B and C have no claims against each other in the same litigation (because there is no litigation).

If litigation or conflict arises between B and C , L must disclose the conflict he should withdraw as counsel for both.

Conflict of interest (Duty of loyalty)- former client (B and D) : A lawyer who fomerly represented a client in a matter shall not thereafter represent another client in the same or substantially similar matter in which the person's interests are materially adverse to the interests of the former client unless the client gives informed consent in writing. Generally, a lawyer always has a duty not to act in a manner which may adversely affect the client's interests.

Here, L formerly represented D in her bankruptcy matter, and thus D is a L's former client to whom he owes continued duties under the rules. B proposes to hire L for a prenup between B and D. On its face, a prenup is not a similar matter to D's matter of bankruptcy. However, prenups are designed to effect the parties' financial rights and remedies against each other in case the marriage must be dissolved, and bankruptcy is directly related to D's fiances. Therefore, the argument could be made that the matters are related.

Also, L should know that he cannot effectively represent B in the prenup because L has information about D that he cannot divulge due to his duties of confidentiality and loyalty to D. L will not be able to communicate freely with B about the risks and benefits of prenup terms, and the representation to B would be materially limited by L's duties to D.

Therefore, L should decline to represent B to draft the prenup because L owes duties to D which materially limit L's ability to effectively advise B regarding the prenup. If L chooses to draft the prenup despite the many problems (conflict, confidentiality, loyalty), then he will be subject to discipline.

Duty of confidentiality: An attorney may not reveal any information obtained during the couse of the attorney-client relationship. Here, L has information about D which he learned during course of L's representation of D. L cannot disclose the information about D's possible fraudulent activities to L, or he would violate this duty and be subject to discipline.

Duty of competence - A lawyer shall provide competent representation to a client. Competent representation requires legal knowledge, skill, thoroughness, and preparation reasonably necessary for representation. An attorney may become competent by acquiring knowledge without undue expense or delay, associate with counsel (with client consent), or he may reject the representation.

Here, B wants L to draft a prenuptual agreement. While L does a lot of business transaction work, it is unlikely L also specializes in domestics/family law. L has a duty to become competent in the area of domestics/family law, associate counsel with B's permission, or he must decline the representation.

The facts do not indicate what L did with respect to the prenup (agree to do it or decline), and it is therefore impossible to determine if L violated the duty of competence and would be subject to discipline.

Scope of representation - Allocation of Authority - A lawyer shall abode by a client's decision concerning the objectives of the representation. Here, F made a settlement offer to B, which L found reasonable and he encouraged B to accept F's offer. B refused, and L complied with B's wishes and did not settle the case with F. Whether or not to settle is an issue that is entirely within the scope of the client, and an attorney may advise about settlements, but cannot make the decision. It was proper for L to abide by B's wishes and reject the settlement offer, and L is not subject to discipline for rejecting F's settlement offer on B's behalf.

Duty to communicate - settlements: An attorney must communicate an offer of settlement to the client. Here, it is clear L communicated F's offer to B because B was upset and instructed L to reject the offer on his behalf. Therefore, L has complied with the duty to communicate the settlement offer to his client.

Preserving dignity - Duty to expedite cases - An attorney has an affirmative duty to expedite cases. An attorney may not delay with intent to harass or for personal gain/convenience. Here, B insists L drag out the case for no other reason than to bleed the opponent dry financially. L has filed motions, requested extensions, and had unnecessary depositions for the sole purpose of dragging out litigation, which effecitively harasses the other party (F). Therefore, L has violated this duty and is subject to discipline.

Scope of representation - Allocation of authority: L, as the attorney is tasked with using his professional judgment and determining the procedural and strategic course of the case. L has abandoned that responsibility and has let B make all decisions (depositions, extensions, file motions, etc.). L has violated his duty to act as an effective attorney for his client ,and he is subject to discipline.

Duty of fairness - Duty to deal fairly with others - A lawyer shall not use means with no other purpose but to delay, harass, or embarass. Here, B insists L take depositions of F and the wife to expose F as an adultering drug addict. B is the defendant in a breach of contract claim brought by F; this claim has nothing to do with F's conduct in his personal life. Although B believes it shows F is untrustworthy, L should advise B that this type of evidence is irrrelevant and inadmissible, and therefore, the deposition can have no other purpose than to harass and embarass F and the wife. If L chooses to conduct these depositions and ask these questions, he has breached his duty and he is subject to discipline.

Business transactions with a client - A layer shall not enter into a business transaction with the client unless certain conditions are met. The lawyer may be self-interested, and his loyalty to the client could be limited. Therefore, there are protections in place (via the rules) to ensure the client is treated fairly. The client must give informed consent, confirmed in writing, and it must be signed by the client. The lawyer must advise the client in writing to seek outside representation and provide an opportunity to do so. The terms must be fair, reasonable, and explained in common terms a client would be able to understand.

Here, there is no indication any of this occurred, and L plans to draft the document. It is likely the document terms will favor L. L has violated the rule, and he will be subject to discipline.

Duty to report misconduct- Duty to maintain itegrity of the profession: A lawyer has a duty to report violations of the NRCP to the bar. Througout the fact pattern, L commits violations of the NRCP. He is obligated to report himself for wrongdoing. His failure to report is itself a violation of the NRCP.

******* Question 6 ENDS HERE *******

FEBRUARY 2022
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

QUESTION 7

******* Question 7 STARTS HERE *******

1. Please fully discuss the standing of each challenger.

As a general rule, there must be an actual case or controversy in dispute. One who brings forward a constitutional issue to a court, must have standing to do so.

Individual standing requires a plaintiff to prove (1) an actual or imminent injury, (2) the injury is caused by the conduct complained of, and (3) it is likely that the injury will be redressed by a favorable decision.

A plaintiff advocating on behalf of a third party must demonstrate (1) individual standing, (2) a special relationship between the plaintiff and the third party, and (3) that it would be difficult for the third party to assert his or her own rights.

Organizational standing requires that (1) the individual members of the organization have standing in their own right, (2) the interests asserted by the organization are related to the organization's purpose, and (3) the case does not require the participation of individual members.

Lastly, as a general rule, a federal taxpayer has standing to sue over a federal tax or spending program that violates the Establishment Clause.

We will now address the standing of each party/entity that is bringing a challenge to the ordinances passed:

<u>1. A local labor union challenged the Veterans Hiring Ordinance (VHO)</u>

Here, a local labor union would require us to examine whether there is organizational standing to challenge the VHO. The facts do not tell us the type of labor union that this local labor union is but we will assume, for the sake of argument, that this local labor union serves local employees of all ages, backgrounds, etc. An individual would have a cause for concern for the VHO ordinance because it mandates that employers with a workforce greater than 20 employees hire veterans for at least half of its vacant positions. An individual could

argue that this not only makes it harder to find work but there is now a preference for retired serviceman and servicewoman. Demonstrating the potential for harm, or injury, would not be difficult. At the organizational level, a labor union, typically represents the interests of employees and are advocates for fairness. It would be safe to say that the VHO affects the local labor union's interests. Lastly, given that the VHO affects everyone working for workforces greater than 20 employees in Utopia, the participation of individual members would not be necessary because the ordinance affects the general populace. Ultimately, the local labor union would have standing to challenge the VHO.

2. The national office of a local fraternity, whose membership dropped when it had to close the local fraternity house, challenged the Noise Abatement Ordinance (NAO)

Here, the local fratermoty will argue that it suffered injury because it membership dropped. While injury does not have to be economic in nature, the local fraternity can plausibly argue that it has lost due payments with the drop in members. Given that the NAO targets males and the fraternities would be affected, the local fraternity would be in the place to complain about the NAO because it directly affects them. The local fraternity will likely be able to demonstrate standing.

3. An Arizona car rental company, which rents 25% of its fleet to drivers traveling to Utopia, challenged the Traffic Abatement Ordinance (TAO)

Here, it would be easy for the Arizona (AZ) car rental company to challenge the TAO which makes it a penalty for a vehicle registered in a different state from being parked at a residence or dwelling within the city. The AZ rental company can demonstrate actual or imminent harm because it rents 25 percent of its fleet to drivers traveling to Utopia. In other words, the TAO provides a disincentive to have vehicles registered out of state so rental companies out of state, like the Arizona rental company, would be affected. The challenge would go to the constitutionality, addressed below, and the examining court would have the power of redressability. Here, the AZ rental company has standing.

4. A 75-year-old Utopia citizen challenged the Traffic Safety Ordinance (TSO)

Here, it would be difficult for the 75 year old Utopia citizen to demonstrate standing because he cannot demonstrate the required "ripeness." Ripeness means that a cause will not be heard if there is not yet a live controversy or immediate threat of a harm to a plaintiff. The TSO affects allpersons over 78 years old from acquiiring or renenewing a driver's license. The plaintiff here is a 75 year old man who is not yet being affected by the ordinance. If he is blessed to live another three years, or arguably as he approaches 78 years old, he would have standing. At 75 years old, he does not have standing to challenge the TSO because there is no requisite ripeness.

2. Assuming each challenger has standing, please fully discuss the constitutionality of each ordinance.

We will now address the constitutionality of each ordinacne assuming that there is standing.

The VHO

Here, the VHO was passed when the City was unaware that the year before, Congress passed a law prohibiting hiring quotas of any kind by any employer. The Supremacy Clause would potentially be at issue here.

The Supremacy Clause states that the Constitution is the supreme law of the land. Any state law that directly conflicts with federal law, impedes the objectives of federal law, or regulates an area traditionally occupied by Congress, will be preempted by federal law. Whenever a state law is inconsistent with a valid federal law covering the same subject matter, the state law will be deemed invalid.

Assuming that the law passed by Congress is a valid law, the VHO would be in direct conflict with the federal law passed by Congress because the VHO is essentially a hiring quota. Utopia may argue that the ordinance is not a strict hiring quota because it only applies to a workforce greater than 20 employees and it only provides for half their vacant workforce. A challenger would correctly argue that because Congress provided that hiring quotas of any kind are against the law, the law passed by Congress would preempt the VHO. Ultimately, the Supremacy Clause would afford a challenger the means to successfully. challenge the VHO

Another avenue a challenger might address the VHO with is the Equal Protection Clause. The Equal Protection Clause (EPC) of the Fourteenth Amendment, applicable to federal government through the Fifth Amendment, prohibts the government from treating similarly situated persons differently.

Here, a challenger could argue that the VHO treats veterans differently than non-veterans. A challenger would argue that veterans are protected by the VHO as job openings would be more easily provided for them. One definding the VHO would argue that even if veterans were being treated better, veterans versus non-verterans would be a nonsuspect classification which would be subject to rational basis review. Rational basis review requires the classification to be rationally related to a legitimate government interest. The burden of proof is on the challenger of the classification. It is very difficult to challenge a classification subject to rational basis review. Here, Utopia could argue that it had a legitimate reason advocating for veterans because it is more difficult for them to find work for example. A, equal protection challenge will be more on an uphill battle for a constitutional challenge to the VHO.

The NAO

Since the NAO limited the number of under 25 year old male residents who could live in a dwelling space to a maximum of two, the strongest challenge would be under the Equal Protection Clause described above. A challenger to the NAO would argue that the NAO is discriminatory on its face because the government treats people differently - namely, only males under 25, and not females, are being regulated on how and where to live.

Quasi-suspect classifcations include those based on gender and illegitimacy and are subject to intermediate scrutiny. Intermediate scrutiny requires the government to prove that the classification is substantially related to achieve an important government interest. The burden of proof is on the government.

Here, the government would argue that its important government interest is to address noise complaints. The facts tell us that studies by the City of Utopia over a five-year period showed that 80 pecent of the noise complaints made by citizens invovled dwelling spaces with more than two young male adults living together. The City would argue that the ordinance is the best way to address these complaints. However, a challenger would argue that the NAO is so broad and selective that there are far better and easier means to address noise complaints than to restrict hwo young adult males live.

The NAO will likely be deemed unconstitutional because the government will not be able to show that the ordinance is substantially related to an important government interest.

TAO

Here, the TAO is affecting vehicles that have been registered out of state. The Dormant Commerce Clause (DCC) restricts the states and local governments from regulating activity that affects interstate commerce if the regulation is (1) discriminatory or (2) unduly burdensome.

A regulation that is facially discriminatory against out of towners will be permitted only if it is necessary to achieve an important noneconomic governmental interest such that there are no reasonable alternatives.

A regulation that unduly burdens interstate commerce will be permitted if it is rationally related to a legitimate government interest, and the burden imposed on interstate commerce must be outweighed by the benefits to the state. This is essentially a rational basis test with some balacning.

Here, a challenger would argue that the TAO both discriminates against out of towners which vehicles registered out of state and burdens interstate commerce. A challenger will argue that the regulation itself makes it harder, and actually punishes drivers from out of state, who have vehicles registered out of state. A challenger could also reasoanbly argue that the TAO makes it more difficult to engage in interstate commerce because those who purchase out of Nevada vehicles will now potentially be fined. a challenger, like the Arizona rental company, could argue that interstate commerce would be unduly burdened because many people lease and purchase vehicles from out of state. In response, the government would argue that there is a legitimate purpose of passing the ordinance based on the City's traffic study - the government would argue that traffic would be reduced by half in more densely populated areas and public transportation would be encouraged. On balance, even if the ordinance was not discriminatory in nature, a Court will likely find that the TAO unduly burdens interstate commerce and is unconstittuional on that ground.

Another possible challenge would be based on the Privilege and Immunities clause. The Privilege and Immunities Clause of Article IV prevents a state or city from intentionally discriminating against noncitizens regarding rights fundamental to national unity. Rights fundamental to national unity focus on commercial activites, such as one's right to support oneself, right to be employed, right to engage in business, etc. However, corporations are not considered citizens so they will not be afforded protection under this rule. Since the Arizona car rental company is a company, they cannot raise a Privilege and Immunities challenge.

TSO

Assuming the 75 year old had standing to challenge the TSO, he would likely argue that the TSO is discriminating based on a person's age under the Equal Protection Clause. He would argue that the ordinance itself clearly treats people older than 78 differently than the rest of the populace because this class of indivdiauls are prevented from acquiring or renewing a driver's license.

We would have to determine what type of classification applies to this type of discrimination. Suspect classification includes only those based on race, national origin, and state alienage. Quasi-suspect clasisficaiton, explained above, includes gender and illegitimitacy. Nonsuspect classifications, as disccused above, include everything else and are subjet to rational basis scrutiny. As stressed above, the burden is on the challenger and it is truly an uphill battle to show discrimination.

Here, the City could argue that it has several reasons justifying the TSO. The City will argue that it passed this ordinance to protect drivers and pedestrians because it determines that there were fives times the number of vehicle accidents near a retirement home. The City will advance its point and stress that that intersection alone had more accidents despite the fact that there were fewer cars traveling through that intersection compared to other intersections. Even though people older than 78 will be prevented to acquiring or renewing a drivers' license, the City will argue that there is a very compelling need to prevent unfit or unsafe drivers from being on the road.

Ultimately, it is unlike that the TSO can be challenged based on equal protection because a challenger like the 75 year old man will not be able to overcome the burden.

******* Question 7 ENDS HERE *******

FEBRUARY 2022
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

Nevada Performance Test - 1

***** **NPT 1 STARTS HERE** *****

MEMORANDUM

To: Senior Parnter

From: Applicant

Re: Dr. Jeffrey Joyce

Date: February 23, 2022.

I. Introduction

This memorandum considers the relevant statutes and cases relating to certain substantive and procedural matters regarind contribution as they may apply to Dr. Joyce. As discussed below, the two actions for contribution would not prevail under NRS 17.225-.305.

II. Analysis

A. Do Nevada statutes and cases allow contribution from doctors who treated the injuries but had no role in causing the original injury?

Yes, the relevant authorities allow contribution from doctors who treated the injuries but had no role in causing the original injury. The right of contribution exists when two parties are jointly or severally liable for the same injury. See NRS 17.225. Whether the parties are

joint ***or successive*** tortfeasors is not material, so long as both parties are liable ***for the injury*** for which contribution is sought. *REPUBLIC SILVER STATE DISPOSAL, INC. v. Andrew M. CASH, M.D.* (emphasis added). Because Dr. Joyce may be jointly or severally liable for the injuries to Jack and Eve, the right to contribution is not prohibited on this basis alone.

B. Does Nevada permit a defendant to bring a new contribution lawsuit against someone who was never named in the original lawsuit?

Yes, Nevada law permits a defendant to bring a new contribution lawsuit against someone who was never named in the original lawsuit, as a general proposition. NRS 12.285(1) provides that contribution may be enforced by a separate action whether or not a judgment has been entered into an action. See also *Republic State* which provides an illustrative example on this point.

In application, the right to bring a new contribution lawsuit is subject to several conditions. The relevant limitations are discussed in Section II.C. of this Memorandum.

C. If such actions as threatened here are generally permissible, are there any limitations in the statutes or cases that would prevent the two actions threatened here against Dr. Joyce?

(1) Eve Wharton Matter

a. Factual Background

Eve Wharton filed suit against Green Cab and Mr. Adams due to the permanent damage to her spine resulting directly from Green Cab's and Smith's negligence. It is alleged that Dr. Joyce's treatment for traumatic her spine injuries was the major cause of Ms. Wharton's injury. Green Cab and Ms. Wharton settled the matter.

b. Analysis

Effect of Settlement on Contribution Right: The settlement is governed by Nevada law. NRS 17.225 provides that the right to contribution arises in favor of a settling joint tortfeasor only where the other tortfeasor's liability is extinguished by the settlement. Here, Section 5 of the Settlement Agreement entered into by and between Eve Wharton and Green Cab Company, a Nevada corporation (the "***Settlement***") provides that Ms. Wharton pecifically reserves her right to seek compensation for her damages suffered from any other

person or entity who may have caused or contributed to the accident and her damages. Note also Section 2 of the Settlement which only provides for a release against Green Cab.

Therefore, Dr. Joyce's liability for the common injury is not extinguished by the Settlement. As a result, no right to contribution in favor Green Cab withrespect to Dr. Joyce since Dr. Joyce's potential liabilty is not extinguished. See NRS 17.225(3); *THE DOCTORS COMPANY (TDC) v. VINCENT (2004)* ("***TDC***"). The TDC Court explicitly adressed this issue, holding that where TDC settled without the extinguishment of the joint tortfeasor's liabilty, the joint tortfeasor (here, Vincent) became immune to TDC's contribution action. Applying TDC by analogy, Green Cab's claim for contribution is clearly barred.

Jill Green may argue that, under the common law rule, the release of claims against one joint tortfeasor extinguishes claims against all the tortfeasors, this argument would not prevail. In this regard, Jill might point to *Russ v. Gen. Motors Corp.*, 111 Nev. 1431, 1435, 906 P.2d 718, 720 (1995) which notes that under the common law, "the release of one tortfeasor automatically released all other potential tortfeasors." (criticizing the common law rule as "harsh and without any rational basis"). This, however, is a decision which predates NRS 17.245 as presently enacted. Although this was the rule at common law, NRS 17.245(1)(a) provides that a release given in good faith to one of two or more persons liable in tort for the same injury "does not discharge any of the other tortfeasors from liability ... unless its terms so provide." Here, the terms do not provide for a release of any claims against Dr. Joyce, as noted above. Therefore, this argument would not prevail. See *MCCROSKY v. CARSON TAHOE REGIONAL MEDICAL CENTER*, which illustrates this rule.

When a Contribution Action may be Brought: In the case of a settling joint tortfeasor defendant, NRS 17.285(4) provides that the right to contribution is barred unless the tortfeasor (x) has discharged by payment the common liabilty within the statute of limitations period for the action against the tortfeasor seeking contribution and the contribution action is brought within 1 year after the payment, **or** (y) agreed to discharge the common liability and within 1 year after the agreement paid the liability and commenced an action for contribution. It is unclear how this statute should be construed in application here. One might argue that NRS 17.285(4) bars a claim unless and until the settlement is paid. Here, we could argue that the claim is not yet ripe since Green Cab still has several installments due. Or, a court might determine that such a result would be inconsistent with the intent of NRS 17.285(4). Similarly, a court might find that the settlement is paid at the time the agreement is entered into and adequate security is provided therefore (here the deed of trust). Although the claim is barred for other reason, this point should be further researched and considered (perhaps by reviewing the legislative history to NRS 17.285. See also Republic Silver State which, in addressing NRS 17.285(4)(b), noted that "[the joint tortfeasor seeking contribution's] action for contribution within one year of the settlement as satisfying NRS 17.285(4)(b), without discussing the time of payments which might not have been an issue in that case if settled via a lump sum.

Equitable Share: The right of contribution only exists in favor of a tortfeasor who has paid more than his, her or its equitable share of the common liabillity. See NRS 17.225(2). Even if there was potential liability, Dr. Joyce's share of the $1,000,000 liability would be limimted to his equitable share. Here, it may be that seeking $800,000 far exceeds Dr. Joyce's equitable share (i.e., if his share were less than 80%), despite the fact that Jill alleges that Dr. Joyce's actions were the major cause. So, even if the suit were unexpectedly viable notwithstanding the above discussion, Dr. Joyce's liability would be limited.

Separate Injury?: A right of contribution would not be present if a successive tortfeasor produced a completely independent injury, such is not the case here. It is unclear from the facts but if Dr. Joyce caused a separate injury there would also be no right to contribution.

(2) Jack Steinback Matter

a. Factual Background: Boss is threatening to sue Dr. Joyce for contribution arising out of injuries suffered by a Jack Steinbeck from spinal surgery performed by Dr. Joyce on September 13, 2020. McKenzie said that Boss is a high-profile professional wrestler who settled a lawsuit for injuries to Jack Steinbeck caused when Boss shoved Steinbeck into a ditch in a road rage incident. Steinbeck's spinal injuries were treated surgically by Dr. Joyce, but Steinbeck now suffers tremors in both legs. Boss apparently settled the Steinbeck suit for $500,000 on March 12, 2021.

b. Analysis

Intentional Tortfeasor: There are several limitations which may prohibit Boss from bringing a contribution action against Dr. Joyce. First, there is no right to contribution for an intentional tortfeasor, even if two tortfeasors contribute to the same injury. See NRS 17.255. In application, Boss shoved Steinbeck into a ditch in a road rage incident. Unless further factual information comes to light to show that the the shove was unintentional, Boss's right to contribution is barred under NRS 17.255.

Effect of Settlement on Contribution Right: As discussed above, NRS 17.225 provides that the right to contribution arises in favor of a settling joint tortfeasor only where the other tortfeasor's liability is extinguished by the settlement. It is not clear from the February 20, 2022 memorandum or the facts whehter Boss's settlement extinguished all liability against Dr. Joyce as well. If not, the contribution action would also be barred for the reasons discussed above.

When a Contribution Action may be Brought: Finally, note that the settlement was made on March 12, 2021. Although we are advices Boss will file suit if the matter is not settled in 30 days, NRS 17.285 would bar the suit at that time because the 1-year period to bring the claim would have expired on March 12, 2022 (and the 30-day period would end on February 23, 2022).

Equitable Share: See the discussion in Section II.C.(1)b., above, which is incorporated by reference. Even if for some reason the action were to succeed, Dr Joyce's liabilty would be limited to his equitable share of the $500,000.

Separate Injury?: A right of contribution would not be present if a successive tortfeasor produced a completely independent injury, such is not the case here. It is unclear from the facts but if Dr. Joyce caused a separate injury there would also be no right to contribution.

III. Conclusion

In sum, the the two actions threatened here against Dr. Joyce would not succeed under NRS 17.225-.305. Senior Partner should point out to the counsel involved that their claims are without basis. Dr. Joyce should be advised not to settle.

******* NPT 1 ENDS HERE *******

FEBRUARY 2022
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

Nevada Performance Test - 2

***** **NPT 2 STARTS HERE** *****

Memo

TO: Attorney General

FROM: Deputy Attorney General

SUBJECT: Silver City Open Meeting Law Compaint

DATE: February 23, 2022

Dear Attorney General:

You asked me to address any potential issues under the Open Meeting Law (NRS 241) raised by the February 10, 2022 Complaint by Al Rabblerousar, and any other issues related to the February 8, 2022 Meeting by Silver City (the "SC Meeting"). Please find in the Memo a list of six major issues, as detailed below. Do not hesitate to contact me with any questions or concerns.

Brief Overview of the Six Issues

1. The Agenda did not provide a "clear and complete" statement of the topics scheduled for the SC Meeting.
2. There was closed session with the City Attorney, which may raise issues with the Open Meeting Law. Specifically, there should not have been a vote (action) while still in closed session.
3. There was insufficient notice of the time restrictions for public comment, as the Agenda failed to give a specified time restriction.
4. There was likely an unlawful conversation among three council members outside of the SC Meeting because, even though informal, there was discussion about appointment of an public officer.
5. The appointment of the Director of Finance was likely unlawful during a closed session because that position is a public officer.
6. The City Council improperly voted on measures first raised during public comments at the SC Meeting.

Analysis and Conclusion on Each Issue

1. The Agenda did not provide a "clear and complete" statement of the topics scheduled for the SC Meeting.

NRS 241.020 sets out the requirements for a notice and agenda of a public meeting. There is no debate that the SC Meeting was a public meeting -- although there are issues of what may have been permissibly closed vs. public. Regardless, the notice and agenda must fulfill certain requirements.

Among the requirements is that the Agenda must consist of a "clear and complete statement of the topics to be considered at the meeting." NRS 241.020(3)(a). Clear and complete requires a "higher degree of specificity" on the agenda so as to give clear notice to the public when discussing or debating things of special or significant interest to the public. Sandoval (2003); AG Opinion 2012-003. For example, "budget process" is insufficiently broad.

For the Agenda of the SC Meeting, there was at least one clear violation and many other generally broad topics. First, Item VII, or the "Request for Approval of Application for Special Use Permit - Joe SMith, ABC, LLC [for possible action]" is *not* clear and complete. This eventual action concerned the slaughterhouse, which Mr. Rabblerouser discussed was a highly significant issue for the public. Moreover, the topic never even mentions the fact that Joe Smith, LLC was related to the slaughterhouse. A court would likely find this a violation of the statute's requirements.

As for other topics, they are likely just as broad. The appointment of the Director of Finance does not describe the position, its duties, and who is interviewing for the position. Item VI regarding the City Attorney has no indication for what reason the closed session must be held.

Conclusion

A court would likely find that the Agenda lacked "clear and complete" statements about multiple topics, but certainly about Item VII.

2. There was a vote in the closed session with the City Attorney, which may raise issues with the Open Meeting Law.

The next issue is whether the closed session with the City Attorney violates the Open Meeting Law.

When an attorney meets with a quorum of a public body, the Open Meeting Law permits there to be "deliberation" in a closed session, so long as there is no action taken behind closed doors. NRS 241.015; AG Opinion 2021-001(1). "Deliberate" means that the body can examine, weigh, and reflect upon the reasons for or against an action. This closed session -- an exception to the general rule -- permits government bodies the benefits of an attorney-client relationship. Finn (2016). The catch is that deliberations cannot turn into an action behind closed doors. AG Opinion 2021-001(1).

Item VI on the Agenda regarded a closed session with the City Attorney. Aside from the issue discussed above about broad notice, there is another issue of voting behind closed doors. It was permissible for the members to deliberate and examine the legal issues of the Silver City Road, but it was impermissible when they voted and took action, 5-0, while still in a closed session. That action should have taken place back in the public session.

Conclusion

A court will likely find that the closed session *vote* of the city council while with the City Attorney was unlawful because it went beyond deliberation.

3. There was insufficient notice of the time restrictions for public comment, as the Agenda failed to give a specified time restriction.

Freedom of Speech is codified in the Nevada Constitution. Art. 1, § 9. It is of utmost importance. In the Open Meeting Law, the public body must give notice of any restriction of such freedom of speech. For purposes of public meetings, speech may be restricted if the restriction is (i) reasonable and (ii) only in regards to time, place and manner. NRS 241.020(7); AG Opinion 2021-01(2). Restrictions cannot be unreasonable or arbitrary, and the agenda must explictly express a specified amount of time if the restriction is time-based. AG Opinion 2021-01(2).

Here, the Agenda was silent on any speech restricition. Then, in the meeting, citing lateness of the day, the Chairperson limited public comment to three minutes. Although that was likely not unreasonable, the lack of notice in the agenda is critical. According to our own opinions, a "specific amount of time [must] be placed on the agenda" to give the public reasonable notice of their restriction to free speech.

Conclusion

Although the reasons for limiting the public comments was likely not unreasonable or arbitrary, the failure to give notice on the Agenda of any specificied time renders the action by the Council unlawful.

4. The Conversation Between Three Members Outside of the Public Meeting Is Likely a Violation Because Quorum Was Present.

The Open Meeting Law protects against "serial communications." OML Manual (2019) § 4.08. The purpose is to prevent secret meeting where sensitive information is discussed where no quorum is present, but there are serial communications that lead to a concensus, leading to action, committment, and promises outside of public meetings. *Id.* A meeting need not be in person; it can be through electronic communication. NRS 241.015(3)(a)(1).

This was a central issue in the *Del Papa* case (1998), where the Nevada Supreme Court ruled that it was okay for a *non-voting* mayor to meet with a minority of council members, even to discuss public topics. The Court cautioned against serial communications, whereby a non-voting mayor could meet with 2/5 on one day, then 2/5 the next day, to reach a consenus or effectively an action.

However, here, Mayor Brown *is also a council member -- indeed the chairperson*. Therefore, his presence on the phone call with two other council members constitutes a quorum -- three our of five members -- and even though it was through a phone, that still fits under the definitiion of meeting. Because that phone conversation was about qualified candidates for the Director of Finance, it was a public meeting under the Open Meeting Law.

Note, however, that the Director of Finance appointment may be an exception to the public meeting rule if he is determiend not to be a public officer, as discussed in the section below. Nevertheless, even if it would have been permissible to be in a closed session, the timing of the discussion before public comment violates the Open Meeting Law.

Conclusion

The conversation

5. The appointment of the Director of Finance was likely unlawful during a closed session because it is a public office.

The central issue here is whether the Director of Finance is considered a public officer.

The leading case on this issue is *DR Partners* (2001). In that case, the court considered whether the president of a community college is considered a public officer under the Open Meeting Law. The importance of that determination is that appointments of non-public officers are exempt from the public meeting requirement -- i.e, they can be discussed and appointed in a closed session. DR Partners (2001); NRS 241.030(3)(d).

The inquiry turns on the definition of a public officer under NRS 281.005, which the *DR Partners* Court held applied to the Open Meeting Law. That statute has two elements: (i) the position of the officer was established by the Nevada Constitution or statutes, or by a charter or ordinance of a political subdivision of the state; and (ii) it involves continuous exercise of government or public power, trust or duty, which can be described as "sovereign functions." DR Partners (2001).

The Director of Finance is a position established by the City Charter of Silver City. Charter § 1.080. Therefore, it is a position established under the charter of a political subdivision of Nevada, and satisfies the first element of the test. The next issue is whether it continuously exhibits sovereign power and functions. In *DR Partners*, a central fact was that the president was controlled by the Board of Regents in most abilities. Here, on the other hand, the Director of Finance is its own executive, and probably has many more executive and sovereign functions. Thus, it is a public officer.

Conclusion

The City Council should have held an open session for the appointment of the Director of Finance, and a court will likely find its actions unlawful.

6. The City Council improperly voted on measures first raised during public comments at the SC Meeting.

Public comments are required at public meetings, however, "no deliberation or action may be taken on matters introduced in public comment." AG Opinion 2021-01(2); NRS 241.020(c)(3).

Here, when the City Council voted on measures introduced by Mr. Mann in the public comments, it plainly violated this rule.

Conclusion

A court will likely conclude that this action taken by the City Council is invalid.

Conclusion

The City Council violated many rules under the Open Meeting Law with its meeting on February 8, 2022. The following are the violations that a court will likely find:

1. The Agenda for the SC Meetingdid not provide a "clear and complete" statement of at least the Application for the Slaughterhouse, and likely more broad topics.
2. There was closed session with the City Attorney, which was permissible, but there should not have been a vote (action) while still in closed session.
3. There was insufficient notice of the time restrictions for public comment, as the Agenda failed to give a specified time restriction.
4. There was likely an unlawful conversation among three council members outside of the SC Meeting because, even though through a phone call, there was discussion about appointment of an public officer and this constitutes a meeting.
5. The appointment of the Director of Finance was likely unlawful during a closed session because that position is a public officer.
6. The City Council improperly voted on measures first raised during public comments at the SC Meeting.

Please do not hesitate to contact me with any comments or concerns.

***** NPT 2 ENDS HERE *****