



**JULY 2023
EXAMINATION ANSWERS**

**SELECTED APPLICANT ANSWERS
NEVADA BOARD OF BAR EXAMINERS**

QUESTION 1

Question 1 - Selected Answer 1

Peter's evidence

1. Dave's wife's testimony

Relevance

The issue is whether Dave's wife's testimony is relevant. Evidence is relevant if it tends to prove a fact is more probable than not and if it is not substantially outweighed by a danger of unfair prejudice.

Here, Peter is seeking to introduce Dave's wife's testimony that she overheard her husband, Dave, tell Peter immediately after Peter was injured not to "worry, I'm sure NVSR will cover all of your medical expenses." This is relevant as a statement of an employee of NVSR that would tend to prove that NVSR is responsible for Peter's accident. There is no danger of unfair prejudice as such evidence would not confuse or mislead the jury.

Therefore, the evidence is relevant.

Public Policy Exception to Relevant Evidence - Offers to pay

Even if evidence is relevant, there are exceptions that preclude the admissibility of such evidence for public policy reasons. These include offers to pay medical expenses, among others. Offers to pay medical expenses are not admissible to prove liability, but any accompanying statements may be used.

Here, Peter is seeking to introduce testimony that concerns who will/should pay for Peter's injuries. Specifically, evidence that Dave, an employee of NVSR, claimed through his statements that NVSR is liable for Peter's injuries. This might be construed as an offer to pay medical expenses since Dave, an employee and thus agent of NVSR, is claiming that NVSR will probably pay for Peter's medical expenses. However, because Dave's statement is not affirmative, but rather speculative, in that he states "I'm sure" NVSR will pay, it's likely this does not constitute an offer to pay medical expenses.

Therefore, the evidence does not meet the exception of offers to pay medical expenses and is admissible.

Hearsay.

The next issue is whether the evidence is hearsay. Hearsay is an out of court statement that is offered to prove the truth of the matter asserted. Hearsay is not admissible unless an exception applies.

Here, Peter is offering the testimony of Dave's wife, who said she overheard Dave tell Peter that NVSR would likely pay. Because the evidence is likely being offered to prove that NVSR is liable for Peter's injury, and the testimony was made out of court, it likely qualifies as hearsay. Thus, is inadmissible unless an exception applies.

Non-Hearsay - admission by a party opponent

Despite being offered for the truth of the matter asserted, Statements made by a party-opponent are deemed non-hearsay and are thus admitted. Such statements are admissible if they were made the opposing party. Vicarious admissions, such as statements made by an authorized spokesperson or agent, are considered admissible and are imputed to the party opponent.

Here, the testimony at issue is Dave's testimony that NVSR would likely pay for Peter's medical expenses. Dave is an employee of NVSR and thus an agent. The question is whether Dave's statement was within the scope of his relationship with NVSR so that his statements would be imputed to the corporation. Dave was an employee who, based on the facts, was responsible for pushing people down sledding runs. Based on such limited facts, it's not likely that his statement would be imputed to the corporation, since a regular employee is not likely to have the authority to speak on behalf of the corporation itself when it comes to liability.

Therefore, Dave's statement is hearsay and absent an exception, inadmissible.

Present Sense Impression

Present sense impressions are statements made by a declarant describing an event as it takes place or immediately after.

Here, Dave's statement was not made during Dave's accident, but likely qualifies as a present sense impression since the statement was made immediately after the injury.

Therefore, Dave's statement is likely admissible.

2. Medical records

include a statement from Peter where he said his back was sore where Dave pushed him

Relevance

See rule above.

Here, the evidence is relevant to prove that NVSR is liable for Peter's injuries because it would tend to prove that NVSR's employee was negligent in pushing Peter down the run. Evidence that Peter's back was sore would indicate that Dave used excessive force to push Peter. Additionally, such evidence is not likely to confuse or mislead the jury.

Therefore, the evidence is relevant.

Authentication

All tangible evidence must be authenticated. That is, the evidence must be proven to be what it is claimed to be.

Here, the facts do not indicate whether there is support to find that the medical record was properly authenticated. However, testimony from hospital staff or by the staff member who prepared the record would likely suffice for authentication.

Therefore, it's likely the evidence would be properly authenticated.

Hearsay

See rule above.

Here, the evidence is hearsay because it is an out of court statement (documents are statements for hearsay purposes) and is being offered to prove that NVSR is likely responsible for Peter's injuries through the actions of its employee, Dave.

Therefore, absent an exception, it is inadmissible.

Exception - Medical Diagnosis/Treatment

A statement of a person's past or present condition is admissible so long as it is made for the purpose of medical diagnosis or treatment.

Here, the evidence offered might be construed as having been made for medical diagnosis or treatment, since the statement concerned where Peter was sore (his back). However, it's likely that his back injury could have also resulted from the fall down the run itself. Assuming that the evidence was made to help support his treatment, it is admissible as a hearsay exception.

Exception - Business Records

A business record is admissible if it is kept in the regular course of business and made by a person with knowledge of the matter.

Here, the medical records likely constitute a business record because medical records are often kept in the ordinary course of business.

Therefore, as long as someone can authenticate the record, it is likely admissible.

3. Photograph

of a sign installed two weeks after the incident "Do not use any ski wax on your sled"

Relevance

See rule above.

Here, the evidence is relevant because it would show that NVSR is aware of the dangers of using ski-wax, and could thus be held liable for Peter's damages. Such evidence is not likely to confuse or mislead the jury.

Therefore, the evidence is likely relevant.

Exception - subsequent remedial measures

An exception to relevant evidence is subsequent remedial measures. Evidence of actions taken after an injury that make future injury less likely are not admissible to prove negligence or culpable conduct.

Here, NVSR posted a sign two weeks after the accident saying "Do not use any ski wax on your sled." Such statement will be considered an action taken after an injury to make a future injury less likely, and is thus inadmissible under the exception.

Therefore, because the sign cannot be introduced as proof of culpability, it is inadmissible in Peter's case-in-chief.

It is also worth noting that since the sign is being introduced via a photograph, the photograph would need to be authenticated by someone who can attest to the photograph's accuracy. However, since it is inadmissible, this does not need to be analyzed.

NVSR's evidence

4. Dave's testimony

that he pushed every customer this year the exact same on top of the hill without issues

Relevance

See rule above.

Here, the evidence is relevant because it would show that Dave was not negligent in pushing Peter, and thus NVSR is not liable for Peter's injuries. Such evidence is also not likely to mislead or confuse the jury.

Therefore, the evidence is relevant.

Character evidence

Character evidence is evidence of a person's character or specific character trait offered to prove the person acted in conformity with that trait. Character is inadmissible to prove conduct in conformity in civil cases unless character is at issue. Character is at issue only for defamation cases, negligent entrustment cases, and certain sexual misconduct cases.

Here, Dave wishes to offer evidence that he pushes everyone the same. This might be considered character evidence since it may show that Dave has a propensity to push everyone equally. However, it's more likely this is habit evidence, discussed further below.

Therefore, the evidence is not likely character evidence.

Habit

Habit evidence, evidence of a person's routine practices, is admissible to prove that on a particular occasion the person acted in accordance with that habit.

Here, Dave is offering evidence that he pushes everyone down the run the same. This is evidence of a routine practice (Dave pushing people down the run) and is thus likely admissible as habit evidence.

Therefore, the evidence is admissible.

5. Mr. Snow's testimony

world renown expert of sledding resort design

has been qualified as an expert in California, Utah, Oregon

will testify that "Super-Fast Ski Wax" should never be used on plastic sleds because it causes them to travel twice as fast than normal

Relevance

See rule above.

Here, the evidence is relevant because it would show that Peter should not have used ski wax on his board.

Therefore, the evidence is relevant.

Expert Opinion

Expert's may testify in the form of an opinion or otherwise if the expert is qualified, the expert's scientific or specialized knowledge will help the trier of fact, the testimony is based on sufficient facts/data, the testimony is the product of reliable principles and methods, and the expert has reliably applied the principles and methods to the case.

Here, Mr. Snow is a world-renown expert in the field of sledding resort design. However, it's not clear whether sled resort design would mean that he is an expert in sledding itself, or whether he is merely an architect. There is also no indication that he relied on any data or facts to suggest he has applied any methods to his analysis that ski wax should never be used on plastic sleds.

Therefore, it's likely that Mr. Snow's testimony would be inadmissible as improper expert opinion.

6. Judicial Notice/Relevance

See rule for relevance above.

Judicial notice allows a court to accept indisputable facts as true without requiring formal proof if the facts are commonly known in the community and readily capable of verification. Civil juries must accept judicial notice of a fact as true.

Here, NVSR requested that the court take notice of a prior Order of Dismissal involving Peter and a different sledding resort in California with the same claims involved. Evidence of such a dismissal would easily be proven. However, it's likely the evidence is not relevant as it would prejudice Peter. Evidence of a previous lawsuit that was dismissed and happened to contain similar facts may bear on the issue of liability, but it would likely impute bias on the jury since the case is similar. Since NVSR does not appear to be offering the previous case for collateral estoppel purposes, but merely for judicial notice, such evidence is likely inadmissible as it would be too prejudicial to Peter.

Therefore, the evidence is likely inadmissible.

Question 1 - Selected Answer 2

1. Admissibility of Dave's Wife's Statement

All evidence must be relevant to be admitted. Evidence is relevant if it makes any fact in consequence more or less probable. Here, it is likely Dave's wife's statement is relevant because it makes it more probable that NVSR may be responsible for Peter's injuries.

The statement presents a hearsay issue. Hearsay is when a statement is made by an out of court declarant that is offered to prove the truth of the matter asserted. If the statement is being offered to prove NVSR will in fact pay Peter's medical bills it may raise a hearsay issue.

However, an exception to hearsay is when the statement is made by a party opponent. Statements made by a party and offered against that party are admissible as nonhearsay. Employee's statements made during the course of their employment are considered to be vicariously the statement of the employer. Here, Dave is an employee of NVSR who was acting within the scope of his employment when Peter's accident occurred, and thus NVSR is vicariously liable for this statement made by its employee, Dave. Thus, the statement will likely not be barred as hearsay because of the exception.

Offers to pay medical expenses are inadmissible for public policy reasons to promote charitable support and so as not to punish people for offering such support to others. However, statements that are made in conjunction with offers to pay medical expenses are not barred. Here, the statement made by Dave was an offer to pay for medical expenses and did not include other statements that would be admissible. Thus, on balance, the statement will be likely be inadmissible as an offer to pay medical expenses.

2. Admissibility of Peter's Medical Records and Statement

Peter's medical records about his back being sore where Dave pushed him are relevant to making it more probable his injuries were due to the actions of NVSR's employee.

The medical records and Peter's statement within them are likely hearsay within hearsay. Business records that are normally kept in the regular operations of a business are an exception to the hearsay rule. Business records from a resort such as this one would need to be authenticated through a written certification of a custodian of records in a Nevada or federal court (if the resort is a casino, the person in charge of the records must certify in Nevada). Statements of past or present medical condition made for the purpose of medical diagnosis are also an exception to hearsay. Here, the medical records are likely business records kept in the treating medical facility's regular course of business, so there is likely an exception for the first level of hearsay. Peter's statement that his back was sore where Dave pushed him is likely also admissible because it was very likely made to treating medical personnel to assist in providing him with medical treatment or diagnosis. Thus, Peter's statement within the medical record will likely not be barred as hearsay.

In Nevada, there is a doctor-patient privilege. The privilege prevents doctors from testifying as to confidential communications with patients that were made for treatment purposes (not those statements made to place fault). However, this privilege is waived when the patient puts their physical condition at issue in the case. Here, Peter is suing for the severe injuries he sustained. Therefore, he has put his medical condition in issue in this case, and these records will therefore be admissible despite the privilege. On balance, the statement within these records will be admitted.

3. Admissibility of Photograph of Subsequent Warning

The photograph of the warning is relevant to make it more probable that NVSR knew of the dangers of putting ski wax on sleds and is therefore liable to Peter.

Real evidence such as photographs must be authenticated. A witness testifying that the photograph is an accurate depiction of what it purports to depict is required. Here, there will likely be no problem authenticating the photograph through an expert testifying.

Evidence of subsequent remedial measures taken after an injury has occurred are generally barred for public policy reasons because we want to incentivize people to make unsafe conditions safe after learning of their danger. In both Nevada and federal court, subsequent remedial measures are barred if being admitted to show the defendant is negligent or at fault. In

Nevada, subsequent remedial measures are allowed in strict products liability cases. Here, the warning is a subsequent remedial measure because it was made two weeks after Peter's injury. It is not being offered in a strict products liability case, but rather is likely being offered in a negligence case. Thus, in either a Nevada or federal court this warning is likely inadmissible as a subsequent remedial measure.

4. Admissibility of Dave's Past Pushing Behavior

Dave's past pushing behavior is relevant because it makes it less probable that his push caused Peter's accident.

In civil cases, character evidence is generally inadmissible. Character evidence is evidence offered of someone's past actions to suggest they have a propensity to act in a particular way and therefore acted in such a way in this instance. Habit evidence however is admissible. Habit evidence is evidence that someone acted with a regular response to a specific set of circumstances.

Here, Dave has an argument that his pushing behavior is habit evidence because he "pushed every customer this year in the exact same way." Because pushing is part of Dave's job, it is potentially the case that this is valid habit evidence of how Dave pushes customers each day and would therefore be admissible. However, if Dave's testimony is character evidence being offered that his past pushing behavior supports finding he did not push too hard in this case, it would be inadmissible as evidence offered to prove propensity. This is a close call, but it more likely that the evidence here is habit evidence and would therefore be admissible.

5. Admissibility of Mr. Snow's Expert Testimony

Mr. Snow's expert testimony is relevant to make it more probable that NVSR is not liable because Peter's injury was caused by the wax.

Expert testimony is admissible if it is testimony that requires technical or specialized knowledge that aids the jury or judge in determining issues of consequence in the case. The judge acts as a gatekeeper, considering issues such as the reliability of what the expert's opinion is based on, whether the basis for the opinion relies on information that has been tested, has a low rate of error, is published in peer-reviewed sources, and is relied on by other experts. In federal courts, these factors are the Daubert standard that judges use. In Nevada courts, judges have more flexibility to consider factors in their discretion as to whether an expert's opinion is reliable.

Here, Mr. Snow is described as a world-renown expert in the field of sledding resort design. He has previously been qualified in other western states in the field. Thus, Mr. Snow is likely to be found qualified to be an expert on this issue in Nevada. His testimony is that the wax should never be used on plastic sleds because it causes the sleds to travel twice as fast. This testimony is likely to help the jury to understand the issue of the wax may limit NVSR's liability in the case. Thus, Mr. Snow's opinion is likely admissible.

6. Whether Judicial Notice of the Order of Dismissal in Peter's Previous Case Should Be Permitted

Peter's previous case with the same claims against different sledding resorts is relevant because it makes it more probable that NVSR is not liable if Peter has a pattern of bringing such claims.

In civil cases, facts that are judicially noticed are facts the judge or jury takes notice of and that have conclusive weight. Information from prior judicial proceedings can be judicially noticed.

Here, judicial notice could be taken of the order of dismissal to make Peter's past claims admissible. However, the court document being proffered is not a judgment against Peter, but a dismissal so it is less probative for limiting NVSR's liability.

Courts in Nevada must exclude evidence when its probative value is substantially outweighed by prejudice, confusing the jury, or misleading the jury. Federal courts may do so in their discretion. Here, there is a potential issue of misleading the jury into thinking that Peter is a repeat litigator of these issues in bad faith, despite the fact that the previous case was dismissed. Thus, because of the relatively low probative value, the risk of misleading the jury substantially outweighs here and the evidence should not be admitted.



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QUESTION 2

Question 2 - Selected Answer 1

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

A. Business with Frank

Lenny's friend Frank, who is not a licensed attorney, approached Lenny with a business proposal for Lenny to offer legal services. For all of the reasons articulated below, Lenny should decline Frank's proposal, as it would subject Lenny to discipline under the NRCP.

Business intermingling legal services

The first issue with the business with Frank is that an attorney cannot open a law practice with another individual who is not a lawyer. This includes businesses that offer legal services along with other services that are of non-legal nature. While an attorney can have ownership of an ancillary business that provides non-legal services, the two cannot intermingle. Here, Frank wants to open a business with Lenny that provides legal services. Under the Rules, this is not permitted. Alternatively, Lenny can open his own practice and then separately hire Frank for advertising services, or Lenny and Frank can open up a separate business that does not offer legal services, but the business plan proposed by Frank would not be permissible under the Rules. Therefore, Lenny should turn down Frank's proposal to open a business with him.

Solicitation

A lawyer must not seek fee-paying work by initiating in-person or live telephone contact with a prospective client. This includes employees/partners of the lawyer and his practice. If the lawyer uses a written communication to solicit employment from someone not known to be in need of legal services for a particular matter, but who is so situated that they might find such services useful, the communication must include in red ink the words "NOTICE: THIS IS AN ADVERTISEMENT!" on it outside the envelope and on each page. An exception to this requirement is if the lawyer has a family or prior professional relationship with the prospective client. NV imposes a 30-day mandatory waiting period after the date of the incident before attorney solicitation of accident victims and their families can occur.

Here, Frank's proposal offers to solicit clients from his social media page for legal services. Under Frank's business proposal, the business would be both Frank and Lenny's and under the Rules, Lenny cannot solicit clients that he does not know for paid services. Further, it does not appear that Frank intends to advertise Lenny's services because he specifically indicated that he would be soliciting clients. These actions, even through Frank--presumably under this proposal would be a partner, are prohibited under the Rules. If Lenny engages, or allows Frank to engage in these actions, Lenny could be subject to discipline under the Rules. Therefore, Lenny should decline Frank's proposal to allow him to solicit clients for Lenny's legal services.

Duty to supervise

An attorney has a duty to supervise staff employed by his law practice. This includes ensuring that those employees are familiar with the ethical rules and the legal processes related to the tasks that they are assigned. This includes employees who the attorney is responsible for managing as well as non-legal staff.

Here, Frank's business proposal contemplates hiring a paralegal to complete forms that are drafted by Lenny for prospective clients. Frank suggests that he will supervise the paralegal; however, Lenny has a duty to supervise non-legal staff to ensure that what they are assigned to complete is done efficiently and lawfully. Frank, as a non-lawyer, would not be able to adequately and sufficiently ensure that the paralegal's work comports with the Rules and the law. Further, without supervising a paralegal who is drafting legal documents, Lenny would be assisting in the unauthorized practice of law, as the paralegal is not licensed to practice law and must be supervised by a licensed attorney. Therefore, under Frank's proposal, Lenny would have a duty to supervise all non-legal staff, including the paralegal, to ensure that no unlawful practice of law is happening under his supervision and management.

Unauthorized practice of law

An attorney must not engage in or assist unauthorized practice of law. These actions include appearing in judicial proceedings, engaging in settlement negotiations, and drafting documents that affect substantial legal rights or obligations (contract, wills, trusts). However, an attorney may delegate tasks to a paralegal, law clerk, student, etc., but must supervise the delegated work carefully and must be ultimately responsible for the results.

Here, Frank's business proposal provides that Frank would hire a paralegal to draft legal documents for clients and that Frank would be the one to supervise that employee. Frank is not licensed to practice law, therefore, his actions in supervising an employee who is tasked with preparing legal documents would constitute an unauthorized practice of law. Only Lenny, who is licensed to practice law, would be able to delegate legal tasks to the paralegal and Lenny would be responsible for supervising the paralegal and would be responsible for the results. This would require Lenny to review legal related work drafted by the paralegal and to sign off on the same, authorizing that Lenny has reviewed the work and it is legally sound. If Frank were to hire and supervise the paralegal, Lenny would be assisting and potentially engaging in the unauthorized practice of law, which would subject him to discipline under the Rules. Therefore, Lenny should decline Frank's proposal to engage in the business and hire a paralegal that Frank would supervise.

Fee splitting with a non-lawyer

A lawyer cannot split his/her legal fees with non-lawyers. Here, Frank's proposal suggests that Frank and Lenny would split the profits of the business 50/50. However, this would be splitting attorney fees because the services offered under the business are legal services, which only Lenny would be permitted to provide. Therefore, if Lenny were to split the fees of the business with Frank, he would be splitting attorney fees with a non-lawyer, which is a violation of the Rules. Therefore, Lenny should turn down Frank's business proposal and suggestion to split the fees. Otherwise, Lenny would be subject to discipline under the Rules.

B. Dan's divorce

Duty of competence

Lenny owes a duty of competence to Dan. A lawyer is obligated to provide competent representation to a client and must possess the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. Here, Lenny represents Dan in his divorce. The facts indicate that Lenny has experience in handling simple divorces. Dan advises Lenny that he has some undisclosed and secret bank accounts which his wife does not know about. This may be a little more complicated than a "simple" divorce. Therefore, Lenny must be competent in these matters, and has a duty to ensure that he becomes competent in that matter before accepting the representation, if he is not already competent in those matters.

Duty of confidentiality

L owes a duty of confidentiality to D. A lawyer is prohibited from disclosing information relating to the representation of a client, unless the client gives informed consent, the disclosure is impliedly authorized, or a specific exception applies. Here, the facts do not indicate that D gave L informed consent to disclose any information relating to L's representation of him in this matter. Further, the facts do not indicate that disclosure of information is impliedly authorized or a specific exception applies. Therefore, L must keep all information relating to the representation of D confidential.

Duty of diligence

L owes a duty of diligence to D. A lawyer must act with reasonable diligence in representing a client by following through on all matters until completion. A lawyer may withdraw if they can do so without causing materially adverse effect on the client; however, they must give the client reasonable notice to obtain new representation. Here, L owes D a duty of diligence and must follow through with all matters related to his representation, including responding to requests for information, and timely litigating the matter.

Duty of communication

A lawyer must act with reasonable diligence and promptness to keep a client informed about the status of a matter relating to the representation. A lawyer has a duty to communicate with clients, keep them reasonably informed about their case, and provide them information to make capable decisions about their case. Here, L must adequately communicate with D in order to help him make informed decisions about his case. This includes settlement offers and any issues that arise that may cause complications to D's case. Further, this includes a duty to inform D of any potential results or crimes that may result from any actions D is contemplating doing. This includes hiding the bank accounts from his wife. L knows that state law requires D to disclose this information and D does not want to. L must inform D of this law, and if D still refuses to do so, L has a duty not to assist his client in engaging in future crimes. Therefore, if D asks L to not disclose the bank accounts, and that would be a violation of the law, L must move to withdraw representing D. As further representation would constitute assisting D in committing a crime.

C. Wendy's divorce

Conflicts

An attorney has a duty to conduct conflict checks with new clients and prior clients. This includes prospective clients who merely engaged in a consultation with the attorney. Here, L consulted with W's husband about an unrelated matter (not divorce) but through that consultation, obtained potentially harmful information to the husband if L accepts representing W in the divorce. In order to represent W in her divorce proceeding, L must obtain written consent from both W and her husband to represent W in the matter. Further L can only take the case if he believes that he can do so without breaking attorney-client privilege with the husband (information obtained in consultation) while also representing the best interests of W. L will not likely be able to have the best interests of W with representation knowing the information he does about her husband. Therefore, L should decline representation of W in her divorce matter.

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

Question 2 - Selected Answer 2

There are many potential ethical violations and concerns for Lenny (L). I address each encounter in turn.

1. Conversation with Frank

Partnerships

The first issue is whether forming a partnership with Frank would violate an ethical rule. A lawyer is not permitted to form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law. A lawyer may also not form a professional corporation for profit if a nonlawyer owns any interest in the firm, a nonlawyer is a director or officer, of the nonlawyer has the right to direct or control professional judgement.

Here, the facts explain that Frank (F), a non-lawyer, has asked L to "become partners with him to form a legal document preparation business." This likely means that the two would be forming a formal partnership for the purposes of practicing law: preparing testamentary instruments. Because F is a non-lawyer, it would violate Nevada's ethical rules to form a partnership with F for the purposes of practicing law. Therefore, L should refuse to form the partnership unless F decides he wants to earn his law degree/license.

Competence

The next issue is if L can practice this area of law competently. A lawyer must possess the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. The lawyer may gain the requisite competence, but may not bill the client for any time spent doing so.

Here, the facts explain that L has only been licensed to practice for 3 years, and in those 3 years has only done DUI defense and simple divorces. Therefore, he may not have the requisite skill and knowledge and therefore the requisite competence to enter an area of drafting wills and trusts, though he would for divorces. However, he already practices and deals with estates in doing divorces, so he may indeed already have the requisite knowledge. And even if he doesn't, he may attain such knowledge so long as he does not bill any clients for the time spent doing so. Therefore, L should not expand his practice in these areas unless he is competent in them or gains such requisite competence.

Solicitation

The next issue is whether F's planned solicitation of clients violates an ethical rule. A solicitation is a narrow, targeted communication with an individual or a small group. Solicitation of prospective clients is prohibited when a significant motive behind the lawyer's actions is pecuniary gain, unless the person contacted has a family or prior professional relationship with the lawyer.

Here, F, a non-lawyer, plans to solicit clients using his social media accounts in order to communicate with them about their particular needs. This sounds to be a solicitation because of the facts use of the word solicit, rather than an advertisement such as generally posting on social media about available services, and it is very unlikely that even any of these prospective clients contacted through social media have family or prior legal connections with Lenny. And even then, it is F who would be doing the soliciting, not L. Therefore, it is likely solicitation barred by Nevada's ethical rules and L should not allow it to happen.

Unauthorized practice of law

A lawyer is not allowed to provide legal services in Nevada if they know they are not allowed to by lack of licensing etc., nor may they knowingly assist a nonlawyer in the practice of law.

Here, F has proposed that he hire an "experienced paralegal" who will use L's forms to prepare documents for clients, and that F would supervise the paralegal himself. While it could be permissible that L prepare all legal aspects of a document and a paralegal prepare the non-legal aspects of the document in order to submit to the court, it would be impermissible if the paralegal substantively does legal work on behalf of the clients. Further, L would be knowingly assisting F supervise the paralegal in the practice of law, and therefore would be violating the Nevada rule prohibiting the knowing assistance of the unauthorized practice of law. Therefore, L should not allow a paralegal to perform substantive legal work, and should definitely not allow F, a nonlawyer, to supervise a paralegal in the carrying out of the practice of law or otherwise legal work.

Supervision

Partners at a law firm must make reasonable efforts to ensure the firm has measures in place that give reasonable assurance that all lawyers and non-lawyers in the firm conform to ethics rules.

Here, L would likely be the founding partner because he is the only attorney in F's proposed partnership. Therefore, he would have to take reasonable measures to ensure that other employees do not act in violation of Nevada's ethical rules. For the reasons discussed above, allowing the partnership to function as F has described would not follow these rules, and L would not be supervising the firm in accordance with Nevada's legal rules. Therefore, while he cannot form the partnership in the first place, if he follows the plan at all he must take measures to ensure F or a paralegal do not violate any ethical rules.

Diligence

The next issue is whether F's proposed practice would violate L's duty of diligence. A lawyer must be dedicated and committed to a client's interests despite inconvenience/obstruction, control workload, act with reasonable promptness, and

pursue all matters to completion.

Here, by merely preparing form documents for clients and nonlawyers to fill out, L would likely not be providing diligent representation to the clients. Therefore, if he does expand his practice to this area, he likely must take more action than merely preparing form documents for trusts, wills, and divorces in order to meet the commands of diligent representation.

Fee sharing

The next issue is whether sharing fees with F would violate an ethical rule. Lawyers are not permitted to share legal fees with nonlawyers if the activities include the practice of law.

Here, the activities of preparing wills and trusts, as well as preparing divorce decrees and submitting them to the court, constitute the practice of law. Therefore, not only can L not share half of these fees evenly with F, he cannot share *any* fees earned from the practice of law with him.

Safekeeping information

A lawyer owes a duty to their clients to take reasonable steps in the safekeeping of their information and confidences. This may include taking reasonable steps to ensure requisite safekeeping of information digitally.

Here, the facts explain that F looks to solicit clients over social media and discuss their information that way. L owes a duty to prospective clients to keep their information reasonably safe, and discussing information in the course of representation over social media may not conform with these requirements. Therefore, L may have to stop F from discussing such information over social media if they go forward with the plan in any fashion.

Conflicts of interest.

Generally, a lawyer must not represent a client if there is a significant risk that the representation may be materially limited by the lawyer's own interests unless 1) the lawyer reasonably believes they can provide competent/diligent representation; 2) the representation is not prohibited by law; and 3) the lawyer gains the affected parties' informed consent confirmed in writing.

Here, soliciting clients over social media may lead to a wide variety of clients seeking services. Therefore, if L goes with that plan, he will have to take reasonable steps to be sure he does not take on any representation or information he should not gain access to and properly screen prospective clients that way.

2. Discussion with Dan

Competence

The first issue is whether L is competent in representing Dan (D) in his divorce. See rule above. Here, the facts say L has practiced for the past 3 years in "simple divorces," therefore he is likely competent. However, if his competence does not reach beyond simple divorces and Dan's divorce is complex, then he may not have the requisite competence. In such an event, he must refuse to represent D or must gain the requisite competence and not bill D for the time spent doing so.

Confidentiality

The next issue is whether L's duty of confidentiality is implicated in the exchange. A lawyer is prohibited from disclosing any information relating to their client's representation unless the client gives informed consent, such disclosure is impliedly authorized, or an exception exists. Under the exceptions, a lawyer **must** disclose confidential information that the lawyer reasonably believes necessary to prevent a criminal act that the lawyer believes is likely to result in reasonably certain death or substantial bodily harm. A lawyer **may** disclose confidential information to the extent that the lawyer believes necessary to prevent reasonably certain death or substantial bodily harm; to prevent the client from committing crime or fraud in furtherance of which the client has used or is using the lawyer's services; to secure ethical advice; in a controversy between the lawyer and client; to screen for conflicts of interest; and in compliance with a court order.

Here, D has requested L represent him in a manner that furthers fraud because he is seeking to defy a sworn financial disclosure as required in the course of the divorce and to illegally divert funds outside the community so that he does not have to share them upon divorce. Therefore, while L is not required to, he may disclose the information gained in the course of the representation to the extent he reasonably believes is necessary to stop the furtherance of the crime/fraud D seeks to use his services for.

Candor

A lawyer is prohibited from knowingly offering false evidence and may refuse to offer evidence that the lawyer reasonably believes is false. When a lawyer learns of false material evidence after it is offered, he must take reasonable remedial measures. This includes remonstrating with the client, and if the client refuses to remedy the false disclosure, then the lawyer may withdraw or reveal information to the tribunal as they believe is reasonably necessary.

Here, L may violate his duty of candor to the tribunal if he fails to remedy any false disclosure D has already made, such as by remonstrating with him and if he refuses informing the court himself. He may also violate ethical demands if he agrees to offer false statements in D's required financial disclosure and helps D relocate the funds with his sister in furtherance of defrauding his ex wife. Therefore, L should convince D to not offer the false statements and to not illegally divert the money, and if D refuses, he may withdraw or inform the court himself.

Withdrawal

A lawyer must withdraw their representation if failure to do so would result in an ethical or legal violation.

Here, representing D in furtherance of the fraud in his divorce proceedings would violate L's ethical commands to not act in a manner that violates ethical or legal rules. Therefore, if he cannot convince D to not go forward with the illegal acts, he must withdraw.

Representation in furtherance of crime or fraud

A lawyer may not represent a client in furtherance of a crime or fraud. A lawyer, however, may discuss with a client the legality of particular actions and counsel them so as to conform with the law or what they must do to act in accordance with the law.

Here, the facts seem to suggest that D has not failed to disclose anything to the extent that he has acted illegally yet. Therefore, while L may not represent him in a capacity that furthers the crime or fraud, he may counsel him of the potential parameters of the law and legal repercussions if he chooses to act in a particular way without actually representing him furtherance of any crime or fraud.

3. Representation of W

Duty of Loyalty

A lawyer has a duty of loyalty to the client and, as a very general rule, may not take any action which would be detrimental to that client's interest. Absent informed consent, a lawyer may not represent a client if the representation involves a conflict of interest.

Here, though no lawyer-client relationship was formed, L still owes H a duty of loyalty to keep his information confidential and to not take on representation that would result in a conflict with him. For the reasons below, it may violate L's duty of loyalty to H if he represents W.

Conflict of Interest

Generally, a lawyer must not represent a client if there is a significant risk that the representation may be materially limited by the lawyer's own interests unless 1) the lawyer reasonably believes they can provide competent/diligent representation; 2) the representation is not prohibited by law; and 3) the lawyer gains the affected parties' informed consent confirmed in writing.

A lawyer cannot represent a client with interests materially adverse to a prospective client in the same or substantially related matter if the lawyer received information from the prospective client that could significantly harm the client unless both clients give informed consent or there is limited exposure, timely screening, no sharing of the fee, and notice to the prospective client.

Here, L previously met with Howard (H) who Wendy (W) now seeks to have L represent her in divorcing H. While L and H never formed a lawyer-client relationship, L's representation may still be barred because conflicts of interest attach to prospective clients, regardless of whether L and H exchanged money. In order to represent Wendy, L would have to gain the informed consent of both clients, which Wendy seems to think she will be able to accomplish. But even then, it is likely that L feels he learned too much and does not reasonably believe he can provide diligent/competent representation to W while maintaining his confidences and duty of loyalty to H. If that is the case, then L should decline the representation, and in any event is permitted to decline the representation no matter what.

Confidentiality

The next issue is whether L can disclose what he learned in his consultation with H. The rules for confidentiality are the same as above. Here, even though no lawyer-client relationship was formed between H and L following the consultation, L still gained the knowledge about H's tax problem in furtherance of his representation-though prospective at the time- so he owes H a duty to keep the information confidential unless authorized to disclose it or otherwise excepted, none of which seem to apply here. Therefore, if L does choose to represent W, he must tell her that what he learned in his consultation with H is protected by L-C confidentiality and that he cannot disclose it to her.

Competence

The rules for competence are the same as above. Again, it is not clear if L is competent to represent clients beyond simple divorces, so if this is too complex he may not be able to competently represent W, or will have to gain competence at no charge to her.

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



**JULY 2023
EXAMINATION ANSWERS**

**SELECTED APPLICANT ANSWERS
NEVADA BOARD OF BAR EXAMINERS**

QUESTION 3

Question 3 - Selected Answer 1

Governing Law

Contracts for the sale of goods are governed by Article 2 of the UCC. All other contracts are governed by general common law contract principles.

Here, as this is a personal services contract for Charlie to perform comedy at Adam's house, the common law will govern.

1. The issue is what claims can Adam bring against Charlie and what defenses Charlie may have.

Valid Contract

A contract is a legally enforceable agreement. A contract is typically created through the process of mutual assent and consideration, provided no valid defense to contract formation exists. Consideration requires bargained for legal benefit or detriment, which can involve both performance and forbearance.

Offer

An offer is an objective manifestation of a willingness by the offeror to enter into an agreement that creates the power of acceptance in the offeree. In other words, it is a communication that gives the power to the recipient to conclude a contract by acceptance.

Advertisements are generally considered to be invitations to deal, unless associated with a stated reward or has sufficiently specific and limited information as to who may accept, then it may qualify as an offer.

Here, Charlie posted an advertisement on his social media describing a night of comedy performed by him and lists his accolades. The ad does list a price and contact information but it is not specific enough to qualify as an offer under the rule above as it does not say "first come first served," it does not have a specific date, and does not limit who may accept. This ad will be considered an invitation to deal.

Adam then reached out to Charlie via email. Adam informed Charlie how he heard about him, that Adam was having a party, asked if Charlie was available on a specific date (August 28), to perform specific services, informed Charlie of Steve's fandom and request, and listed the offer amount (\$12,000). This is sufficient to constitute a valid offer because it has all the necessary information and then some and it leaves the power of acceptance in Charlie's hands.

Acceptance

An acceptance is an objective manifestation by the offeree to be bound by the terms of the offer. An offeree must know of the offer and must communicate the acceptance to the offeror.

Here, Charlie's email response to Adam's offer was "See you then!" While this is a less than fulfilling response to make someone feel extra secure, it is unambiguous and gives Adam no reason to think that Charlie has not accepted the offer. The acceptance does not contain any additional or different terms and the words are objective. This will qualify as acceptance.

Mirror Image Rule

At common law, the terms in the acceptance must match the terms of the offer exactly, otherwise it is not an acceptance but a counteroffer.

As mentioned above, Charlie's acceptance did not contain any additional or different terms. Therefore, it was a mirror image acceptance of Charlie's offer.

Consideration

Consideration exists because Adam has promised to pay and Charlie has promised to perform comedy.

In conclusion, there is a valid and enforceable contract between Adam and Charlie. The terms are exactly what Adam included in his emailed offer.

Breach of Contract

Once a duty to perform exists, nonperformance is a breach of contract unless the duty is discharged.

Here, Charlie had a duty to perform at the August 28 party and he failed to show up. This is a material breach of the contract. At common law, the nonbreaching party can withhold performance. In this case, Adam would not have to pay the \$12,000.

Delegation of Duties

Generally, contractual obligations can be delegated. However, delegation is not allowed when a party to the contract has a substantial interest in having the delegating party perform. This is especially true in a personal services contract involving taste or a special skill. When obligations are delegated, the delegator is not released from liability. Acceptance by the delegatee constitutes a promise to perform those duties. That promise is enforceable against the delegatee if the delegatee has received consideration or there is a consideration substitute that makes the promise enforceable.

Charlie will first claim a defense that he delegated his duties to Dee, which he did. However, the delegation was not permitted because Adam had a substantial interest in having Charlie perform specifically. Charlie is super famous, he has won awards, he has been on TV, Steve is his biggest fan, and Charlie tells family-friendly jokes. All of these factors weigh heavily towards Adam having a substantial interest in Charlie, and only Charlie, performing for Blake's party. Charlie will further claim that Adam accepted this delegation when he allowed Dee to begin performing after she arrived at the party. Adam will respond that Dee is new to comedy, he did not know that Dee would be telling crude and offensive jokes, and that Adam felt compelled to have *someone* performed after being surprised at Charlie's breach. Lastly, Charlie and Adam did not agree to a novation, or a complete substitution of the contract to replace Charlie with Dee.

Impracticability / Impossibility

This defense is available if performance becomes illegal after the contract is made, the specific subject matter of the contract is destroyed, the performing party in a personal services contract dies or becomes incapacitated, or performance becomes impracticable - not just more expensive.

Charlie will try to claim this defense and say it is impossible for him to be in two places at once and he had to be in New York City for an audition. Adam will respond that Charlie made a contract and was obligated to fulfill it. Charlie having a difficult decision to make does not qualify as impracticability.

2. The issue is what claims Adam can assert against Dee and what are Dee's defenses.

Delegation

According to the delegation rules above, Dee's promise to perform Charlie's duties are only enforceable against Dee if she received consideration for the delegation. The facts do not indicate that Dee received any consideration for performing. Therefore, Dee is not liable under the contract and Adam cannot recover from her.

However, Adam may be able to argue that Dee received a consideration substitute in the form of experience. Dee only has a few years of comedy experience and performing for 150 people can be great practice and great exposure. If this argument was to hold up, Adam could sue Dee for breach similar to Charlie. Dee could defend the breach action by showing that she did perform under the contract. Just because Adam did not like it does not mean she did not perform her brand of comedy.

Intentional Infliction of Emotional Distress

The facts do not indicate anyone suffering emotional distress, but if they had, Dee may be liable for IIED considering she was performing for young families and she was offensive and crude which could be considered outrageous and indecent.

3. The issue is what claims can Steve bring against Charlie and what are Charlie's defenses.

Third-Party Beneficiary Contracts

This results when the parties to a contract intend that the performance by one of the parties is to benefit a third person who is not a party to the contract. Beneficiaries can be intended or incidental. Incidental beneficiaries are those who benefit from a contract but there was no intent to do so and they have no rights to enforce the contract. Intended beneficiaries are those whom the promise of the performance is intended to benefit and they do have rights to enforce the contract. A donee beneficiary can sue the promisor.

Here, Steve was an intended beneficiary of the contract between Adam and Charlie. Adam specifically informed Charlie that Steve was a huge fan, Steve purchased a script of Charlie's TV show for Charlie to sign, and that Steve would be present for the signature at the meet and greet. Charlie was aware of this benefit to Steve. This makes Steve an intended third-party beneficiary. As such, Steve has rights to sue Charlie under the contract for breach. There is no need to discuss vesting rights because they do not apply as the contract is essentially over as the time for proper performance has passed.

Defenses

Defenses to third-party contracts are same as against original parties. Charlie will again try to claim delegation and impracticability but for the same reasons above, these will fail. Steve was not a fan of Dee and Steve did not buy Dee's script.

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

Question 3 - Selected Answer 2

1. Adam's Claims Against Charlie

Governing Law

The common law governs contracts for services. Here, this is a contract for service because a comedian performing at a party is a service. The CL governs this contract.

Statute of Frauds

Contracts that cannot be completed within a year must be in writing. Here, this contract can be performed in less than a year thus the SOF is not indicated, though the contract was in writing by email.

Contract

A contract is an agreement between parties that can be enforced in court. The agreement consists of a promise or set of promises. Once formed, the parties have a duty to perform the contract as promised. A contract requires a mutual agreement and consideration. An agreement is in the form of an offer and acceptance.

Offer

An offer is a communication of willingness to enter a contract. It creates the power of acceptance in the offeree. It requires intent to enter into a bargain and definite terms and is communicated to an identified offeree. Here, Adam made an offer to Charlie, a specific person, for his comedic services. The terms were sufficiently defined as the date, time, place, fee, and conduct to be performed were communicated. Adam will pay \$12,000 for C to make an appearance. A valid offer was made. Note: the post by Charlie for his service was merely a generic advertisement and not an offer as it is directed to no one in particular. Although ads can be offers, those exceptions do not apply here.

Acceptance

Acceptance is a communication indicating a desire to be bound to the contract. Intent to enter a bargain is shown if a reasonable person would believe that his assent would create a contract. Under CL, acceptance must mirror the offer.

Here, C effectively accepted A's offer when he emailed back and said, "see you then, which mirrors the offer. The offer was accepted.

Consideration

Consideration is a bargained-for exchange of something. Here, A offered \$12,000, and in exchange, C offered to appear and perform. There was consideration.

A contract was formed.

Assignment

Duties and rights under a contract can be freely assigned unless it is a contract for something unique such as land, a one-of-a-kind item or an artist's or performer's service. Here, this is a contract for a specific performer's service, C comedy routine. He is unique (comedian of the year), and the offeror wants to see him personally (as does a friend for an autograph), and his duties cannot be delegated. No other comedian, even if better than C, can perform these duties. These are non-delegable duties. C delegated his duty to Dee when he asked her to perform at the graduation party is his place, and she did. C wrongfully assigned his duty.

Breach

A breach is material when a party fails to receive the benefit of the bargain without any substantial performance. Here, the terms of the contract require C and no one but C to appear and perform at the graduation party. C did not appear as he went to NYC. A did not receive the benefit of the bargain, and C's performance was a basic assumption of the contract. A did not get a comedic performance, meet and greet, or book signing by C. C breached the contract. Due to the breach, A has the option to sue C for damages. A's performance should be excused due to C's material breach.

Expectation Damages

Expectation damages are awarded to the nonbreaching party to put him in as good a position had performance been done plus incidental and consequential damages less mitigation of damages. Under CL, an injured party may seek monetary damages for the difference between the performance rendered and the performance expected. Here, a court can rule that A does not have to pay any amount to C for D's performance as it was not even close to substantial performance. There was no way that A could have mitigated anything in this situation.

Charlie's Defenses

Modification

Under CL, a change to an already formed contract requires new consideration. Here, D may argue that the contract was modified when A agreed to accept performance from Dee. That argument will fail because no new consideration was offered. C cannot modify at the last minute for a prior performance that had come due at that moment. There was no modification.

Novation

A mutual agreement to substitute an existing party with another party thereby excusing performance of the original party. To be valid, all parties must agree that the third party will take over the contract. When D offered to perform instead of C, and A reluctantly agreed. The consideration would be paying D for her to perform a comedy routine and a new contract was formed. The terms would be those of the former contract with C minus the autograph that she could not supply but could give her autograph as she said, she was "taking over for Charlie." A novation occurred.

Full Performance

C will argue that A received full performance as a comedian did appear and performed at the agreed upon date and time. D would have fully performed had A not stopped her and asked her to leave. A cannot sue for breach when he was the cause not C. Even if A had not stopped D, A did not receive the benefit of the bargain at all. The duty was non-delegable. D's performance was poor and she told offensive and crude jokes that were so offensive guests left the party. C will fail with this argument.

Substantial Performance

Under CL, a party has a duty to substantially perform his part of the contract. A party who substantially performed can recover on the contract without full performance depending on the amount of benefit conferred, hardship to the breaching party, whether the breach was willful or trivial, and adequate damage. If a party did not substantially perform, he can generally not recover damages but may recover the value of the benefit conferred to the other party through restitution.

If not full performance, C will argue that he at least substantially performed. D was a suitable replacement. D is a comedian, and A wanted a comedian. That is what he got. C's argument will fail because the two performers are considerably different. A had over twenty years of experience, and D was new to comedy. A was the star of an award-winning TV series, and D appeared in a few TV commercials. D's experience is as a dramatic actor and not in comedy. D and C are substantially different performers. D's performance cannot suffice as substantial performance on a service contract. As far as collecting restitution, given the offensive nature of D's performance, A can likely argue that no benefit was conferred and he was not unjustly enriched. Quite the opposite, his guests were offended and left his party.

Impossibility

A duty to perform is discharged if the occurrence of an unforeseeable event make it objectively impossible for the party seeking discharge to perform, the nonoccurrence of the even was a basic assumption of the contract, the party seeking discharge was not at fault, and neither party assumed the risk of the event occurring. Here, C may argue that it was impossible for him to perform because he had to be in NYC on the date of the graduation party and could not be in two places at one time. His argument will fail because it was possible for him to perform. He could have rescheduled his audition or not gone due to this commitment to perform at the party. The party seeking discharge was at fault as C caused his own failure to appear and perform. C cannot successfully argue impossibility.

Impracticability

A duty to perform is discharged if the occurrence of an unforeseeable event makes performance of the contract extremely difficult, the nonoccurrence of the even was a basic assumption of the contract, the party seeking discharge was not at fault, and neither party assumed the risk of the event occurring. C may argue that it was not practical to attempt to perform and audition in the same time frame even if he could arrange travel and schedules. Again, C is at fault for his failure to appear not some impractical, unforeseen event. He knew he had an audition, he may have forgotten, but he knew. C cannot successfully argue impracticability.

2. Adam's Claims Against Dee

Adam has a breach of contract claim against Dee for her failure to perform under the new contract, from the novation. A will argue D materially breached when her performance was not funny and offended guests causing them to leave after only 20 minutes. Twenty minutes is not substantial performance given the routine was supposed to last two hours. A did not receive the benefit of the bargain and will argue he should be excused from performing his part i.e., paying.

Dee's Defenses

Quasi-Contract

D can argue A was unjustly enriched by getting twenty minutes of D's routine and if not ordered to pay, the outcome would not be fair as D provided a benefit without compensation. D was willing to perform for the full two hours and do a meet and greet, and it was A who stopped her and had her leave. D performed in good faith.

3. Steve's Claims Against Charlie

Third Party Beneficiary

Parties to a contract intend performance by one of the parties to benefit a third party who is not a party to the contract. The party promising to perform is the promisor, and here that is C. The promisee who secures the promise was A. The intended beneficiary who had rights and can enforce the contract is Steve. Steve was an intended beneficiary and not incidental as he was named in the terms of the contract. Steve was to get his script signed by C at the meet and greet. That did not happen because C failed to appear. S has standing to bring a claim against C as the delegating party always remains liable.

Charlie's Defenses

Charlie will argue that a promisor and promisee can rescind or modify the contract until the rights of the 3P vest, and the contract was modified when A agreed to accept performance from D thus S has no claim against C. That argument will fail because S's rights already vested when A and C made the contract.

C will argue that the novation removed his liability to S. S's right vested before a novation occurred. C's argument will fail.

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



**JULY 2023
EXAMINATION ANSWERS**

**SELECTED APPLICANT ANSWERS
NEVADA BOARD OF BAR EXAMINERS**

QUESTION 4

Question 4 - Selected Answer 1

Sovereign immunity: The 11th amendment bars suits against states or federal agencies in federal court unless the state has explicitly waived immunity. State officers may be sued if the plaintiff is seeking only injunctive relief or if any money damages will be paid by the officer and not out of the state treasury.

MAW suit: MAW is suing the City Manager, an officer, for injunctive relief. They wish for the permit to be granted so they can protest in the library. This will not be barred by Sovereign immunity.

Author's suit: The author is suing the Board of trustees for banning his book. He is seeking injunctive relief - the lift of the ban on his book. Therefore, his suit will not be barred by sovereign immunity.

Librarian's suit: The librarian is suing the Board of trustees to challenge her termination. To the extent that she seeks injunctive relief, reinstatement in her job, her suit will not be barred. However, she will be barred from seeking lost wages from the state treasury during the time she was unemployed by sovereign immunity.

1. MAW's lawsuit against the City Manager for denying the permit

Justiciability: For a case to be justiciable, (1) the Plaintiff must have standing, (2) the case must be ripe for review and (3) the case must not be moot.

Standing: In federal court, a person has standing only if there is an injury in fact caused by the government that will be remedied by a decision in their favor. Nevada recognizes that parties seeking relief in court must have standing to raise their claims. This requires that the parties have a right to enforce the claim or interest in question and that the parties have a significant interest in the litigation.

Here, MAW is a national political group, an organization. They planned to protest the memoir selected by the Board and librarians to be highlighted during the month for the "Nevada Series." The memoir is about a Nevada youth who joined a foreign terrorist group. Here, the group has a significant interest in the litigation because the book could be seen as highlighting war, which MAW is ardently against. To protest, they need a permit. Their permit was denied by a government actor (the City Manager) according to a city ordinance allowing the CM to deny the permit application based on any "political sensitivities involved in the protest that may give rise to public safety issues." Without this, they cannot exercise their first amendment right to protest (injury). The court, by overturning the denial of the permit will remedy this injury.

As to whether MAW, as an organization, has standing -- An organization has standing to sue on behalf of its members if the members would have the right to sue, the interests are relevant to the organization's purpose, and neither the claim nor relief requires that the individual members participate.

The members of the group would have the right to sue regarding an ordinance that improperly restricts their right to protest, as protected by the first amendment. The interests here are relevant to the organization's purpose. The purpose is to speak up against war, a political issue. The ordinance restricts this purpose. Lastly, it is unlikely that a member of MAW would have to individually be involved in this case for relief to be granted. MAW has standing.

Ripeness: A court generally cannot grant pre-enforcement review of a statute or regulation. In analyzing ripeness, courts consider (1) the injury to the plaintiff without pre-enforcement review and (2) the fitness of the issues and the record for judicial review. Here, this is not pre-enforcement. MAW has been injured by the denial of their permit. This case is ripe.

Mootness: A real, live controversy must exist at all stages of review, not merely when the complaint is filed. If a true controversy no longer exists, the court will dismiss the complaint as moot. A case becomes moot when a party cannot be affected by a challenged statute. The ordinance is still being applied against MAW because they have not yet received a permit. This case is not moot.

To the extent that the permit is granted before the case concludes, this case would not be moot because it would be harm capable of repetition but evades review. The City Manager could deny more permits in the future just to grant them when he is sued.

Ordinance: A designated public forum is public property not traditionally held open to speech activities, but which the gov. has thrown open on a temporary or permanent basis. The gov. may regulate speech in public forums and designated public forums with content-neutral time, place, and manner regulations if the regulation leaves open ample alternative channels of communication.

Most public property is considered to be a limited public forum, such as a public library sometimes used to host speakers. The government may regulate limited public forums so long as the regulation is viewpoint neutral and reasonably related to

a legitimate government interest.

Here, the public library requires a group of 10 or more to obtain a permit before protesting in the library. Therefore, it is likely a designated public forum because the gov employees hold it open for protests and speech activities. The permit is content and viewpoint neutral and is a valid time, place, manner restriction. It does not restrict the topics that can be protested, merely that they need to have a permit. It merely requires groups of a certain number to exercise in a certain manner, getting a permit. Further, there are ample alternative channels such as limiting your group to less than 10 people or protesting outside of the Library.

To the extent this is a limited public forum, the government regulation is viewpoint neutral as discussed above and reasonably related to a legitimate government interest of maintaining a quiet, controlled space in the public library for people to enjoy because it gives the library more notice of the crowds. Therefore, the library can make arrangements to accommodate a large group of people.

Permit: A municipality may not adopt a regulation that gives officials broad discretion over speech issues. If a statute gives licensing officials unbridled discretion, it is void on its face. Here, the permit allows the CM to deny based on "political sensitivities involved in the protest that may give rise to public safety issues." This is not unbridled discretion, so the permitting process is valid on its face.

However, the City Manager was able to deny the permit based on "staffing shortages," so there is evidence that, in practice, the Manager actually has unbridled discretion. This is further evidenced by the fact that he states no threat of public safety issues. If that is the case, the ordinance is invalid on its face and MAW need not even apply.

Vagueness and Overbreadth: A restriction on free speech will be unconstitutional if it is vague or overbroad. A statute is vague if a reasonable person cannot tell what activity or conduct the statute permits or prohibits.

Here, the ordinance is likely vague because "public safety issues" is not clear enough to determine what counts as an issue. Further, it may chill speech because people are not sure what counts as a public safety issue. However, the ordinance is more likely to be overbroad.

A statute is overbroad if it regulates substantially more speech than necessary. Here, the Library is presumably attempting to regulate speech that may incite lawless action or harm to people at the library. However, it is too broad as written because it includes any political "sensitivities" that may lead to public safety issues. This ordinance is likely unconstitutionally broad.

2. Memoir author's lawsuit against Board of Silver Library banning his book

Standing: [Rule incorporated above]. The memoir author has a concrete injury, the banning of his book from the library. The book was banned by the Board of a public library. This reduces readership and potential sales of his memoir stemming from people reading the book in the library. Thus, he is significantly interested in his book being put back in the library. This court has the ability to redress his injuries by removing the ban on the book. The author has standing.

Ripeness: The book was banned, this is not pre-enforcement review. The case is ripe.

Mootness: The book ban is still in place. This case is not moot.

Free Speech: The first amendment provides that Congress shall not abridge free speech. this applies to the states through incorporation by the 14th amendment. The first amendment generally prohibits the government from restricting the content of speech unless the government can prove that the restriction is necessary to achieve a compelling interest (strict scrutiny). This is a restriction on the author's free speech because it limits where his book is accessed, therefore limiting where the author can speak. As discussed below, the book ban likely fails strict scrutiny.

Substantive due process: A law that substantially burdens a fundamental right violates SDP unless the gov can satisfy strict scrutiny. The gov must prove that it is necessary to achieve a compelling government interest. A fundamental right is deeply rooted in the nation's history and tradition and is essential to the concept of ordered liberty. The right to earn a living and the right to free speech are fundamental rights.

Here, the author's book was banned from the library. This restricts both his right to earn a living and his right to free speech. The government must prove that it is necessary to achieve a compelling gov interest. The banning was to lessen media attention and limit the threats to the librarians. While these are legitimate, they are likely not compelling. Further, banning the book is not necessary to achieve these purposes. It is possible to achieve these purposes by making it clear that the librarians are not solely responsible for the selection. Further courts have upheld restrictions on speech that protect the safety of public employees. Therefore, the library could simply restrict speech in this way.

However, the right to earn a living may not be a fundamental right because it is an economic right and is, therefore, only subject to rational basis. If this is the case, then the ban must only be rationally related to a legitimate government interest. The book ban would pass rational basis because removing something that is inciting so much discourse is rationally related to maintaining a peaceful, controlled library environment, a legitimate government interest.

EPC: The equal protection clause applies to state governments and protects against discrimination involving suspect or quasi-suspect classes. Here, the guideline states that no book will be chosen and kept in circulation if it is likely to insult and racial, ethnic, religious, or gender-oriented groups. Here, the book was banned for insulting gender-oriented groups.

Gender is a quasi-suspect class and any classifications on the basis of gender must satisfy intermediate scrutiny. Therefore, the gov must prove that the law is substantially related to achieve an important government interest. Discrimination on the basis of gender will be upheld only if there is an exceedingly persuasive justification. The book was banned on this basis because of intense media attention and several death threats sent to the librarians. While protecting the librarians may be an important government interest, it is likely not exceedingly persuasive justification. Particularly because it was only threats and there has been no action. Media attention will not be an important interest because of the freedom of press.

If the court decides that this is not an exceedingly persuasive justification, the ban will be struck down because the basis, insulting a gender-oriented group, is unconstitutional.

Racial and ethnic groups: Racial and ethnic groups are subject to strict scrutiny, so the government must show that it is necessary to achieve a compelling interest. The government is unlikely to be able to do so. The interest in the ordinance is to prevent upsetting people of a certain race. This is not a compelling reason to restrict speech and this section of the guideline is unconstitutional.

Religion: Religious beliefs are not a suspect or quasi-suspect class. Therefore, this restriction is subject only to rational basis. A challenger must prove that the government action is not rationally related to a legitimate government interest. Almost all actions survive rational basis. Here, not upsetting people of a certain religion is rationally related to the legitimate purpose of maintaining a welcoming library for people of all religions. Therefore, it is likely a permissible restriction on speech.

Vague: That a book is "likely to insult" particular groups is overly vague. It is unclear how likely the book must be to insult the groups, or what would be considered an insult. This could chill speech, particularly with people hoping to have a book in this library or featured in the Nevada series, because authors are unsure what could be "likely" to insult a group.

3. Librarian's lawsuit against the Board of Silver Library challenging her termination

Standing: [Rule incorporated above]. The librarian was fired by the Board of a public library for speaking up about a political issue. Her injury is the loss of her job and she has a significant interest in maintaining employment while exercising her right to free speech. The court, by requiring the library to hire her back, has the ability to redress the harm to the librarian.

Ripeness: The librarian lost her job, this case is ripe. This is not pre-enforcement review.

Mootness: The library has not hired the librarian back, so her injury is still ongoing. This case is not moot.

Procedural Due Process: The Due Process clause of the 14th amendment provides that the government shall not take a person's life, liberty, or property without due process of law. The 14th amendment only applies to state action, including gov agencies and officials acting under the color of state law. Unless the private individual was (1) performing exclusively public functions, or (2) took actions with significant state involvement, the individual's action is not unconstitutional.

State action: Here, the librarian was fired by the Board of Trustees for a Public library. This will likely be considered state action because a public library is funded by government money. However, to the extent that Board action is considered an individual's action, they are performing exclusively public functions - managing a publicly funded library for the enjoyment of the public.

Process: DP generally requires notice and a hearing before deprivation. The type of process that is required will be determined by balancing the importance of the P's interest, the value of procedural safeguards to that interest, and the interest in government efficiency.

A person has a property interest in their government job whenever they have a legitimate entitlement to a continued enjoyment of the job or benefit. Here, there are no facts to suggest the librarian has a property interest in her job. She is not under a contract and, assuming that she is an at-will employee, has no reason to expect the continuation of her employment.

A deprivation of liberty occurs when a person loses significant freedom of action or is denied a freedom provided by the Constitution or a statute. A person has a liberty interest in the exercise of specific rights, including free speech rights.

Here, there was likely a deprivation of liberty - the employees right to speak out against the memoir. The employee was fired for posting on her social media page an explanation of why she did not vote for the memoir and insisted every copy be burned and the ashes thrown at the author. The right to free speech is one of the most important interests in this country, so the value of procedural safeguards are also incredibly high. However, the government also has a large interest in government efficiency and can operate under different rules with restriction of certain speech (as explained below). Therefore, while she would be entitled to a pre-deprivation hearing if she were not a government employee, here, she is likely only entitled to a post-deprivation hearing. While being fired for speech is typically protected, there are different rules for government employees (such as the librarian)

Employee speech: Speech made by an employee while on the job and pursuant to their official duties may be punished. However, If the speech outside the workplace involves a matter of public concern, courts will balance the employee's rights as a citizen against the employers interest in efficient performance of public service. Specifically, the court looks for evidence of interference in efficiency. Here the speech was made on social media, outside the workplace. However, this is a matter of public concern related to her duties because it has to do with the selection of the memoir (by majority vote of the librarians and the Board). Therefore, the court will balance the employee's interest in speech with the Library's interest in maintaining a united front against protestors and standing behind their selections for the "Nevada Series." Here, the right to free speech is greater than the Library's interest because there is no evidence that her comment affected the efficiency of the Library. Further, it appears that the Library was simply punishing her for her opinion which is impermissible if it is not pursuant to official duties and is merely as a private citizen on a matter of public concern. Therefore, the employee's being fired because of the speech was impermissible because it is protected speech.

Imminent lawless action: Speech that incites imminent lawless action is unprotected by the First Amendment. The Board will argue that encouraging the throwing of ashes on the author is inciting imminent lawless action. However, this was on social media. There is little evidence that illegal conduct is likely and that the librarian intended to cause it.

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

Question 4 - Selected Answer 2

1. MAW's lawsuit against the City Manager for denying the permit

The first issue is whether there is a justiciable case or controversy.

Standing: To have standing, there must be a concrete stake in the outcome of the controversy demonstrated by an injury-in-fact caused by the government that will be remedied by a decision in the plaintiff's favor.

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.

Here, a local member of MAW applied for the permit and the City Manager denied it because of "the City's staffing shortages." MAW seeks a lawsuit against the City Manager for denying the permit. The requirements of organizational standing are not necessarily satisfied as to MAW. The local member has standing in her own right because she was denied a permit to protest, and a decision in the local member's favor will remedy the injury by allowing the protest. The interests asserted by MAW are related to the organization's purpose of opposing war, and the lawsuit does not require that each of its members participate.

One issue though is that MAW is a national organization, so it is unclear if its members other than the local member are residents of the city or have suffered injury in fact. If the other members are not residents of the city, then MAW's members have been impacted by the ordinance and/or suffered an injury in fact. Assuming its members other than the local member reside in the city, MAW would have standing to sue.

Ripeness/Mootness: In analyzing ripeness, courts consider two factors: (1) the injury the plaintiffs will suffer without pre-enforcement review; and (2) the fitness of the issues and the record for judicial review.

Here, MAW wants to protest the selection of the memoir about a Nevada youth who joined a foreign terrorist group, as part of the "Nevada Series". However, Silver Library's Board of Trustees has already banned the memoir thereby removing its selection as part of the "Nevada Series". Thus, it is arguably moot.

However, while the issue of the memoir itself is no longer an issue, the permit procedures still is. Thus, pre-enforcement review is necessary because First Amendment rights are involved. Without pre-enforcement review, the City's permitting requirement for protesting at government buildings may chill protected speech. Furthermore, an adequate record exists for judicial review because the primary question is the facial validity of the City's ordinance. Therefore, the civil action filed by MAW is still ripe.

First Amendment: The First Amendment provides, in part, that the government shall not abridge free speech, and applies to the states through incorporation by the Fourteenth Amendment. The First Amendment applies only to government action.

Here, the right to protest is a free speech issue. The City passed an ordinance requiring permits in order to protest at government buildings. The City Manager also denied the permit. Therefore, there is government action because of the City's ordinance which arguably abridges free speech.

Prior Restraint - First Amendment Free Speech: A prior restraint is an administrative system that stops speech before it occurs. Prior restraints are disfavored and must pass strict scrutiny. To survive strict scrutiny, an order must be necessary to achieve a compelling state interest. The order must also be narrowly tailored to achieve the purported goals and leave open alternative channels or methods of communication.

Here, the City will argue that the ordinance serves a compelling state interest because it seeks to protect "political sensitivities involved in the protest that may give rise to public safety issues."

However, requiring licenses or permits in order to protest are generally invalid, especially if it gives discretion for such denials to a licensing authority. The only narrow exception is if the ordinance contained procedural safeguards like prompt determination of requests for licenses and judicial review--however, neither are present here.

Fourteenth Amendment Due Process: The Due Process Clause of the Fourteenth Amendment provides that government shall not take a person's life, liberty, or property without due process of law. The type of process that is required will be determined by balancing the importance of the person's interest, the value of procedural safeguards to that interest, and the interest in government efficiency.

Here, the City denied the local member's request for permit because of "the City's staffing shortages." No due process was provided to MAW's local member to challenge the denial of her permit. The City ordinance is unconstitutional.

2. The memoir author's lawsuit against the Board of Trustees of Silver Library banning his book

Standing: (See rule above.) Here, the memoir author has standing because the ban of his book caused an injury in fact--people who could have read his book through Silver Library are no longer able to. Moreover, the ban paints the author's book in a negative light, especially after the publicity against it. The author will be remedied by a decision in its favor because people will have access to his book again through Silver Library.

Ripeness: (See rule above.) Here, the author's book was already banned. The author will continue being injured to the extent that his book is made unavailable to the public through Silver Library. Therefore, his case is ripe and pre-enforcement review is necessary.

Free Speech: (See rule above.) Here, there was state action by the Board of Trustees, who are government agents of the City of Sage. The Board of Trustees created guidelines under which books are selected for the "Nevada Series". The Board of Trustees also banned the memoir in its entirety. Therefore state action is present.

Prior Restraint - First Amendment Free Speech: A prior restraint is an administrative system that stops speech before it occurs. Prior restraints are disfavored and must pass strict scrutiny. To survive strict scrutiny, an order must be necessary to achieve a compelling state interest. The order must also be narrowly tailored to achieve the purported goals and leave open alternative channels or methods of communication.

Here, the Board of Trustees will argue that the ban was based on the guideline that the book insulted a "gender-oriented group" like MAW. However, the author will contend that there is no compelling state interest in protecting gender-oriented groups from "insults". First, the concept of "gender-oriented groups" is vague and overbroad (discussed below). Second, a memoir about a Nevada youth who joined a foreign terrorist group has nothing to do with a gender--the facts do not even state if the youth in question was a male or female. This seems more like a pretext to unconstitutionally chill free speech. Further, even if one assumes that the City's interest was compelling, the guidelines are not narrowly tailored to achieve the City's goal. The memoir could be made available with a warning or even outside of the "Nevada Series" to provide an alternate channel.

Based on the above, the author could seek an injunction to overturn the ban on the memoir.

Content Based: the author could also challenge the guidelines as an impermissible content-based restriction on speech. The guidelines are content-based because it applies only when the subject matter involves topics that are "likely to insult any racial, ethnic, religious, or gender-orientated groups". As such, it would have to meet strict scrutiny, described above.

Vagueness/Overbreadth: the author can also argue that the guidelines are overbroad/vague. It regulates more speech than necessary, and it is unclear what exactly constitutes "likely to insult" certain groups.

3. The librarian's lawsuit against the Board of Trustees of Silver Library challenging her termination

Standing: The librarian has standing because she was fired for her social media post, thus an injury in fact is present. A decision in her favor will remedy her situation as she may be reinstated.

Ripeness: The issue is ripe because the librarian was terminated and pre-enforcement review is necessary.

First Amendment: There is state action because the librarian worked for the Library which is a government agent, and the Library terminated the librarian.

Employee Speech: The Supreme Court has held that government organizations do not have an interest in ensuring the efficient operation and administration of their organizations, and that this interest can serve as the basis for regulating the speech of employees of government organizations.

However, where a government employee, like the librarian, is speaking outside of her role in the government (the Library) and on a matter of public importance (there was intense media attention), the organization/Library's ability to regulate such speech is subject to strict scrutiny, and the organization/Library is prohibited by the First and Fourteenth Amendments from punishing the employee for such speech unless the termination/punishment is necessary to achieve a compelling interest, which is lacking here.

Fourteenth Amendment Due Process: (see rule above). Here the librarian was deprived of her life, liberty and property interests--the librarian's termination keeps her from earning a living, working her job as a librarian, and pursuing her career. She was not provided due process but was terminated summarily for behavior "unbecoming of a public employee." Thus, the librarian's due process rights were violated by her termination.

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



**JULY 2023
EXAMINATION ANSWERS**

**SELECTED APPLICANT ANSWERS
NEVADA BOARD OF BAR EXAMINERS**

QUESTION 5

Question 5 - Selected Answer 1

Lisa v. Carl:

Lisa (L) has potential claim(s) against Carl (C) for misrepresentation of fact and/or intentional misrepresentation.

Misrepresentation of Fact: A seller may be liable for misrepresentation of fact if they made a statement of material fact regarding the use or quality of a good, intending to induce the buyer to rely, and the buyer justifiably relied on the representation in making their purchase. Actual cause is evidenced by reliance.

Here, C misrepresented to L that the Beyond vehicle was a new, technologically advanced vehicle and also told her that pre-order required \$10k deposit. This was false as the facts do not indicate that the vehicle was actually technologically advanced, and the \$10k down payment was not required. C intended to induce L's reliance because he wanted her to purchase the vehicle. L did actually and justifiably rely because she furnished \$5k cash and a \$5k ring to C as a down payment. As such, There is a claim for misrepresentation of fact of a buyer.

Intentional Misrepresentation:

If Misrepresentation of fact of a buyer fails, L can pursue a claim for regular intentional misrepresentation. The prima facie case for intentional misrepresentation requires a misrepresentation of material fact, scienter, intent to induce Plaintiff to rely on the representation, causation (actual reliance), justifiable reliance, and damages. See above analysis on C's intentional misrepresentation, intent to induce L to pre-order the vehicle, and L's actual and justifiable reliance. Scienter is knowledge of falsity or lack of basis for the statement. Here, C had no basis for the statement. As such, subject to suffering damages, L has a claim for intentional misrepresentation.

Damages: L suffered damages because she disposed herself of \$10k value. L is entitled to reimbursement plus interest, but may not obtain duplicative damages (which she may if she also succeeds in her conversion claim).

Trespass to Chattels/Conversion:

Lisa (L) has a claim against Carl (C) for trespass to chattels. Depending on the court's finding of the seriousness of C's interference with L's possessory rights, the trespass to chattel claim may ripen into a claim for conversion. To establish a prima facie case for trespass to chattels, there must be an intentional act by defendant, that interferes with plaintiff's right of possession in the chattel, causation of the interference by defendant, and damages. To satisfy tortious intent, the defendant must intend to bring about the specific consequences or have knowledge to a substantial certainty that the consequences will result.

Before going further in analysis, we must note that Beyond was not accepting any money for pre-orders of vehicles, and therefore, anything C took from L for alleged compensation for the pre-order was wrongful. C never expressed intent to give the funds or ring to Beyond and therefore had to of intended to keep the chattel for himself. Here, C has the requisite intent for this tort because he intentionally dispossessed L of her money and the ring and intended to keep both for himself. Such a dispossession interfered with L's right of possession in the money and the ring because she did not even have to give that money up in order to pre-order the vehicle to begin with. She therefore had a right to retain possession of the money and the ring. Plaintiff must also prove causation and damages. Here, the facts tell us that C alone caused L's dispossession of the money and the ring. L has suffered damages because, even if the ring is intact and the money has not been spent, damages to L's possessory right alone in those chattels may be recovered.

Trespass to chattels may evolve into conversion if the interference with L's right to possession was so serious that C must pay for the entire chattel's value. Here, C retained the money and ring for at least an entire year. With regard to the money, C likely spent it, which amounts to conversion. Even if he did not, as discussed above, interference with the possessory right alone gives rise to damages. This is a substantial interference with L's right to possess the money. With regard to the ring, dispossessing L of her diamond ring for an entire year is a serious and substantial interference with her possessory right in it. As such, L may be able to heighten the case for trespass to chattels into conversion.

Damages: Depending on the degree of damage to the ring, C must either return the ring or pay the fair market value of it, C must fully reimburse L for the money he stole and may also be subject to paying her interest for the time she was dispossessed of it.

Lisa v. Beyond:

Beyond will not be vicariously liable to L for C's Trespass to chattel, conversion, and misrepresentations. An employer's Vicarious Liability requires that the employee was acting within the scope of their employment when they committed the tort. NV allows recovery against the employer if the tortious conduct was foreseeable within the context of employment. Here, C was acting outside the scope of his employment because Beyond specifically told him that there are no sales contracts for buyers to sign until the vehicles were in production, and that any potential buyers may pre-order without financial obligation. Thus, by lying to L about essentially all of the facts of the Beyond vehicle purchase, directly contradicting the information told to him by Beyond, C was acting outside the permissible scope of his employment - this was a substantial deviation. Further, an employee's intentional tort is generally not within the scope of employment. Trespass to chattel, conversion, and misrepresentation are all intentional torts.

Damages: L will recover no damages from Beyond.

ABC v. Carl:

ABC has a valid claim against C for interference with a business contract. The tort of interference with a business contract (K) requires existence of a valid K or business expectancy, tortfeasor's knowledge of such relationship or expectancy, intentional interference inducing a breach or termination, and damages.

Here, C was assigned simply to finalize the K between Lisa and ABC for the purchase of a vehicle. L had already negotiated a purchase price with ABC and had done everything necessary to facilitate the purchase agreement other than sign it. As such, because every detail of the agreement had been hammered out, ABC had a business expectancy in the sale of the vehicle to Lisa. C knew of the expectancy because he was assigned simply to finalize the K between Lisa and ABC - he knew or should have known that ABC had a business expectancy in Lisa purchasing the car, and he also knew or should have known as an employee that he should not interfere with such an expectancy. C intentionally interfered with the relationship by telling L about the Beyond vehicle and inducing her to retract the car deal with ABC. Lisa also told ABC on the phone that she would have bought a vehicle from them but for C's lies and theft. This directly evidences that C intentionally interfered with the business expectancy. ABC also suffered damages (discussed below). Thus, ABC has a valid claim against C for interference with a business contract.

Damages: ABC can recover consequential damages from C, namely, the expected profit from the sale to L. ABC may also recover direct, consequential, and incidental damages with proof that they have been suffered. Incidental damages would be the costs expended in trying to secure the vehicle contract with L. Consequential damages available here are ABC's lost profits from the sale.

Carl v. Lisa:

C has a Slander Per Se claim against L. C's general defamation case against L will fail.

Defamation:

Defamation requires a defamatory statement by defendant, concerning the plaintiff, communicated to a 3rd person, falsity of the statement, damages to plaintiff's reputation, and fault on the defendant's part.

Here, L made a defamatory statement about C to ABC, a 3rd person. The statement that C is a pedophile was defamatory because it concerns C and is false. There are no facts to suggest that C is a pedophile. Allegations of pedophilia are likely to be inherently damaging to C's reputation because it would lead a reasonable person to have disfavored views of them. If C's reputation was damaged, it was entirely L's fault for making such a heinous statement. Although, this claim likely fails because the facts do not indicate that C suffered any damages from L's statement. Since this is slander, C would have to prove special damages (pecuniary loss). This might be the case if C were fired from his job for being a pedophile.

Damages for Defamation: None.

Slander Per Se:

Defamation is slander per se if it states that plaintiff has committed a crime of moral turpitude, states that plaintiff has engaged in serious sexual misconduct, or states that plaintiff has a loathsome disease. Here, L's statement that C is a pedophile meets both (if not all) of these tests. Pedophilia is a crime of moral turpitude because it involves sex with children - that absolutely reflects terribly on C's reputation. Second, pedophilia is serious sexual misconduct because, again, it involves sex with children. Third, depending on whether the fact finder believes pedophilia is a disease, pedophilia may be considered a loathsome disease as well, again, because it involves sex with children. As such, C can recover from L for slander per se (defamation).

Damages: Damages are presumed in slander per se cases.

C cannot recover for defamation or slander per se from L for her saying her stole and lied because C did in fact do both of those things, therefore there is no falsity.

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

Question 5 - Selected Answer 2

1) Lisa (L) against Carl (C) tort claims & type of damages:

Trespass to Chattels/ Conversion

The issue is whether C taking the cash and ring is trespass to chattel or conversion. When evaluating if a tort is trespass to chattel or conversion, the courts will look at the duration and extent of interference, the defendant's intent to assert a right inconsistent with the rightful possessor, the defendant's good faith, the expense or inconvenience to the plaintiff and the extent of harm. The more extreme the likelier the court will find for conversion.

Here, the duration of the taking was one about a year with permission, but it is unclear how long C refused to return the ring and cash. The extent was permitted, but then not returned when asked as explained previously. C's intent does not seem in good faith from the beginning, since Beyond did not require a financial obligation to pre-order the vehicle. This was C's doing and he did so fraudulently. The total expense was \$10k before calculating time as money. The court will likely find that this meets the elements of conversion.

Intentional Misrepresentation

The issue is whether C intentionally misrepresented himself to L. Intentional misrepresentation is a fraud that requires 6 elements.

1. A *false representation* about a material fact which can involve misleading statements that can arise through concealing a material fact. There is generally no duty to disclose material facts to other parties unless there is a fiduciary relationship, the other party is likely to be misled by the statements the defendant made about a basis of fact in transaction, and custom suggests disclosure should be made.

Here, C had a fiduciary duty to L as he was trying to get her to pre-order a vehicle. Beyond did not require a financial deposit, which C lied about and told L she needed. She was misled by this statement and gave him \$5k in cash and the ring in response to his misleading statement. Custom suggests you not lie when getting into a contract with someone. This element is met.

2. Defendant has *scienter*, or knows the representation is false or acted with reckless disregard for falsehood. Here, C is the one who made up that the money was needed as a deposit. He fabricated the falsehood and knew that it was not true. His statement directly contradicted the guidance provided by ABC. This element is met.

3. *Intent*. The defendant must intend to induce the plaintiff to act in reliance on the misrepresentation. Here, C was counting on L giving him the valuables in reliance of him telling her that she needed to give a financial deposit for the pre-order of the vehicle. This element is met.

4. *Causation*. The misrepresentation must have caused the plaintiff to act to their detriment. Here, L gave C the cash and ring to her detriment. She did not have to give those items to C in order to fulfill ABC's requirement. This element is met.

5. *Justifiable Reliance*. The reliance is not justifiable if the facts are obviously false or clear that the defendant was stating an opinion. This is not the case here, as L was under the impression that she was not able to pre-order the vehicle unless she gave the valuables as collateral. This element is met.

6. *Damages*. The plaintiff must prove actual pecuniary loss, nominal damages are not available. L lost the cash and the ring due to C's fraud. This element is met.

L can pursue intentional misrepresentation against C.

Damages

The court can award compensatory damages to compensate for the harm. This would include any expectation damages, consequential damages or incidental damages. The court may also impose punitive damages for the tort. These damages are meant to punish the defendant engaged in serious misconduct with an improper state of mind. In NV the Plaintiff has the burden of proving by clear and convincing evidence that the defendant has been guilty of Oppression, Fraud, or Malice. Although the constitutional limits are 1:9 for compensatory to punitive, in NV the punitive damages can be no more than 3 times if the compensatory damages are more than \$100k, and no more than \$300k if they are less than \$100k. The damages would be the about \$10k total, \$5k cash and possibly any interest that it could have garnered, and the return of the ring.

2) Lisa (L) against Beyond Inc. (B) tort claims & type of damages:

Respondeat Superior

An employer can be held vicariously liable for the negligence of their employee if it occurred within the scope of their employment. This is different than the employer's own negligence. For intentional torts committed by their employees, employers are generally not liable. The exception is when the employee's conduct is within the scope of employment.

Here, Beyond will argue that the intentional tort of conversion or fraud is not something that they should be liable for. L will argue that the fraud was committed within the scope of C's employment as he was going over the contract to pre-order the vehicle with Beyond. This distinction will be up to the trier of fact to determine.

Torts and Independent contractor or business partner

Employers are generally not liable for torts committed by independent contractors, but they are liable for torts committed by business partners within the scope of their business purpose.

Here, the distinction of how Beyond categorizes their sales representatives may come into play. Even if they categorize C as an independent contractor, L may still be able to hold them liable.

Apparent or general agent doctrine says that an independent contractor (IC) is treated as an employee (and therefore the employer is liable) if the injured person accepted the IC's services based on reasonable belief the IC was an employee, based on manifestations from the putative employer, and the IC's negligence is a factual cause of harm to one who receives the services, and such harm is within the scope of liability.

Here, C represented himself as an agent of Beyond (not sure under what term specifically) but he had marketing materials from Beyond that he shared with L. This could have made L reasonably believe that C was an employee based on the Beyond marketing materials that he had.

Joint and several

L may be able to hold Beyond jointly and severally liable for the damages she incurred from C. See analysis below for those damages.

3) ABC against Carl (C) tort claims & type of damages:

Intentional interference with a contract

The elements of this are if there is a valid contract between the plaintiff and the 3d party, the defendant knew of the contractual relationship, the defendant intentionally interfered with the contract, resulting in a breach, and the breach caused damages to the plaintiff.

Here, although there was no written and signed contract yet, L and the manager had come to an agreement as to an acceptable price. When C was left alone with L to sign the sales contract, he gave her the marketing materials from Beyond and convinced her to meet with him and discuss the new technologically advanced vehicle. This convinced L to leave

without signing the sales contract with ABC and without purchasing a vehicle at that time. (She must not have needed a car very badly, if she could wait over a year without getting a car).

Alternately, since the contract had not been signed yet, C may be liable for interference with a prospective economic advantage. This is when the defendant intentionally interferes with a prospective business relationship or benefit between the plaintiff and the 3d party absent a valid contract. This would apply in this scenario since L and the manager had agreed on the price but she had not yet signed a contract. The elements for this are the same as interference with a contract, but without a contract and the conduct must be wrongful. C's conduct here is wrongful, since he owed a duty of loyalty to his employer to not usurp a business opportunity, not to take secret profits, and not to compete in a business with the principal.

Breach of Principal Agent duty

An agent owes fiduciary duties to their principal. These include the duty to exercise reasonable care, the duty to obey reasonable instructions, the duty of loyalty, which includes not usurping a business opportunity, not taking secret profits, and not competing in a business with the principal.

Here, C broke most of his fiduciary duties to ABC. He did not obey the reasonable instruction to have L sign the contract. He usurped L's business, took the profits (in violation to his duty to ABC and Beyond), and entered into a business directly competing with ABC.

4) Carl (C) against Lisa (L) tort claims & type of damages:

Defamation/Libel

The issue is whether L defamed C when she sent ABC's manager the email. Defamation by words written, printed, or otherwise recorded in permanent form is libel. To be successful in a defamation suit, the plaintiff must prove that the defendant made a defamatory statement, that is of and concerning the plaintiff, that the statement was communicated to a 3d party who understood its defamatory nature, and that damage to plaintiff's reputation resulted. In NV, defamation is a false and defamatory statement made by the defendant concerning the plaintiff, in an unprivileged publication of a statement to a 3d party, a level of fault at least negligence, and actual or presumed damages.

The email was written and as we know the emails never go away no matter how many servers are broken.

defamatory language

A defamatory statement is one where the language diminishes respect, esteem, or goodwill toward the plaintiff, or deters others from associating with the plaintiff. The defamatory statement must be false to be actionable, and an opinion, which implies a basis in fact is not actionable.

Here, L made a statement to ABC manager saying that C was an employee who was a lying, stealing, and a pedophile. Lying and stealing in this case can be seen as L's opinion based on her interaction with C and not necessarily a false statement. However, calling someone a pedophile will definitively diminish respect, esteem, or goodwill toward that person, it will also deter others from associating with that person. Even if the facts are silent as to the repercussions that C suffered as a result of the language in this email, the language is on its face defamatory without evidence of its truth.

of or concerning

A reasonable person must believe the defamatory language referred to this particular plaintiff.

Here, L makes it very clear that she is referring to C, as she mentions him before the defamatory language and states that he is an employee of ABC after the language. There is little to no doubt that L is referring to C with this language.

Publication

The language must be intentionally or negligently communicated to a 3d party. A person who repeats the defamatory statement may be liable for defamation as well.

Here, the language was communicated to ABC's manager via email. Unless the email was lost and the manager never received it, the language has been published. If the manager repeats that C is a pedophile then the manager can also be liable for defamation.

It is unclear if C suffered any damage to his reputation because of this defamatory language, but NV allows presumed damages. Having someone email your boss and call you a pedophile will presumably incur some kind of damages.

Private figure

When the defamatory language concerns a private figure, and the matter is one of public concern, the plaintiff must prove the statement false and that the person who made the statement was negligent w/ respect to its falsehood, or that they should have known it was false. When the matter is one of private concern, it is unclear whether constitutional limitations apply, since many states apply the same requirement for the plaintiff to prove negligence.

Since C is a private individual and not a public figure, C must prove that the statement is false and that L was negligent with respect to its falsehood, or should have known that the statement was false. Unless L has evidence to accuse C of being a pedophile, this may be proven relatively easily given that L may be holding a grudge against C.

Negligence

If C must prove that L was negligent in making her false statement about him. He will have to prove the four elements of negligence: duty, breach, causation, and damages.

Slander per se

Although slander is spoken words, and email is considered libel. C may be able to pursue slander per se. Slander per se is when the defamatory statement accuses the plaintiff of committing a crime among others. Pedophilia is a serious crime and this accusation would fall under the slander per se definitions.

Damages

The damages are measured by the loss of the bargain or expectancy interest or out of pocket losses that the defamatory statement may have caused.

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



**JULY 2023
EXAMINATION ANSWERS**

**SELECTED APPLICANT ANSWERS
NEVADA BOARD OF BAR EXAMINERS**

QUESTION 6

Question 6 - Selected Answer 1

Brad could be charged with and convicted of the following: 3 counts of conspiracy to commit burglary/robbery/larceny, possibly 3 counts of burglary, 3 counts of larceny, 2 counts of robbery, 1 count of false imprisonment through accomplice liability, 2 counts of batter (one through accomplice liability), and 1 count of assault. Brad could assert defenses, as discussed below, but they will likely not be successful with any of them.

Accomplice Liability: a person may be liable as an accomplice if, with the intent to assist the principal and that a crime is committed, the person aids, counsels, or encourages the principal before or during the commission of the offense. An accomplice is liable for crimes committed or counseled as well as for crimes foreseeably arising from the underlying offense. Accomplice liability depends on the intent to commit the crime. The elements of accomplice liability are (1) intent to promote or facilitate the commission of an offense by the other, (2) solicit request, command, encourage, or intentionally aid another to engage in criminal conduct, (3) the fact that the principal is not convicted or cannot be convicted is no defense, and (4) liability for the crime itself and all other foreseeable crimes.

Here, Brad could be convicted for any of the below crimes under a theory of accomplice liability.

- (1) Brad had the intent to promote or facilitate the commission of any of these crimes, as he agreed on all three occasions to commit the crimes with Anthony.
- (2) Brad encouraged and aided Anthony in these crimes, by going with him to the houses, and taking items from all three houses and further harming individuals inside the houses, which is criminal conduct.
- (3) regardless of Anthony being charged or convicted, Brad will still be held liable.
- (4) this element will be discussed below with each specific crime. As shown below, Brad is liable for each crime.

Conspiracy: conspiracy at common law is an agreement between two or more persons to commit a crime and requires intent to agree and intent to achieve the objective of the agreement. at common law, there must be an overt act in furtherance of the conspiracy, but NV does not require this. There must also be an outcome that was the natural and probable consequence of the conspiracy, foreseeable.

- (1) agreement to commit the crime: both Brad and Anthony agreed to commit the crime of burglary/robbery/larceny at a minimum. with only the facts we have in front of us, the crimes in question are burglary, robbery, and larceny, as Brad and Anthony discussed breaking into someone else's home to steal money or other items from those homes.
- (2) intent to commit the crime: Brad intended to commit the crime, as he agreed to commit the underlying crime(s) and showing up at the homes to commit the crimes.
- (3) overt act: although not required in NV, at common law, Brad did commit an overt act, but going to these homes in furtherance of committing the crime of burglary/robbery/larceny at a minimum.

Therefore, Brad meets all the elements of conspiracy for the underlying crimes of burglary, robbery, and larceny.

Burglary: Burglary is the breaking and entering of a dwelling at night with the intent to commit a felony therein. Here, Brad did break into the homes of the Millers, the Smiths, and the Goldbergs, as he was not an invited guest, and he unlawfully entered into the dwelling of another. Next, Brad at the intent to commit a felony within, as he had agreed to and intended to take several items from each of the homes which he did. He took several diamonds and laptops from the Millers, several tvs and tablets from the Smiths, and several diamond necklaces and bracelets from the Goldbergs. However, without more facts, we do not know if this was done at night, which is a requirement for burglary. If not done at night, Brad cannot be convicted of burglary.

Larceny: Larceny is the trespassory taking and carrying away of the property of another with the intent to permanently deprive. Here, Brad, at a minimum, trespassed into the homes of the Millers, Smiths, and Goldbergs, as there is no evidence that he was invited into their homes, and he entered into them without permission. Additionally, Brad took several diamonds and laptops from the Millers, several tvs and tablets from the Smiths, and several diamond necklaces and bracelets from the Goldbergs. There is no evidence that Brad ever intended to give these items back to their respective owners. Therefore, Brad can be convicted of Larceny against the Millers, the Smiths, and the Goldbergs.

Robbery: Robbery is the trespassory taking and carrying away of property belonging to another by force or threat of force with the intent to permanently deprive. Brad, at a minimum, trespassed into the homes of the Smiths and Goldbergs, as

there is no evidence that he was invited into their homes, and he entered into them without permission. Here, Brad, while attempting to steal from the Smiths, got into a physical altercation with Mr. Smith, where he repeatedly punched and kicked Mr. Smith, then left the house with several TVs and tablets. Brad also, while attempting to steal from the Goldbergs, Anthony slapped Mrs. Goldberg and tied her hands with a rope, while Brad took several diamond necklaces and bracelets. This is considered force, or threat of force, and therefore meets the element of robbery. There is no evidence that Brad ever intended to give these items back to their respective owners. There is no evidence that any force was used on the Millers, as they did not come home during the course of the crime like the Smiths and the Goldbergs. Thus, Brad could be convicted of robbery against the Smiths and the Goldbergs.

False Imprisonment: False imprisonment is the unlawful confinement of a person without his valid consent. Here, while attempting to steal from the Goldbergs, Anthony slapped and tied up Mrs. Goldberg, and Brad and Anthony left, leaving her tied up in the kitchen. There is no evidence that Mrs. Goldberg could leave where she was tied up at, nor is there evidence that Mrs. Goldberg consented to being tied up. Therefore, the elements of false imprisonment are met. Since Anthony was the only to tie up Mrs. Goldberg, we must discuss accomplice liability in order to hold Brad liable for false imprisonment. As discussed above, Brad will be held liable for false imprisonment through the theory of accomplice liability.

Battery: Battery is the unlawful application of force to the person of another resulting in either bodily injury or an offensive touching. Aggravated battery is when a deadly weapon is used, serious bodily injury is caused, or the victim is a child, woman, or police officer. Here, while attempting to steal from the Smiths, Brad and Mr. Smith got into an altercation, Brad repeatedly punched and kicked Mr. Smith. Without facts to tell us, we will assume that this beating resulting serious bodily injury to Mr. Smith, since he was repeatedly kicked and punched. Therefore, Brad unlawfully touched Mr. Smith, resulting in serious bodily injury. During the attempt to steal from the Goldbergs, Anthony slapped Mrs. Goldberg, and tied her up. As discussed above, we will assume that Mrs. Goldberg did not consent to this. This is an unlawful application of force against Mrs. Goldberg, and while a mere slap may not cause bodily injury, a reasonable person would find a slap to be offensive touching. Therefore, there was battery against Mrs. Goldberg. Since Anthony committed this batter and not Brad, we must discuss accomplice liability in order to hold Brad liable for this battery. As discussed above, Brad will be held liable for the battery against Mrs. Goldberg under accomplice liability.

Assault: Assault is an attempt to commit a battery, or the intentional creation of a reasonable apprehension in the mind of the victim of imminent bodily harm. While attempting to steal from the Smiths, as discussed above, Brad will be held liable for battery on Mr. Smith. In these facts, Mrs. Smith was crying and hiding in the corner, presumably watching all of this happen. A reasonable person would be put in imminent fear that they would likely be subjected to bodily harm, after watching someone beat their husband right in front of them. Thus, the elements of assault are met here, and Brad will be held liable for assault against Mrs. Smith.

Defenses:

-Self-Defense: a victim can use self-defense if he reasonably believes force is about to be used on him or to retain property and can be used by the original aggressor in certain circumstances. Deadly force can only be used if the victim is confronted with unlawful force and reasonably believes that he is threatened with death or great bodily harm. Here, Brad could attempt to assert self-defense against the battery involving Mr. Smith. Brad will likely assert that he hit Mr. Smith, after Mr. Smith attempted to restrain him when Mr. Smith walked in on Brad and Anthony in his home. However, Brad will not be successful since the facts state that Brad "repeatedly" punched and kicked Mr. Smith, and the Court will likely rule that that goes beyond the scope of self-defense.

-Intoxication: voluntary intoxication results in the defendant intentionally consuming alcohol and the resulting intoxication negates the existence of an element of the crime. the defense is not usually effective for general intent crimes. Here, burglary, larceny, and robbery are specific intent crimes, and thus intoxication could be used to negate the intent element of the crimes. Since Brad was only intoxicated during the crime against the Goldbergs, he can only assert this defense against the crime of burglary/larceny/robbery of the Goldbergs, and not any other crime resulting from that incident. Since this was Brad's third burglary/robbery/larceny, the Court could rule that the intoxication does not negate the intent element for this specific incident.

-Duress: Brad could assert that he committed the crimes involving the incident with the Goldbergs under duress because Anthony threatened to kill his family if he did not do it. However, Brad will have to show that this was a credible threat, and Anthony had the means to kill his family, knew who is family was, and Brad had reason to believe that Anthony would carry out this threat. Without more facts, we cannot discuss more, and therefore Brad will likely be unsuccessful in asserting this defense.

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

Question 6 - Selected Answer 2

Brad's Crimes and Defenses

1. Miller's House

Conspiracy to commit burglary and larceny- For conspiracy, there must be an agreement, with intent to agree, of an unlawful objective between two or more persons. Nevada does not require an overt act in furtherance of the conspiracy- just a substantial step. Here, Brad intentionally agreed with Anthony to break in and steal from the Millers, and they then drove to the Miller's. This is conspiracy.

Defense: Brad may try to say initially he did not agree, but he ultimately did have the intent to agree to steal with Anthony.

Burglary- in NV, burglary is unlawfully entering or remaining in a structure by day or by night, with the intent to commit a felony or certain misdemeanors (assaults, batteries, petit larceny, and false pretenses if property obtained is less than \$1.2K).

Here, Brad entered the Miller's home with the intent to commit larceny. Brad has committed burglary in Nevada.

Defenses: Brad does not have a defense for this crime.

Larceny- in Nevada, the crime of grand larceny is 1) common law larceny of property with a value of \$1.2K or more. Common law larceny is the taking of the property of another, transporting/asporting it, without consent or consent obtained by fraud, with intent to steal/not return.

Brad stole "several diamond rings, a pair of diamond earrings and two laptop computers" from the Millers. Though the facts do not state a specific dollar value for these items, it is highly likely they are valued together above \$1.2K. The facts also do not say specifically whether they did not intend to return the items, but there are no facts stating they did intend to return the items and they certainly did not obtain the permission or consent of the Millers. Brad is guilty of grand larceny.

Defense: Brad may say this is only petit larceny if the value of the items is indeed below \$1.2K

2. Smith's House

Conspiracy to commit burglary and larceny- Under the definition above, Brad agreed to steal from the Smith's as well- he specifically agreed to this and drove to the Smith's house with Anthony intending to do so- Brad has committed Conspiracy for burglary and larceny.

Defense- Brad may try to assert the defense of duress, but there is no threat against Brad's life or another life or great bodily harm if he did not do this

Burglary- on the facts and the definition of burglary above, Brad entered the Smith's house with the intent to commit larceny. It does not matter the larceny turned into a different crime as discussed below- Brad's intent to commit larceny was enough to convict him of burglary.

Defense: no defense for burglary.

Battery is the intentional unlawful application of force resulting in bodily injury or offensive touching. Nevada defines it as "unlawful and willful force." Aggravated battery may occur where serious bodily harm takes place. Here, the facts state that Brad "repeatedly punched and kicked Mr. Smith," and we don't know if this created serious bodily harm. Depending on Mr. Smith's injuries, this may be aggravated battery or simple battery.

Defense: Brad may try to assert self-defense since Mr Smith "tried to restrain" Brad prior to the altercation taking place. However, for self-defense to be justified, the defendant must be "without fault" and here Brad was in the middle of breaking into the Smiths' house and stealing from Mr. Smith. Brad will not be able to successfully raise this defense.

Robbery is the taking of personal property of another from other's person or presence by use of force or threat of imminent danger/injury with intent to permanently deprive. In NV, the threat of force does not need to be imminent, and may be against the victim's property, family, or anyone in their company at the time of the robbery. Because Brad used force against Mr. Smith while stealing from him (hitting and punching Mr. Smith), when Brad grabbed several Tv and tablets, he committed robbery against the Smiths.

Defense: Brad does not have a defense against robbery.

3. Goldberg's House

Conspiracy:- same facts as above, Brad intended and agreed to help Anthony burglarize and rob the Goldbergs and took a substantial step in doing so by going to the Goldberg's house.

Defense- Duress. Duress is the threat of imminent loss of life or great bodily harm to self or another. Because Anthony threatened to kill Brad's family if he did not go with him to burglarize the Goldberg's, Brad may successfully assert the defense of duress to conspiracy under the definition of duress.

Burglary:- same facts- Brad did enter the Goldberg's house, but it would be hard to say he had the specific intent to commit any felony or larceny due to:

Defense: Duress/Voluntary Intoxication. As above, Brad did not want to go to the Goldberg's house and was only there because Anthony threatened to kill his family. In addition, burglary is a specific intent crime which may be negated by voluntary intoxication. If Brad can assert he was too intoxicated to have the specific intent to burglarize the Goldberg's he may successfully use this defense. However, see the robbery defense analysis as to why this is unlikely.

Accomplice to Robbery:- While it was Anthony who used the force for the robbery (slapping and tying up Mrs. Goldberg), a principal's actions may be imputed to an accomplice if the accomplice aids or encourages the principal. Brad aided Anthony in robbery by then stealing jewelry after Anthony slapped and tied up Mrs. Goldberg and they left. Under the definition of robbery above, Brad is an accomplice to robbery.

Defense: Duress/Voluntary Intoxication. As above, Brad did not want to go to the Goldberg's house and was only there because Anthony threatened to kill his family. In addition, robbery is a specific intent crime which may be negated by voluntary intoxication. If Brad can assert he was too intoxicated to have the specific intent to burglarize the Goldberg's he may successfully use this defense. However, the facts state that he and Anthony both successfully broke into the Goldberg's home, and Brad had the wits to steal jewelry- it is unlikely a judge or jury would find he was too intoxicated to not have the specific intent to rob Mrs. Goldberg.

Accomplice to battery:- Brad is likely not an accomplice to battery- Anthony committed battery by slapping Mrs. Goldberg- an intentional offensive touching. However, there are no facts to state that Brad aided or encouraged Anthony specifically in the slapping, though it did occur while they were robbing Mrs. Goldberg.

However, Brad could still be charged with larceny which is a general intent crime and therefore the defense of voluntary intoxication is unavailable. Brad meets the elements of larceny above- whether petit or grand depending on the amount of jewelry/quality stolen from the Goldbergs.

Torts and Anthony's crimes not discussed per the prompt of discussing specifically Brad's crimes only.

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



**JULY 2023
EXAMINATION ANSWERS**

**SELECTED APPLICANT ANSWERS
NEVADA BOARD OF BAR EXAMINERS**

Nevada Performance Test – 1

Performance Test 1 - Selected Answer 1

To: Senior Partner

From: New Associate

Re: *FirstBank Nevada vs. Linda Swanson* - Foreclosure Matter

Date: July 27, 2023

Introduction

The purpose of this memo is to answer your questions related to the *First Bank v. Swanson* matter, in anticipation of your meeting with Mr. Stewart tomorrow afternoon.

I. Priority of FirstBank's Deed of Trust

Every document conveying or affecting real property must be recorded with the office of the recorder in the county in order to give notice to subsequent purchasers. NRS 111.315. Additionally, documents conveying or affecting real property must be recorded with the Secretary of State. NRS 111.320. All conveyances of real property that are not recorded shall be void against subsequent purchasers of the same property, when the subsequent purchaser's own conveyance is first duly recorded. NRS 111.325.

Here, James and Mary signed leases, which are "documents affecting real property." As such, their leases must be recorded with the recorder in the county and with the Secretary of State. However, neither recorded their loan. FirstBank entered into the Loan Agreement ("Loan") with Linda Swanson ("Swanson") and promptly and properly recorded the Deed of Trust with the Clark County Recorder. FirstBank had no notice of the lease agreements between Swanson and Mary or James. As such, Mary and James' leases are void against the FirstBank's recorded interest. FirstBank's security has higher priority than either the lease with Mary or James.

II. Survival of Junior Interests

Holders of a secured promissory note have two remedies: A suit on the note (a "judicial foreclosure" or by a sale of the land (called a "non-judicial foreclosure" or a "power of sale foreclosure"). See *McMillan v United Mortgage Co.*, 1966 (quotations added). Relying on Ms. Brown, attorney for FirstBank, a judicial foreclosure provides more flexibility than a non-judicial foreclosure when there are Junior Interests that the mortgage does not want to eliminate. She claims a mortgagee may elect to not include the holder of a junior interest in the judicial foreclosure action, which allows the junior interest to survive the judicial foreclosure action. I am unable to support her findings under state statute or provided legal authority.

As such, if FirstBank chooses to use a judicial foreclosure, it is my recommendation that FirstBank name Mary as a defendant in the action. FirstBank should choose not to name James as a defendant, but FirstBank should renegotiate a lease agreement with James regardless of the outcome of the judicial foreclosure, in the event that Ms. Brown is incorrect.

III. Effect of the One Action Rule Upon Judicial and Non-Judicial Disclosures

FirstBank can avoid the One Action Rule if it chooses to forego on pursuing foreclosure of the Deed of Trust

The One Action Rule states that there may only be one action for the recovery of any debt or enforcement of any right secured by mortgage upon real estate. See *McMillan*. The One Action Rule applies to deeds of trust as well as mortgages. See *Keever v. Nicholas Beers Co.*, 1980 citing *McMillan*. An "action," as used in the One Action Rule, does not include a proceeding "for the exercise of a power of sale pursuant to NRS 107.080. See NRS 40.430(6)(e). Any transfer of real property to secure the performance of an obligation of debt creates a power of sale upon the trustee which may be exercised after breach. See NRS 107.080.

Here, the promissory note has power of sale language pursuant to NRS 107.080. As such, any action used to exercise the power of sale is not included under the definition of "action" under the One Action Rule. FirstBank counsel recommends that FirstBank forgo its right to pursue a foreclosure under the power of sale language contained in the Deed of Trust in order to avoid problems with the No Action Rule. That is inadvisable. Even if FirstBank chooses to pursue foreclosure under the Deed of Trust, any action doing so is not considered an "action" under the One Action Rule Statute. In conclusion, FirstBank will not have any issues with the No Action Rule if it *does* decide to foreclose; if FirstBank chooses *not* to foreclose, it certainly won't have any issue with the No Action Rule.

If Swanson raises the One Action Rule as an affirmative defense, FirstBank is not precluded from proceeding with its lawsuit

The No Action Rule must be raised by motion as an affirmative defense. See NRS 40.435(2). The affirmative defense must be raised before the entry of final judgment or the defense is waived in that proceeding. See NRS 40.435(2) & (3). The debtor may not waive the One Action Rule as a defense within a "document relating to the sale of real property." See *Hyman v. Kelly*, citing NRS 40.453(1).

Here, if FirstBank chooses to bring an action against Swanson for payment of the Loan, Swanson may choose to file a motion using the One Action Rule as an affirmative defense. However, the burden is upon Swanson to file the motion; the affirmative defense is not presumed. In conclusion, FirstBank is not precluded from proceeding with its lawsuit.

FirstBank may file a deficiency lawsuit to recover the remaining balance of the unpaid loan.

The One Action Rule states that there may only be one action for the recovery of any debt or enforcement of any right secured by mortgage upon real estate. See *McMillan*. The One Action Rule applies to deeds of trust as well as mortgages. See *Keever v. Nicholas Beers Co.*, 1980 citing *McMillan*. An "action," as used in the One Action Rule, does not include a proceeding "for the exercise of a power of sale pursuant to NRS 107.080. See NRS 40.430(6)(e). Any transfer of real property to secure the performance of an obligation of debt creates a power of sale upon the trustee which may be exercised after breach. See NRS 107.080.

Here, if FirstBank chooses to proceed with a non-judicial foreclosure, it is not barred from bringing an action to recover the difference under the No Action Rule. As stated above, Swanson must assert the No Action Rule defense via motion before judgment is entered. In conclusion, because the One Action Rule does not define a power of sale transaction as an "action," FirstBank may bring suit to be fully repaid for the loan.

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

Performance Test 1 - Selected Answer 2

To: Senior Partner

From: New Associate

Re: *FirstBank Nevada v. Linda Swanson* - Foreclosure Matter Memo

Date: July 27, 2023

Memorandum

Introduction

Thank you for allowing me to review the FirstBank Nevada's ("FB") file and provide an analysis on the legal questions presented.

It is important to note that Deed of Trust and mortgage are used interchangeably and for the purposes of this memo mean the same thing.

Please find below my analysis on the legal issues presented and conclusions on those issues. Let me know how I can be of further assistance.

Analysis

Does FB's Deed of Trust (DOT) have a higher or lower priority than James' and Mary's lease? Does this matter?

Under NRS 111.315, a conveyance of real property operates as notice to third parties and should be recorded with the state recorder, but if not recorded, is still valid and binding between the parties. Under NRS 111.320, the filing of such conveyance (recording of the conveyance) serves as notice to all persons after the time of filing, and thus subsequent purchasers and mortgagees take with notice. However, under NRS 111.325, a conveyance of real property that is not recorded is void against a subsequent bona fide purchaser of the same property if the bona fide purchaser records/files first.

Here, in April 2020, Linda Swanson ("Swanson") entered into two leases with Mary Smith ("Mary") and James Polk ("James") for the lease of office spaces in the property. Mary and James both did not record their leases with the Clark County Recorder ("Recorder"). Mary and James did not begin renovations until July 2020 and moved in during October 2020.

On June 15, FB entered into a loan agreement with a Promissory Note ("PN") secured by the Deed of Trust ("DOT") on Swanson's property. Prior to finalizing the loan on this date, FB had performed a title search that showed clear fee simple title in Swanson, no liens, encumbrances, or other interests recorded. FB also physically went to the property and there was no evidence of occupants. Swanson also did not disclose the two leases to Mary and James to FB when they closed on the loan. After the loan closing on June 15, FB properly recorded the DOT with the Recorder.

While Mary and James' leases are valid and binding between the parties under NRS 111.315, because they are unrecorded, there is no notice provided to subsequent purchasers under NRS 111.320. Further, because FB had no actual or constructive notice because of the performance of the title search, physical inspection, and no record notice due to the two leases being unrecorded and no disclosure by Swanson, FB would be a subsequent bona fide purchaser because they offered the loan in good faith and for valuable consideration for the DOT and were the first to record their interest in the property. Therefore, FB has a valid conveyance that has priority over James and Mary's leases as the two leases are void against FB.

Having a higher priority is important because when there is a foreclosure of a mortgage, which is something FB is considering, all interests in the foreclosed property can be effected. Specifically, all junior interests to the foreclosing mortgage are eliminated. Dependent on the type of foreclosure, a judicial foreclosure will provide the opportunity for a mortgagee to include junior interests in the action, while a non-judicial foreclosure will eliminate all junior interests in the mortgage. However, in both types of actions, all superior/higher priority interests are not affected. Here, because FB has priority due to being a superior interest because they were a bona fide purchaser who recorded first, they would be able to have their interest included in either foreclosure action and can determine what junior interests they want to include in the action.

If FB forecloses on the DOT, how can FB keep James' lease but end Mary's lease?

When there is a foreclosure of a mortgage, all interests in the foreclosed property that are junior in priority to the foreclosed mortgage are eliminated. Here, FB would be the mortgagee that is foreclosing and has a superior interest to both James and Mary's leases as discussed above. FB can decide between a judicial foreclosure and a non-judicial foreclosure. A judicial foreclosure provides flexibility because a mortgagee can elect not to include the holder of a junior interest in the judicial foreclosure action, which results in the property interest of that unnamed holder of junior interest not being eliminated by the foreclosure. In a non-judicial foreclosure, this flexibility is not available and all junior interests are eliminated. However, nothing precludes parties from negotiating new lease arrangements after a foreclosure.

Here, FB has two options. First, FB can institute a judicial foreclosure, and name Mary as a party with FB, but keep James unnamed. Therefore, James's lease interest would not be eliminated, but Mary's would. Also, FB can institute a non-judicial foreclosure, which would eliminate both James and Mary's lease interests. After the foreclosure, FB could negotiate a new lease arrangement with James. However, if FB is foreclosing on the DOT, then it may be easier to keep James unnamed so that his interest is not eliminated and there is no need to negotiate after the fact.

If FB does not foreclose and instead sues Swanson on the PN or voluntarily releases its DOT before starting a deficiency action against Swanson, will FB be able to avoid the One Action Rule ("OAR")?

The OAR is codified in NRS 40.430, and is defined by *Real Estate Finance Law* treatise as "in... default, the mortgagee's sole remedy is a foreclosure action and that any deficiency claims must be sought in that proceeding." The purpose is to make the creditor with a mortgage on the land to exhaust that security first before trying to reach any unmortgaged property. *McMillan v. United Mortgage* determined whether a trust deed falls under NRS 40.430. The court determined it did because following California law, a trust deed is within the statutory one-action rule relating to mortgages. The court explained there is an implied understanding between parties that land shall constitute the primary fund to secure the debt because a trust deed and mortgage are "identical." *Bank of Italy*. Therefore, the trust deed falls under the OAR.

In *Keever v. Nicholas Beers*, the court was asked to determine if the recovery on a promissory note that was secured by a trust deed on real property was barred by the OAR. The court held that the action was barred because the consent through waiver was ineffective to permit the direct suit on the promissory note. *Paramount Inc. v. Rayson* further clarified that right to have a secured creditor proceed against that security before going to the general assets of the debtor is a right under law and cannot be waived in advance. Therefore, the court in *Keever* held that the creditor must proceed first against the security unless there is a waiver due to failure to raise the constraint as an affirmative defense.

Here, although FB included in the DOT a waiver on the exhaustion of remedies, under the ruling in the *Keever* court, this waiver is invalid. Further, NRS 40.453 also bars the waiver of rights in real property documents because these waivers are against public policy and therefore unenforceable. Following the precedent of *Paramount* and *Keever*, the OAR will require FB to first proceed against the security of real property even if there is a loss of security, as the waiver was unenforceable and therefore ineffective to waive Swanson's right under NRS 40.430/the OAR.

If FB does not foreclose and sues Swanson to recover the amount due on the Loan, and Swanson does not raise the OAR as affirmative defense, is FB precluded from proceeding with its lawsuit?

In *Keever*, the court noted that while the OAR requires a creditor to proceed first against the security, the OAR is waived and the debtor does not receive the benefit of the rule if the debtor fails to raise the OAR defense as a bar to the suit on their debt. NRS 40.435 codifies this in section 3, and this was also exemplified in *Nevada Wholesale Lumber*, where debtors can waive the OAR by failing to assert it as a defense to a suit upon the underlying obligation. Further, *Hyman v. Kelly* also held that a creditor may waive the security only when a debtor does not raise the OAR as a defense, and it does not apply when a waiver of the security is made in a document relating to the sale of property.

Here, if FB does not foreclose and instead sues Swanson and she does not raise the OAR as an affirmative defense, FB is likely not precluded from proceeding with the lawsuit due to the caselaw above holding that failure to raise the OAR as an affirmative defense is an effective waiver of that rule.

If FB proceeds with a non-judicial foreclosure and there is deficiency remaining, can Swanson successfully defend the deficiency lawsuit by arguing the OAR precludes FB from pursuing a lawsuit for deficiency?

In a non-judicial foreclosure, or a power of sale foreclosure, NRS 107.080 requires that the DOT contain language authorizing the mortgagee/beneficiary to sell the property after default. Under NRS 40.430, the OAR states that in the event of default a mortgagee's sole remedy is the foreclosure action and any deficiency claims must be sought in that proceeding. However, NRS 40.430(6)(e) states that action under the OAR does not include any act for the exercise of a power of sale under NRS 107.080. NRS 107.080 states that any transfer in trust of real property secures the performance of an obligation or payment of any debt, and the power of sale given to the trustee can be exercised after the breach of the obligation for which the transfer is security.

Although the OAR in NRS 40.430 limits mortgagee's remedies to foreclosure actions, the specific language in section 6e creates an exception for power of sale actions. Here, if FB does proceed with a non-judicial foreclosure and there is deficiency remaining, although Swanson may raise the OAR defense, it would not preclude a power of sale deficiency action.

by FB because this is a specific exception to the OAR rule and is guaranteed by NRS 107.080. Therefore, FB would not be precluded from pursuing a lawsuit for deficiency after a non-judicial foreclosure under the power of sale in the DOT.

Conclusion

Thank you for the opportunity to work on this memorandum. Please contact me with further questions or research needs.

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



**JULY 2023
EXAMINATION ANSWERS**

**SELECTED APPLICANT ANSWERS
NEVADA BOARD OF BAR EXAMINERS**

Nevada Performance Test – 2

Performance Test 2 - Selected Answer 1

OFFICE MEMORANDUM

To: Melinda Crow, GRA Executive Director & Senior Attorney

From: Candidate

Subject: Motion for Attorneys' Fees in *GRA v. Pierce*

Date: July 27, 2023

III. Legal Argument

A. Legal Standard

(1) NRS 239.010 requires governmental agencies to disclose their records pursuant to a public records request in line with the Nevada Public Records Act (NPRA).

NRS 239.010 requires public records to be produced pursuant to a public records request under the Nevada Public Records Act (NPRA). The Nevada Legislature enacted the NPRA to "foster democratic principles," and "promote government transparency and accountability by facilitating public access to information regarding government activities." Public Employees' Retirement System of Nevada v. Nevada Public Policy Research Institute (citing Reno Newspapers v. Reno Gazette-Journal)

(2) Pursuant to NRS 239.011(2), a requester is entitled to attorney's fees and costs should they prevail in a matter to obtain records.

Generally, our legal system requires parties to pay their own litigation expenses, unless a statute, rule, or contract authorizes otherwise. Las Vegas Review-Journal v. Clark County Office of the Coroner/Medical Examiner. The NPRA has reserved a fee shifting statute pursuant to NRS 239.011(2) against only the government and is mandatory. Id. It entitles the prevailing record requester to recover costs and reasonable fees. See Las Vegas Review Journal and NRS 239.011(2).

B. GRA prevailed by obtaining the records requested from Everett Police Department.

NRS 239.011(2) provides in pertinent part that..

"If the requester prevails, the requester is entitled to recover his or her costs and reasonable attorney's fees in the proceeding from the governmental entity whose officer has custody of the book or record." See, Las Vegas Metropolitan Police Department v. Center for Investigative Reporting, Inc. ("LVMPD").

However, the legislature does not define "prevails." Id. In order to determine if the requesting party has "prevailed," the court should analyze the factors provided in the Las Vegas Metropolitan Police Department case. In LVMPD, the court looked to the New Jersey Supreme Court's interpretation of the catalyst theory. There, the Court held that for public policy reasons, allowing attorney's fees and costs safeguards against potential governmental abuse in denying records. Id.

In LVMPD, the court analyzed the catalyst theory under three factors. (1) When the documents were released (2) what actually triggered the documents' release and (3) whether the requester was entitled to the documents at an earlier time (citing Church of Scientology v. USPS).

Here, the Everett Police Department released the documents on June 30, 2023. See, Affidavit of Melinda Crow. GRA tried to resolve the matter before litigation and gave Everett multiple opportunities to comply with the records request. Instead, Everett and Pierce responded with excuses for their nonperformance such as that the records request was a new record, which it is not. See, Exhibit A, Memo from Randy Pierce.

On July 2nd, 2023, Pierce went on a radio interview with Sherm Lowe on the Sherm Lowe Show, and gave his reason for complying with the request.

Sherm Lowe: "I understand that you turned over the documents that the lawyers were trying to get."

Randy Pierce: "You've got that right Sherm. I don't think I should have to share our internal records that way, but once we got taken to court it was easier and better for the taxpayers to just give them the documents they wanted." See, Exhibit B, Full Transcript.

Pierce gave his reasoning for finally complying with the records request. Similarly to the case in LVMPD, it appears that the litigation triggered their release of the documents. LVMPD. Pierce finally released the records after the filing of the Writ of Mandamus. Exactly 18 days after GRA filed the Writ, Everett complied with the request.

The court in LVMPD then considered two additional factors: (1) Whether the litigation was frivolous, unreasonable, or groundless and (2) whether the requester reasonably attempted to settle the matter short of litigation by notifying the governmental agency of its grievances and giving the agency an opportunity to supply the records within a reasonable time. LVMPD.

Here, Melinda Crow, Executive Director & Senior Attorney of GRA, sent records request on March 6, 2023. See, Affidavit of Melinda Crow. On April 15th and April 20th, Melinda left telephone messages for Chief Pierce. Id. On May 16th, Melinda called Chief Pierce and he informed her that he was not required to do a search of his database. Id. Finally, after attempting to get through to Pierce on several occasions, GRA filed a Writ of Mandamus to enforce the NPRA on June 12, 2023. Id. GRA gave Everett and Pierce countless opportunities to comply with the request for almost nearly 3 months (March to June).

C. The disclosure of the records request by Everett Chief of Police, Randy Pierce does not require a new record simply because it would involve searching its database for information.

Everett Chief of Police Randy Pierce has and will likely argue that the records GRA sought would need to create a new record. Randy Pierce is correct, that he nor Everett Police Department need to create a new record to comply with the NPRA. However, he is mistaken in his contention that searching the database would require creating a new record.

In Public Employees' Retirement System of Nevada v. Nevada Policy Research Institute, the Court held that searching PERS' electronic database for existing and non-confidential information was not the creation of a new record. The Court distinguished mere searching a database in order to obtain the information requested to compile a document report from requiring an agency to compile a document or report about how the information contained in the database. Id. Here, Pierce and Everett have stated that the mere search of their database would require creating a new record. See, Exhibit A, Memo from Randy Pierce. However, that is incorrect and does not abide by the standard in Public Employees' Retirement.

The mere search of the Everett database does not require a new record and thus, was not a valid excuse in the delay of sending the requested records.

D. GRA's attorney's fees and costs are reasonable and comply with the factors set forth in *Brunzell*.

Everett S. M. Brunzell v. Golden Gate National Bank sets forth four factors in determining the reasonableness of an award of attorney's fees and costs. The factors include: (1) the qualities of the advocate; his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived.

(1) Qualities of the Advocate

Melinda Crow is senior counsel and the executive director for GRA. Melinda is licensed to practice law in Nevada and Colorado and received her J.D. from the University of Colorado. She clerked for the Colorado Supreme Court before going into private practice. While living in Colorado, she specialized in land use issues and developed an expertise in obtaining state and federal public records. She moved to Nevada in 2017 and established a new public interest law firm GRA, that has established itself as the leading law firm handling public records requests in Nevada. She has been invited to lecture attorneys, judges, journalists, and citizens interested in access. See, Affidavit of Melinda Crow.

(2) The Character of the Work to be Done

Melinda spent months trying to work with Pierce and Everett in obtaining the records without judicial relief. However, after nearly three months of failed attempts, GRA had no other avenue but to pursue judicial recourse. Moreover, Melinda Crow specializes in these types of records request with the leading law firm in Nevada. See, Affidavit of Melinda Crow.

(3) The Work Actually Performed

On March 6, 2023, Melinda reached out to Everett for records following all applicable requirements and procedures. On April 15th and 20th, she left telephone messages with no response. On May 16th, she called Pierce and spoke with him. On June 12, 2023, she drafted and filed the Writ of Mandamus in White County District Court. See, Affidavit of Melinda Crow.

(4) The Result

Melinda was finally successful in obtaining the records sought by GRA for records pertaining to seven disciplinary and medical incidents that had occurred in the Everett City Jail between December 2022 and February 2023. On June 30, 2023, GRA received 320 pages of documents responsive to the March 6th request. See, Affidavit of Melinda Crow.

As such, GRA has met all four of the *Brunzell* factors and is entitled to reasonable attorney's fees and costs in the amount of \$_____.

E. GRA's fees awarded in the past which were found to be reasonable.

In past cases, *Estrada v. Municipal Pool* (White County District Court 2022); *Blackstone v. Douglas County Medical Center* (Douglas County District Court 2022); and *Carlaw v. Regents of the State of Nevada* (Clark County District Court 2021), GRA was awarded fees in the following amounts: Senior Attorney fee at a rate of \$300 per hour; Junior Attorney fee at a rate of \$185 per hour; and Certified Paralegal at a rate of \$70 per hour.

GRA has attached a Statement of Costs and Fees for their fees incurred in preparation of requesting records and the Writ Petition. See attached as Exhibit C, Statement of Costs and Fees.

IV. Conclusion

The court should grant GRA's motion for attorney's fees and costs and award GRA fees and costs in the amount of \$_____.

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

Performance Test 2 - Selected Answer 2

TO: Melinda Crow, Government Record Advocates (GRA) Executive Director & Senior Attorney

FROM: Candidate

SUBJECT: Draft Motion for Attorneys' Fees in *GRA v. Pierce*

DATE: July 27, 2023

The following addresses the Legal Argument section you asked for me to prepare for the Motion for Attorneys' Fees in the *GRA v. Pierce* proceeding. Please let me know if you have any questions or revisions you would like me to address.

I. Legal Argument

The governing statute and case law provides that GRA should be entitled to attorneys fees and costs. These attorneys fees and costs are warranted because the fees were (a) the result of unreasonable delay, (b) judgment is not required to recover such fees, and (c) such fees and costs were reasonable under the circumstances.

a. Where a requester is met with unreasonable delay upon requests made of public record, and requester prevails, the requester is entitled to recover reasonable attorneys' fees in the proceeding.

The Nevada Public Records Act (NPRA) requires government agencies to provide nonconfidential public records within their legal custody to be available to the public. See NRS 239.010. The Nevada Supreme Court has held that the NPRA requires a state agency to *query and search* its database to *identify, retrieve, and produce* responsive records for inspection if the agency maintains public records in an electronic database. See *Public Employees' Retirement System of Nevada v. Nevada Policy Research Institute* (2018) (hereinafter "PERS"). In NPRA proceedings, the presumption is in favor of disclosure, and provisions of NPRA must be liberally construed to maximize the public's right of access (*PERS* citing *Reno Newspapers, inc. v. Gibbons*).

If the requester is met with denial or unreasonable delay upon requests made of a public books or record, and the requester prevails, the requester is entitled to "recover from the governmental entity . . . her costs and reasonable attorney's fees in the proceeding." NRS 23.011(2). Furthermore, a request that merely requires the agency to search an electronic database to produce existing records and data is not the same as searching an electronic database to compile information about information in which it contains. See *PERS*.

GRA should be awarded attorneys' fees and costs because Ms. Crow's NPRA requests from Everett Police Chief Randy Pierce were met with unreasonable delay. On March 6, 2023, Ms. Crow made an initial request for records pertaining to seven disciplinary and medical incidents that had occurred in the Everett City Jail between December 2022 and February 2023. See *Affidavit* at 5. This initial response was ignored. Ms. Crow later left two telephone messages on April 15th and April 20th, which were also met with no response. See *Affidavit* at 6.

Ms. Crow was finally able to speak with Chief Pierce on May 16th when Crow was told that Pierce had no intention on providing the requested records because doing so would require a search of his database. However, as per the ruling in *PERS*, the mere need for Chief Pierce to search his database to produce existing records does not equate to a need for the agency to compile information in which it already contains. Had the information requested included confidential information, the request would have been improper. However, the requested documents were in the custody of the Everett Police Department and did not include confidential information. This indicates that there was no reason for such a delay in Ms. Crow's NPRA request.

For these reasons, Ms. Crow's NPRA request from Everett Police Chief Randy Pierce was met with unreasonable delay and warrants GRA to be awarded attorneys fees accordingly.

b. Attorneys fees should be afforded to a requester, even in the absence a judgment, when the defendant changes behavior substantially because of pending litigation.

In LVMP, The Nevada Supreme Court resolved the issue of whether a requesting party should be rewarded attorneys fees and costs when the parties reached an agreement that afforded the requester access to the requested documents before the court entered judgment on the merits. See *Las Vegas Metro Police Dept. v. Center for Inv. Reporting, Inc.* (hereinafter "LVMP") (2020). In LVMP, the Court adopted the "catalyst theory," which permits a requester to recover attorneys fees even when litigation does not result in a judicial resolution *if the defendant change its behavior substantially because of, and in the manner sought by, the litigation.* See LVMP (citing *Graham v. DaimlerChrysler Corp.*) (emphasis added). The mere fact that government voluntarily provides documents *does not preclude* an award of attorneys fees to the requester. *Id.*

In the instant case, GRA filed a Writ of Mandamus to enforce the NPRA request in White County District Court on June 12, 2023. See *Affidavit* at 10. In response to this motion, Chief Pierce provided GRA with 320 pages of the requested documents. These documents were not provided to GRA until nearly four months after Ms. Crow's initial request on March 6th, 2023. Pierce later stated in an interview with WILX Radio on July 2nd 2023, "once we got taken to court it was easier and better for the taxpayers to just give them the documents they wanted." See *Exhibit B*. This statement clearly indicates that although Pierce was in custody of the requested documents at the time of Ms. Crow's initial request, he was not willing to release these documents until litigation commenced. Furthermore, although GRA's proceeding did not result in a judgment, case law provides that this alone does not preclude GRA from recovering reasonable attorneys' fees.

For these reasons, in light of Chief Pierce's delay in responding to Ms. Crow's requests until litigation ensued, GRA should be afforded attorneys fees despite a lack of judgment.

c. Where attorneys fees are based on the qualities of the advocate, the character of the work done, the work actually performed, and the end result is achieved, such attorneys' fees are reasonable.

GRA should be afforded attorneys fees for the NPRA request because the fees are reasonably based on the qualities of Ms. Crow, the character of Ms. Crow's work, the work she actually performed, and the end result.

The Nevada Supreme Court grappled with the issue of reasonable attorneys fees in the case of *Brunzell v. Golden Gate*. The court adopted a multi factor test in ascertaining reasonable attorneys fees which includes: (1) the qualities of the advocate; (2) the character of the work to be done; (3) the work actually performed by the lawyer; (4) and the result. See *Brunzell v. Golden Gate National Bank* (1969) (citing *Arizona case Schwartz v. Schwerin Ariz.*). Each factor is set forth below to demonstrate the reasonableness of the fees requested.

i. The qualities of Ms. Crow

Ms. Crow obtained her JD from the University of Colorado in 2010. Crow passed the Nevada bar in 2017 and has over 12-years of experience dealing with public records requests. Furthermore, Ms. Crow has even been invited to speak on her work at the annual meeting American Bar Association. See *Affidavit* at 4. These qualities clearly support the conclusion that Ms. Crow is an advocate of high quality and warrants reasonable attorneys fees accordingly.

ii. The character of the work done by GRA

GRA has been awarded attorneys' fees in three recent cases in the past involving similar requests. See *Affidavit* at 13. In each of these cases, GRA was awarded attorneys fees in the amount of \$300 per hour for Senior Attorney, \$185 per hour for Junior Attorney, and \$70 per hour for Certified Paralegal. These recent fees should support the conclusion that attorneys fees are reasonable here.

iii. The work to be done and actually performed by Ms. Crow

As discussed above, Ms. Crow has made several attempts at requesting the relevant documents. These documents were only obtained after more than three months. Ms. Crow has completed an ample amount of work to this request that was met with unjustified delay.

Conclusion

In conclusion, the relevant Nevada statutes and Case law support a finding that GRA has spent a total of \$_____ in court costs and is entitled to be awarded \$_____ in attorney's fees.

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