JULY 2018
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

QUESTION 1

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

Oscar's Conduct

1) Duty to Supervise

The first issue is whether Oscar fulfilled his duty to supervise other attorneys and members of his firm. Under the Nevada Rules of Professional Conduct, senior partners of law firms must make sure that there are internal rules in place and that each associate and member of the firm knows of the rules. Senior partners must also not direct someone to engage in conduct which violates the model rules, nor fail to take action when they know someone has and fail to correct or mitigate the consequences of such action.

Here, Oscar has been in practice for over 40 years. He hired a newly licensed attorney. He would be responsible to ensure that she knows of internal procedures designed to help her follow the model rules. The facts do not state whether or not he did this, but given the fact that he handed over his practice to a newly licensed attorney, it is likely that he may have violated the rule by entrusting all of that responsibility to a new associate.

Oscar may have violated his duty to supervise and could be held liable for some of Natalie's violations.

2) Sale of Practice

The next issue is whether Oscar's sale of his practice to Natalie violated the model rules. A lawyer may sell his practice as long as he 1) does so unequivocally in writing 2) agrees to not practice law in the area anymore and 3) notifies all clients in writing of the sale.

Here, Oscar sold his practice to Natalie. The sale was consummated in writing, and signed by both parties. Oscar also retired and there is no indication that he continued to practice law. Thus, it appears as though he did not practice law again. However, he failed to notify any of his clients of the sale of the practice, as he was required to do. Therefore, Oscar has violated the model rules because he did not notify his clients of the sale of his practice.

Oscar will be found to have violated the model rules regarding the sale of his law practice.

Natalie's Potential Violations

1) Name of the Practice

The first issue with Natalie's conduct is whether or not the name of her practice violated the model rules. In Nevada, the name of a firm must not be misleading. Firm names also must neither imply that they are connected with public offices. Any lawyer who is not licensed in Nevada must be stated in the name, and all

attorneys licensed in Nevada practicing elsewhere must also be stated. Firms must also register with the state bar, and pay a $500 annual fee for the use of their firm name.

Here, Natalie renamed the firm "Natalie and Associates, Attorneys at law." This name could be characterized as misleading because there are no other associates and the word "associates" is seen prominently in the firm name. Someone seeking legal assistence could reasonably conclude that their are multiple attorneys who could work on the case. Natalie may contend that she plans to hire associates and therefore the name is not misleading, however her use of the plural "associates" and "attorneys at law" would be misleading to a reasonable person. When Natalie does hire the associates, she must ensure that any who practice outside of Nevada are listed as such. There is also no record that Natalie registered the name with the Nevada State Bar nor paid the $500 fee.

Natalie's name for her firm is misleading and violates the rule for the names of practices.

2) Duty of Diligence

The next issue is whether or not Natalie has violated the duty of diligence. Lawyers owe their clients a duty of diligence. A lawyer must handle their caseload to ensure that they can adequately and zealously handle each case. They also must ensure that they meet the statutes of limitations and keep aprised of all deadlines until resolution of the case.

Here, Natalie inherited over 1,000 clients from Oscar. This is far too many clients to be able to adequately represent the interests of each one. Natalie has not handled her caseload and cannot give each client the diligence to which she owes.

Natalie has violated the duty of diligence to her clients.

3) Duty of Loyalty--Former Clients

The next issue is whether Natalie violated the duty of loyalty. A lawyer owes past, present, and prospective clients a duty of loyalty. As part of this duty of loyalty, a lawyer cannot represent a client if there is a concurrent conflict of interest. A concurrent conflict of interest occurs when the laywer represents multiple parties with directly adverse interests to each other in the same or substantial matter, or where there is a significant risk that the lawyer's ability to represent a client will be materially limited due to obligations owed to a third party, a former client, a present client, or a prospective client. When a conflict arises, a lawyer can obtain informed consent generally and represent the client with the adverse interest. For a present client, a lawyer may not represent another party if the other party's interests are materially adverse to those of the present client unless the prospective client and the present client give their informed consent, confiremd in writing.

Here, Natalie represented the Smiths against their neighbors the Does in an encroachment issue. The negotiations were "tough" and "contentious" and the matter was settled. Later, she stated to Mr. Smith that she was handling the divorce

case for the Does. This could be a conflict of interest since she had represented a party directly adverse to the Smith's later. Natalie will argue that she is not representing the Does in an action against the Smith's nor in an action related to the encroachment, but rather she is representing them in a separate divorce. However, this argument will likely fail because she is still the Smith's lawyer. There is a serious risk that her representation of the Doe's will be materially limited because of her obligations to the Smiths, who already vocalized their opposition to her representing the Does. Because of this, Natalie would need to obtain informed consent from both the Smiths and the Does, since the Smiths are still her client. Further, the divorce could affect the boundary dispute, as whichever couple retains the house could opt to reliitgate. There is no evidence that Natalie obtaine informed consent confirmed in writing from either the Smiths or the Does.

Natalie has likely violated the duty of loyalty to the Smiths by initially choosing to represent the Does.

4) Duty of Competence.

The next issue is whether Natalie has violated the duty of competent representation owed to the Does. A laywer may not represent a client if the laywer cannot competently do so, absent an emergency. This means that the lawyer must adequately know the subject matter of the representation and be able to provide adequate representation to the client. A lawyer who is not competent initially has three options: 1) the lawyer must withdraw from representation 2) the lawyer must

become competent through research or 3) the lawyer must associate with a competenent lawyer who can help.

Here, Nataile had never handled a divorce matter. She was also a newly licensened attorney, with very little general experience. She was not competenet to handle the Does divorce matter. She should have made that clear to the Does, who could have then decided to seek alternate representation. Natalie will argue that she brought herself up to speed with divorce law by researching and studying a legal treatise. Nevertheless, she was not competent at the beginning of the representation. Therefore, she should have declined the representation initially so that she could research divorce law, and then if she felt competent, should have approached the Does to state that she felt confident enough to represent them.

Natalie has violated the duty of competent representation.

5) Duty of Confidentialtiy

The next issue is whether Natalie violated the Duty of confidentiality. A lawyer has a strict duty of confidentiaility which protects confidential communications made in the seeking or rendering of legal services. Absent a waiver from a prospective client or unless the facts become public knowledge, a lawyer cannot divulge to others details concerning the representation of a party.

Here, Natatlie told Mr. Smith that she was representing Mr. Doe in handling his divorce. While a lawyer may state that they are representing a client in a matter,

they may not divulge to others details about that representation. By telling Mr. Smith about Mr. Doe's divorce, Natalie shared confidential information. This is even more so considering the contentious relationship between the Smiths and the Does.

Natalie has violated the duty of confidentiality.

6) Conflict of Interest--The Does

The next issue is whether Natalie violated the duty of loyalty by representing the Does jointly in a divorce case. A lawyer owes a duty of loyalty and may never represent two parties directly adverse to each other in the same litigation, even if both consent.

Here, Nataile agreed to represent both Mr. and Mrs. Smith. She had never even met Mrs. Smith, and both couples were directly adverse in a divorce proceeding. Even if Natalie had obtained informed consent from each, she would not be allowed to represent either party because they are directly adverse to one another in the same litigation. Natalie cannot possibly represent both Mr. Smith's interests and Mrs. Smith's interests zealously while she is representing both.

Natalie has violated the duty of loyalty owed to each of the Smith's by choosing to represent them both in the same divorce proceeeding.

7) Fee Arrangement.

The next issue is whether the fee arrangement is in line with the model rules. In Nevada, a lawyer may not charge an unreasonable fee. Courts look at several factors in deciding what is a reasonable fee including 1) the nature of the legal work involved 2) what is customarily charged for these types of services 3) whether the laywer will be able to accept other work by agreeing to represent a certain client 3) the relationship of the lawyer and client and any history they have 4) the laywer's reputation and experience 5) the length of time involved 6) any time constraints imposed by the client on the lawyer and 6) whether the fee is fixed or contingent. While a fee does not have to be in writing, a lawyer, especially with a new client must explain how the fee is to be calculated, how the fee will be earned, and make sure that the client understands this either before or shortly after agreeing to represent someone. Contingency fees must be in writing, and a laywer may not charge a contingency fee for a divorce case.

Natalie obtained a $30,000 retainer from Mr. Doe. Natalie never explained how the fee was calculated, nor how it would be earned. Thirty thousand dollars seems quite high for a normal divorce case. Natalie did not have a reputation as a divorce attorney, had just agreed to represent the Does, and there is no evidence of any time constraints imposed by her. Natalie not only charged an unreasonable fee, but she also did not explain the fee as she was required to do.

Natalie has violated the model rules by charging an unreasaonble fee and not explaining how the fee was calculated.

8) Safekeeping Client Funds

The next issue is whether Natalie violated the model rules in her safekeeping of the client funds. A lawyer must keep client funds safe, and in a separate trust account. A lawyer may also never comingle funds, nor use client funds for any other purpose than they are meant to be used for. Laywers may only withdraw the funds to pay themselves when they have actually earned the money.

Here, Natalie put the $30,000 in a separate client trust account. She then borrowed $500 to pay for a leagal treatise and agreed to pay it back with interest. Natalie will argue that this did not violate the model rules because she borrowed the money to aid the client in research, and promised to pay it back plus interest. However, a lawyer may never borrow client funds to perform legal research and get competent. A laywer may only advance the costs of litigation, the repayment of which is contingent on the outcome of the litigation. Natalie did not use the money for court costs, but rather to buy a treatise to become competent. Natalie is under a strict duty to not take client funds unless they are earned by her in accordance with the retainer agreement.

Natalie has violated the model rules by withdrawing client funds.

9) Returning Client Property

The next issue is whether Natalie violated the model rules for her billing and sending back one-half of the retainer. A lawyer must, at the end of representation,

promptly return any unearned client funds back to the client. A retainer is also not allowed to be designated as non-refundable, and must instead be made refundable as earned.

Here, Natalie withdrew from being the Doe's lawyer. She sent them a bill for her legal services and only retained one-half of the retainer. She should have returned the entire retainer fee because she did not earn it, and only represented the Does for a week. During that time, she merely researched the law, and did not perform any legal services for the Does. She could arguably send a bill for her research, because that was performed for the Does, but had to return the retainer. In any event, there was never an agreed upon amount for her services, so the Does have a strong case of not having to pay her anything. In fact, they could argue that they only owe her for the reasonable value of her services for the several hours she spent studying. In any event, she may not keep $15,000 for several hours of work.

Natalie has violated the model rules by not promptly returning client funds which she did not earn.

END OF EXAM

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QUESTION 2

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

1. K Breaches and Defenses

A. Applicable Law

This is a contract for the employment of B for the period of three years. This does not include any goods in the contract. Common law will apply as opposed to UCC Article 2.

B. Formation: Offer Acceptance and Consideration + Statute of Frauds

A contract between two parties is if there is an offer and acceptance supported by mutual consideration. Here, J acting on behalf of TA (Which she may or may not have authority to do since she is the sole shareholder but the Board of Directors is generally responsible for the day to day management of the company, but that goes outside the scope of the question) offered B a fill-time position of employment for 3 years, 100,000k per year, plus 10% of the stock in TA after two years upon the personal satisfaction of Joan. Furthermore, the K provided that B had to move to Las Vegas and included the belowmentioned non-compete as well as a liquidated damages clause. B accepted those terms by promising to perform.

However, there may be an issue here with the form of acceptance. Generally unless

specified in the contract otherwise, a contract may be accepted by any performance or a promise to perform. It is not clear from the language of "but only if she moved to Las Vegas" required B to accept by moving to Las Vegas. If this unilateral acceptance was required, B did not properly accept and no contract was formed. (Though there would then be a quasi-contract and contract by estoppel due to the parties acting like there is a contract). However, it appears that this was a bilateral promise with a condition excusing performance. Therefore there is a proper acceptance.

There is ample consideration for this contract. B is promising to work for TA and TA is promising to pay B 100,000 a year plus a bonus of 10% of stock. Therefore this is a valid contract.

Under the Statute of Frauds, certain contracts are generally only enforceable when reduced into writing. A contract for services that cannot be completely performed within a year falls under the Statute of Frauds. Here, the contract was for personal service that lasted three years. By definition three years is more than a year. The facts further state there was fine print detailing the noncompete clause. Therefore, it can be inferred that the entirety of the contract was reduced to writing and will satisfy the Statute of Frauds.

C. Conditions or Promises

Conditions in a contract condition perfomance upon the occurence or specific nonoccurrence of something happening. For example a common condition is the

promise to purchase land on condition that the buyer obtains financing before the close of escrow. If the buyer in good faith cannot obtain financing, the buyer would be excused from performing. If the court does not find that a provision is a condition, they will treat it as a regular promise and require the party to still perform unless it is a material breach.

Here, the employment contract offers the job to Bobbie "but only if she moves to Las Vegas". The but for language of the provision indicates that B's moving is a condition excusing TA's performance. Therefore, unless a defense such as acquiescence or laches applies, TA's duty to perform would be excused.

Alternatively, if there was no condition in this contract, B would have breached her promise to move to LA. The effects of this would depend upon whether it is a material or minor breach. If it is a minor breach, the nonbreaching party would still have a duty to perform, offset by the damages incurred by the breach. Here, the breach is clearly minor. Though she is still living in LA, there is no sign that B is not performing her duties as a talent agent. In fact, at the end of year review, Joan stated that B's performance was fine and not to worry. Furthermore, B signed Sadie to a contract for TA that earned TA month the equivalent of 4x B's annual salary. TA would be required to perform under the terms of the contract and offset the damages of the breach (if there are any). Those damages would also be excused under the defense of laches or acquiescence. TA would probably be limited to damages only. As a matter of public policy, specific performance of

personal service contracts are void because they are too similar to involuntary servitude. However, if B's performance was unique enough the court could order an injunction preventing B from working for another talent agency during that time. However, because the burden to B would be great and the benefit to TA very very very small (given B's adequate performances so far) the court will not grant equitable relief.

D. Defense of Laches/Acquiescence

However, a condition may be waived by the party it is intended to protect. For example a buyer who is unable to obtain financing may waive the provision if he or she wants to acquire the Blackacre regardless. Additionally, the doctrine of laches is similar to that of the statute of limitations: It requires prompt action by a party to assert their rights once they know of the breach otherwise equity will demand that the breach be excused. Here, B let TA know that she was still living in LA at her year end review, specifically stating to Joan that" I'm so glad my commuting from Los Angeles hasn't affected my work!" At that point, TA was put on notice that B had not performed her promise or condition. Instead of immediately seeking recovery from the breach, TA waited almost a year before terminating B. Also the timing of the termination appears suspicious at best. TA fired B right around the time that her stock interest would have vested. There is no evidence indicating that J was not satisfied with B's performance, especially considering the extremely good contract B provided for TA. Additionally, J had already been satisfied with B's work. Therefore, J would have had to be personally satisfied of B's

performance because at that point denial of B's performance would be acting in bad faith and a condition of personal satisfaction must be performed in good faith by the party who has the power to approve. As a result, B should have received the 10% stock around the time she was fired. This is also important because J sold her 100% interest in TA to William only a few months later. Therefore, though B breached the contract, J will lose the ability to sue under the breach because of the doctrine of laches, as well as her own unclean hands in the transaction.

E. Wrongful Termination

Though NV is an at-will employment state, an at-will employment contract is modified into a contract requiring firing for cause upon the establishment of a contract providing for a set term of employment. Here there was a contract of employment for three years. B's employment would be transferred from at-will to requiring termination by cause. Since any breach by B was minor and also appears to have been designed to allow J to keep the 100% interest in TA so she could transfer it, B was not fired for cause and can sue for wrongful termination. Her remedies will be either back pay for the time she was fired and unable to find a comparable job, damages for the difference in her new salary compared to her old salary, and possibly an order requiring reinstatement in her old position.

F. Stock transfer

The stock transfer may be invalid under corporations law if it exceeded the amount

of stock authorized or if Joan was not authorized to make those issuances. More details into the nature of the business would be required. At any rate, J intentionally prevented B from receiving the stock option. B will be able to recover the market price of the 10% of stock since J no longer has the stock and W appears to be a BFP.

G. Assigment

J transfered all of her interests to William in the corporation. As such, (assuming theres been a breach of the corporate veil) W will assume the rights and obligations of TA and J's contracts. Therefore W

2. K Modification under the common law

The modification is not enforceable because it is not supported by consideration. As mentioned above, this is an employment contract for personal services. Therefore, the common law applies. Generally, a common law modification to a contract must be supported by additional consideration. The additional consideration could be in the form of additional payment or by a satisfaction or accord altering how payment is to be provided. Here, there was no additional consideration provided. Bobbie was hired as a talent scout for TA. She has a preexisting legal duty to find talent for TA. Even if B argued that the signing of S was outside of her preexisting duty as S is an alt rock singer, not a country singer, this argument would not work. The demand for more payment came after B had already found talent for TA. B is providing no new consideration for her

preexisting legal duty and therefore the modification is not valid. While there are exceptions in the modern common law to allow for modification without consideration (such as for unforseen circumstances where the parties acted in good faith), the exceptions do not apply here.

Even if the modification was supported by additional consideration, it may be void because of duress or the Statute of Frauds

If B were threatening to stop performance altogether of her duties unless TA paid more, TA might have a claim that they entered into the agreement because of economic duress. The facts do not provide anything except for mention that TA reluctantly agreed. Therefore this is speculative at best.

However, an oral modification of a contract is not enforceable if the contract as modified would fall under the Statute of Frauds. This was an employment contract for a term of three years. Any contract for services to be performed that cannot be discharged within a year must be conformed to writing. Here, the contract does not change the terms of length of employment, but alters the payment for the services. Furthermore, the modification was made with over a year left on B's employment contract. Therefore the length of the contract is still beyond one year and must be reduced into writing. The facts do not state that the contract was reduced to writing. If the modification was not reduced to writing it will not be held enforceable.

3. The non-compete clause is not completely valid, but may be partially valid to the extent of a reasonable geographic area. Regardless, Bobbie will be able to represent clients in Los Angeles

Under NV laws, a no-compete clause must be supported by additional consideration and restricted to a reasonable geographic area and a reasonable amount of time. The public policy behind these restrictions is that we as a society do not want to prevent individuals from being able to earn a living. However, courts have started to modify the requirement of additional consideration (arguing that the total price of the service contract includes the additional consideration for a non-compete clause). Therefore, though there does not appear to be additional consideration, there still could be a valid argument that the salary is so high as to reflect the non-compete clause in it. However, the facts state that the non-compete clause is in the fine print of the agreement and Bobbie probably did not know about it. Therefore, it is more likely than not that the court will refuse to uphold the non-compete clause on the basis of lack of consideration

Should the court find that additional consideration was provided, the main questions for validity are whether the non compete clause is for a reasonable period of time and whether it covers a reasonable geographic area. Applicant is not familiar with non-compete clause durational limits, but considering that PR requires abstaining from practice after sale of a firm for at least six months, two years is probably reasonable. However the non-compete clause is not enforceable in its entirety because the non-compete is for every location on Earth. A reasonable

geographic area limitation is designed to protect the original business while still allowing the employee to make a living. For example, a non-compete clause to not open a franchise in the City of Las Vegas would probably be reasonable because it protects the interest of the business but the franchiser could start a restaurant in Reno or Carson City or Winnemucca or whereever. Here, Bobbie would be prevented from practicing her career in its entirety for the period of two years according to this contract. The court will strike it down as an unreasonable restriction and strike the non-compete clause down as invalid.

However, the courts are split as to the extent the non-compete clause will be struck down as invalid. Some circuits have approached the issue as one recognizing that the non-compete clause is a bargained for exchange and that the company should still receive the benefit of its bargain. These courts will reform the non-compete clause to be limited by the geographical limitations and time durations of the jurisdiction to provide the company the benefit of its bargain. Other courts recognize the unequal bargaining power prevalent between the company and the employee as well as the inherent deterrent power of a non-compete clause (regardless of whether the company actually wants to enforce it). These courts will strike down the non-compete clause in its entirety because the company should have followed the law in the first place.

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QUESTION 3

3) Please type the answer to Essay Question 3 below

UCC Article 9 governs security interests and the priorities of those interests when multiple parties have interests in the same property.

1. First Bank has a perfected security interest (SI) in Trak's equipment, inventory, software and designs and any after acquired property. To perfect a SI, the SI must be attached. Attachment requires a security agreement in writing signed by the debtor that adequately describes the collateral, consideration must have been given, the interest is authorized by the debtor, and the debtor has rights in the collateral. Here, attachment has occurred. Trak and First Bank signed the security agreement which appropriately described the interest. The SI collateral can be described by the types of collateral listed in UCC Art 9 and equipment, inventory, and software and designs (intangible property) are all listed in UCC 9. The goods are categorized based on how the owner is using the goods. After acquired property clauses are appropriate, although not as common for SI such as this one. After acquired property clauses are more common for inventory that has quick turnover (such as a grocery store or electronic equipment). However, this does not invalidate the security agreement in this case.

There are multiple ways to perfect a SI. One of the more common ways is to file a financing statement with the appropriate state authority which serves to put any potential future creditors on notice of the SI. Here, First Bank had Trak sign the

financing statement and promptly filed the statement with the Nevada Secretary of State, therefore perfecting First Bank's SI in Trak's equipment, inventory, software and designs, now owned future acquired.

2. Land Bank has a perfected security agreement in Trak's building and all improvements, present and future. Land Bank has a purchase money mortgage (PMM) SI, which is a special kind of SI. A (PMM) occurs when the creditor lends debtor money specifically to purchase property and the money is used directly to buy that property (Note: a PMM is essentially the same as a purchase money security interest (PMSI) but for property instead of goods). Here that is what happened. Land Bank financed Trak's new building and Trak granted Land Bank a mortgage on the property. Attachment occurs through the signed mortgage, Trak has rights in the building through, and consideration was paid. Further, the interest is automatically perfected through special PMSI/PMM rules. However, Land Bank went a step further and recorded the mortgage with the county to include all impovments, present and future. Nevada is a lien theory state, which maintains title to property with the debtor even after default. The only way for a creditor to recover the property is to go through the proper default sale steps.

3. Second Bank has a PMSI in the state of the art security system, including cameras, monitors, wiring, cabling, switches, and connectors. The facts seem to indicate that Trak borrowed the money directly from Second Bank to pay for the security system and that money was directly used for the security system. Because

it is a PMSI, attachment occurs automatically. The PMSI was perfected whenthe financing statement was filed properly against future creditors but not prior creditors, which will be discussed below.

4a. Priority in the building. Land Bank has priority in the building and all improvements, present in future. PMSI/PMM have super priority over other types of security interests. Further, when fixtures (additions to property) are so ingrained into the property that they become one with the property and removal of the fixture would seriously damage the property, the fixture becomes part of the property. Land Bank's PMSI/PMM was first in time as well regarding the building and neither First or Second Bank have any claim to the building. For Land Bank to recover the cost of their loan, they would have to file default and then proceed with a judicially appropriate sale (appropriate auction, notice to parties, economically reasonable) and then could recover through a default judgment against Trak. Nevada is a lien theory state, which means title to the property does not automatically pass to the creditor upon default. Land Bank would have to follow the above steps to recover and would have the right to purchase the building at auction if they so chose to.

4b. First Bank has priority in the I-Trac player tracking software. I-Trac is a type of intangible item that a SI can be obtained in. First Bank properly included "software and designs" in the security interest and also in the financing statement filed with the state. No other bank has an interest in the I-Trac software so First Bank has first and only priority.

4c. The security system, minus the monitors and cameras, are fixtures and have become part of the building. The facts tell us removal of the system would be impossible without damaging the building, except the monitors and cameras. Therefore, the imbedded components of the security system are now part of the building. This leaves a competing PMSI/PMM from Land Bank vs. the PMSI of Second Bank in the security system. Normally, Second Bank's PMSI would take priority because the PMSI was given to Trak specifically for the security system. However, for Second Bank's PMSI to take priority over Land Bank's PMSI/PMM, Second Bank needed to do two things. Second Bank needed to timely file a financing statement, which they did, but they also had to timely send notice to Land Bank of the now supervening PMSI in the security system installed in the building. Second Bank did not do this and therefore their PMSI does not take priority over Land Bank's PMSI/PMM in the integrated components of the security system. Further, the wiring and cables are now so integrated into the building that it would not be possible to separate one from the other.

Regarding just the monitors and cameras: Land Bank does not have a SI in these because they are not considered fixtures because they are easily removable from the property and are not the type of equipment that would be expected to remain with the property after Trak leaves. Therefore, priority is between First Bank and Second Bank. The monitors and cameras are classified as goods under UCC 9 and are further classified as equipment. Equipment is goods used by a business to facilitate and used during the course of business. The priority analysis is between a

perfected SI for First Bank in future acquired equipment against Second Bank's PMSI in the security system. Second Bank has priority in the monitors and cameras, despite First Bank's future acquired inventory clause. The Second Bank PMSI has super priority, even though First Bank is perfected. Because First Bank doesn't have a PMSI, Second Bank is not required to send notice to First Bank like Second Bank needed to do with Land Bank.

4d. Miscellaneous items. First Bank would likely have priority over any misc. items remaining that were related to the business because of the equipment SI and future acquired equipment clause. There are no other creditors to this type of collateral. Depending on what the misc items are will determine if they are equipment, inventory, or some other type of good. First Bank will have priority in any type of good listed in their security agreement and financing statement.

5. Yes, First Bank has a right to recover the computers from Used. Inc. First Bank can recover the computers if they choose to do so. In order for Used, Inc. (Used) to prevent recovery, Used would have to be a buyer in the ordinary course of business and not have knowledge of any SI. To be a buyer in the ordinary course of business (BIC), Used would need to be a consumer purchasing the goods from a seller that generally sells goods of that kind. Here, Trak does not operate as a retailer of computers, Trak was simply selling old inventory. Further, Used is not a consumer. A consumer buys good for home or personal use. Used purchased the computers likely as inventory that they would then likely turn around and resell the computers. Prior notice of First Bank's SI is irrelevant here because Used is not a

consumer. However, Used had constructive notice because First Bank had filed the financing statement to include Trak's equipment. Second Bank could come get the computer's too and arguably could come get the computers from First Bank as well.

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QUESTION 4

4) Please type the answer to Essay Question 4 below

1.

Dan v Andrew

Tresspass to land: trespass to land is an intentional tort whereby the defendant intends to physically enter the land of another. The entry does not have to be knowing and can be mistaken, and objects that cross onto the Plaintiffs land would qualify as tresspass to land.

Here, Andrew (A) is using a high powered blower to blow trash onto Dan's (D) front lawn. This would be a trespass to land because the trash is being swept onto D's land and is interfering with his use and enjoyment of his own property. The garbage is also being left there which is causing damage to Dan's land. Andrew would be liable for the tresspass and would probably have to pay damages or stop blowing the trash onto Dan's property.

Andrew will try to assert that he is simply blowing the trash away and it inadvertedly gets onto Dan's land. However, this is not an excuse or a defense to trespass to land. Furthermore, Andrew may argue consent, which requires an unambiguous and clear intent to consent to the action. If Dan has not complained before, maybe he consents to this trash being blown now. However, this is not an excuse because Dan clearly tells A not to do it.

Nuisance: nusiance is when the defendant interferes with the quiet use and enjoyment of his property, but a person's sensitivities are not considered. There is a public nuisance and a private nuisance. Here, there would be private nuisance since the two parties are individual private parties. Here, A is causing noise and exhaust fumes to enter onto D's property and cause D and his dog to wake up and also, the trash has attracted mice to the property. This would be nuisance because a reasonably prudent person would not accept blower noises and fumes to interfere with their enjoyment of their property. A is liable for the nuisance he has caused.

Assault: assault is the intent to put a person in reasonable aprehension of a battery or being immediately threatened or harmed. Here, D will claim that A assaulted him by pointing the blower, an inherently dangerous machine and garden tool, within inches of his face. The blowe is gasoline powered and powerful enough to blow trash and food so it placed D in reasonable apprehension and fear. Dan was in so much fear that he ran back into the house to get away from A and his blower. This would be sufficient for a claim of assault.

Battery: battery is the intentional offensive touching of another without their consent. Here, D will claim that A battered him with his leaf blower. The leaf blower was so loud and powerful that Dan now has a damaged ear drug. Sound that can cause a touching and damage would be considered battery as it could in the case here. Dan will be able to claim damages for the battery and damage of his

ear drum.

Self-defense: for both the assault and the battery, A will claim that he was using self-defense to protect himself against D and his dog. However, force can only be used if it is proportional to the harm or act that is being caused. Here, D was only screaming and the dog was growling at A, there was no physical altercation. A instead used physical force and used a dangerous object to react, and claimed that he was started. However, this is likely not a viable defense as the harm done to Dan because of his shouting would not be in proportion to his acts of screaming and yelling.

IIED: intentional infliction of emotional distress is when a person intentionally causes emotional distress through his outrageous conduct or action that causes damages. Physical damage is not required. Here, Dan will claim that he is suffering severe emotiona distress because of the noise and the pollution that A and TB are causing to him. He is not getting enough sleep, he is stressed, and he is frustrated with everything. Furthermore, the blowing is occuring every single day on regular intervals at 4am disturbing his sleep and disturbing his dog. If this conduct rises to the level of outrageous conduct, D may be able to claim for IIED. Furthermore, A is back at it again the next day, undeterred and again going to agitate and cause D damage.

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Respondeat superior: an employer or principal is liable for the damages caused by his or her employee/ agent. The damages are usually limited to those done during the scope of the employee's work and within the duties of the employee. Intentional torts caused by the employee are also not covered and the employer would not be liable, unless it is within the scope of the work or it is done in furtherance of the employer's business and actions. Here, D will claim that The Brew (TB) is A's employer and thus responsible for the damages caused to Dan and his property. A is working in the scope of his employement and is using an industrial blower to clean TB's parking lot and blowing the trash onto D's property.

TB therefore, may also be liable for all of the above damages that A has caused to D. TB would be liable for the trespass to land, the trash left there, the nuisance, and the damages caused. TB would also be liable to D for the battery and assault because A is using a dangerous tool and also because A is using the tool in furtherance of TB's business and is in his scope of work. TB would be liable for these damages as well.

Negligence: negligent acts are caused when a person owes the other a duty of a reasonably prudent person with the same skills, knowledge, physical attributes, and that duty causes some foreseeable injury or damage because of a breach of that duty. Here, TB and Andrew owed D a duty of care and a duty of being respectful business neighbors to not blow trash and debris onto his land and damage his property. Their breach of this duty by blowing trash onto his property, caused

(actual and proximately) damages to his peroperty. Actual damages arose because but for the trash being blown by A onto his property, D would not have trash all over, noise, and air pollution, and mice on his property. The breach also proximately caused damages because it was foreseeable that something like this would cause damages to a neighbor's property if trash, noise, and debris were blown everywhere. Here, TB and A would be liable for their negligence and would be held liable for the damages caused to the property.

TB and A may claim that there is no duty to Dan because he is only a residential neighbor and that TB has a permit or a license to clear trash and debris from their property. However, this argument will not hold because damage is being done to Dan and TB and A are the actors and the reason for his harm.

2. Remedies to Dan

Legal damages/ monetary

Nominal damages: Because D has suffered property damages as well as personal injury, he may just claim that TB and A should pay him to recover the damage that they have caused. This could be the amount necessary to restore his lawn to the way it was before the trash was there. Also for the noise and air pollution that was done, and also for getting rid of the mice that are not on his property. Additionally, Dan would probably seek to recover the damages and the amounts paid to fix his eardrum that was damaged by A.

Punitive: punitive damages are designed to punish the actors, prevent them from doing it again, and usually not granted unless there is a compelling or outstanding reason necessary to do so. Here, the circumstances are probably not so egregious that it would require punitive damages. Nominal damages would be adequate to help restore D to his original position. However, TB and A may be liable to pay fines or damages to the city for their littering the streets and teh community.

Equitable remedies

Injunction: An injunction is available when all legal remedies are exhausted and actions are needed to help restore the plaintiff to his original position. Equitable remedies are generally not available unless there it can be adequately ordered and monitored by the court, it would be feasible and not severely disadvantage the parties, and doing so would remedy the issue. Here, injunctive relief may be available for D because he could get an order to stop TB and A from blowing the trash onto his property. The court will likely grant this because the issue is that A routinely at 4am dumps and blows TB's trash onto D's property. Dan is unable to prevent this from happening himself because it is so early in the morning and he is not awake to witness or say something about it. Furthermore, TB authorizes this type of behavior and allows A to blow and damage D's property. Additionally, D told A to stop, but A just ignored the requests so nothing that D could have said or done would have prevented the acts from occurring. Therefore, court action and intervention is necessary to get A and TB to stop. The next day again at 4am, A is

again blowing the trash into D's yard.

Injunctive relief would allow D to recover and prevent future abuse of his property and his enjoyment of the property from occurring. D also offers a suggestion to A to use an electric blower or a broom to cut down the noise and the disturbance, and air pollution. These are all feasible means of solving the solution and would not inhibit A or TB from maintining a clean property. Instead of pushing their trash onto someone else's property, they could also pick it up instead of leaving it there. D will likley get injunctive relief.

3. A against Dan

Assault: assault is the intent to put a person in reasonable aprehension of a battery or being immediately threatened or harmed. Here, A will claim that D assaulted him when he came running out of his house with his dog, and began screaming at A and his dog growling. While words and future harm are not enough to claim assault, if the words are coupled with reasonable threats of immediate harm, they could arise to the level of assault. Here, Dan came out with his dog and began yelling. This could put a person in reasonable apprehension of being hurt or at least attacked by the dog. If this is the case, then D will be liable for assault.

Battery: battery is the intentional offensive touching of another without their consent. An owner is liable for the actions of his pets and all objects or things within his control. Here, A will claim that D used his dog to batter him. The dog bit A on the ankle and caused him to bleed, therefore, this harmful touching occurred

and caused A damages to his body. D will claim that the dog was acting in self-defense as a response to A attacking D with the blower in his face. However, the blower to the face probably would not warrant someone to use harmful force such as sending the dog to bite someone as a response. D likely cannot claim self-defense was used in this case. Frustration and not enough sleep are not defenses to assault and battery.

Strict liability for wild animals: a property owner is strictly liable for the wild animals that are on his property and also for domestic animals in which he has reason to know of its dangerous propensities. Here, D knows that his dog is a trained attack dog and is trained to defend his owner. Therefore, D is strictly liable for the damages that his dog causes and inflicts upon other people. The dog has bitten A on the ankle and has caused him damages, and D would be liable for these damages. Again here D may try to argue that the dog was just acting in self-defense and in the protection of D. However, in a strict liability action, this would not be a valid defense and D would be liable.

IIED: intentional infliction of emotional distress is when a person intentionally causes emotional distress through his outrageous conduct or action that causes damages. Physical damage is not required. Here, A will try to claim that D was shouting and screaming at him, and causing him to be startled by the whole ordeal. Additionally, he will claim that he suffered emotional distress because of the dog biting him and D constantly trying to confront A every day for the noise and

disturbance caused. However, the fact that A continues to blow trash onto D's lawn the next day shows he is undettered and has not suffered any emotional distress.

Negligence: negligent acts are caused when a person owes the other a duty of a reasonably prudent person with the same skills, knowledge, physical attributes, and that duty causes some foreseeable injury or damage because of a breach of that duty. Here, D owed A a duty to keep his dog trained and not attack him. D had a duty to restrain his dog and make sure that he was not going around and hurting people but in this instance, D breached that duty and caused damage to A. The dog bite was the actual cause of his damages, because but for the dog biting, A would not have a bloody ankle. The bite was also the proximate cause of the damage because it was reasonably foreseeable that his trained attack dog would bite someone who D either was telling to bite or in reaction to someone else trying to harm his owner. Therefore, damages were caused as a result of the breach, and A will be able to claim damages for his bloody ankle.

Comparative contribution: NV is a comparative contribution state and therefore, A will claim that the damages that were caused by D to him and also vice versa should be reduced by the damages that were caused to Dan. In comparative negligence, the party can recover any amount in full comparative, but not a partial comparative state. Any damages received by either party will be offset by the other side.

END OF EXAM

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QUESTION 5

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

Motion to Dismiss for Lack of Personal Jurisdiction

Lexi can file a motion to dismiss for lack of personal jurisdiction, although she will not be successful. She must raise this issue in her first response to Rally's complaint or else it will be deemed waived.

For a court to have personal jurisdiction over a defendant, the defendant must hav had sufficent minimum contacts with the forum state as not to offend traditional notions of fair play and substantial justice. A state statute and teh consitution must be satisfied. Nevada's long arm statute reaches to the limits of the constitution so the statutory and constitutional analysis are the same.

Minimum Contacts

When assessing whther a defendant had minimum contacts, courts examine whether the defendant purposefully availed herself to the laws to the forum state and whether it was foreseeable thaat she could be sued there. Here, Lexi would argue that she did not purposefully avail herslef nor was it foreseeable that she could be sued because, although she attended college in Nevada, she only attended college there 9 months a year. She signed nine-month leases because she always returned to her home in Arizona. As far as the contacts with Rally are concerned,

all she did was pick up the car in Nevada because that location rented to college students. Lexi would be wrong in these arguments. By attending college nine months a year in Nevada, she availed herself to the laws of Nevada for that time and got the protections provided by those laws. It is perfectly foreeseeable that a person who spends the majority of the year in a state could be sued in that state. Also, she rented the car in Nevada, which means she must have executed the contract rental agreement in Nevada, meaning that it is foreeseeable that she could be sued there.

Fair Play and Substantial Justice

When assessing whether the court has personal jurisdcition, the court will also look at the relatedness of the defendant's contacts with the state to the claim and the fairness of her having to defend the claim in the state. If a defendant is not at home, meaning domiciled, in the forum, thereby giving the court general jurisdiction, the claim mut relate to the defendant's contacts, giving the court specific jurisdiction. Here, the claim arises directly from Lexi's contacts with Nevada. She rented a car in Nevada, executed the rental agreement in Nevada, and then failed to return the car to that Nevada location. Although the accident happened in California, her liability arose in Nevada when she entered the agreement and took possession of the car. The Nevada court has specific jurisdiction over Lexi. As far as fairness, the court exaimnes the burden to the defendant, the plaintiff's interest in keeping the case where it is, and the state's interest in protecting its residents. Lexi would argue

that it is very inconvient for her to defend the case in NEvada because she is now living in Arizaon after having taken a break from school. This will fail because the defendant must show that she will be at a severe disadvantage in the litigation if tried in the forum. Lexi still has an apartment with Jane in Nevada. She can defend the case. Rally has an interest in trying the case in Nevada and Nevada has an interest in protecting companies doing business in the state.

The Nevada court has personal jurisdiction over Lexi. Her motion will fail.

Motion to Dismiss for Improper Service of Process

Lexi can file this motion, but again she must put this in her first reponse to the complaint or it will be waived. In Nevada, service of process, consiting of a summons and a copy of the complaint, must be served be a non-party over the age of 18 within 120 days of filing the complaint. It can be served personally, at the defendants usual abode with a resident of the abode who is over 18, or with the defendant's authorized agent.

Here, Lexi's motion will fail because she was properly served. The first attempt at service was at Lexi's Nevada apartmnet. This was her usual abode because she lived there 9 months out of the year. A usual abode need not be where the defendant lives all the time, just a residence where they usually live at the time when service is done. They left the process with Jane, a resident of the apartment who is 20, and the process constited of a summons and complaint. Had Rally stopped here, Lexi might have more of a leg to stand on. She currently was not living there

so she could argue later, after a default judgment is entered against her, that there is good cause to set the judgment aside because she actually was not living there at the time and therefore did not recieve notice of the suit. However, Rally did not stop there. It personally served her at her home in Arizona and did it within 4 months of the complaint being filed. Becasue Rally served process on Lexi within 120 days and did it properly with both attempts at service, Lexi's motion will be denied.

Removal

Lexi looks like she is going to have to defend this suit in Nevada. However, if Lexi does not like the forum she can remove the case to federal court and it will be heard in the federal court embracing where the Washoe county district court sits. She must file a notice of removal with the state and federal court within 30 days of recieving the complaint, because the complaint indicated that removal was proepr.

Removal is proper if the federal court could have heard the case intitially. For a federal court to hear the case it must have subject matter jurisdiction over the claim. Subject matter jurisdiction is satisfied if the claim arises under a federal question or if there is complete diversity and the amount in controversy exceeds 75,000. Here, this is a state law claim to recover the value of the car, so federal question jurisdiction is not applicable. Diversity jurisdiction, however, is applicable.

Diversity

To invoke diversity jurisdiction there must be complete diversity, meaning all plaintiffs must be citizens of different states from all defendants. A person is a citizen of the state in which they are domiciled, meaning physical prescense in the state and the intent to remain indefinetly. A corpopration is a citizen of the state in which they are incorporated and the one state in which it has its principal place of business.

Here, Lexi is currently living with her parents in Arizona, so her physical presecene is in Arizona. Although she most likely intends to go back to Nevada to finish college, she is still an Arizona citizen because she has never intended to remain in NEvada indefinetly. She leases an apartment there for school and returns to Arizona every summer. Lexi is an Arizona citizen. Rally is incorporated in Delaware, meaning it is a Delaware citizen, and has its principal place of busines in Flordia, meaning it is also a Florida citizen. The fact that it has rental cetners nationwide makes no difference in the analysis. There is complete diversity of citizenship.

Rally claims that the total damages for the car are 83,000, and the court will accept this figure if made in good faith. Because the amount in controversy exceeds 75,000, the amount in controversy is satisfied.

The court has subject matter jurisdiction over the claim. As discussed previously, Nevada has personal jurisdiction over the parties. Therefore, the case could have

originally be broughtin federal court. Lexi can remove the case if she wishes.

Venue

In a Nevada trasitory action, which is an action not related to the ownership of property, venue is proper where the contract, if it is a contract claim, was to be executed or performed. If venue is improper, the defendant can demand a transfer to a proper venue within 20 days of service of process and the court must grant it if venue is improper and timely demanded. If LExi wantes to transfer she need not include this demand in her first response, just so that it is timely.

Here, this is a claim under the rental contract so the proper venue should be in Clark County, where the rental agreement was executed. Lexi can transfer if she would like. Although for her personal conviencnce, it would make little sense for her to make this demand. She has an apratment in Washoe County, where Rally chose to sue. However, Lexi does have the option if she would like.

Other Challenges

It should be noted that Rally's complaint likely violated Nevada pleading standards, but not so much as to make the court dismiss the case. In Nevada, the plaintiff when specifying damages that exceed 15,000, must simply state that damages exceed 15,000 and provide no further elaboration. If Lexi removes to federal court, the damages must then be determined. However, Rally can amend their complaint as a right before Lexi responds and after that with leaved of the court, so they will

be able to correct their pleading mistake.

END OF EXAM

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QUESTION 6

State Bar of Nevada

ID:	**151** (Code#)
Question:	6
Exam Name:	NVBar_7-26-18_Essay5-6_AM
Exam Date:	Jul 26, 2018
File Name:	18195_NVBar_7-26-18_Essay5-6_AM_20180726105533643_final.xmdx
Exam Length:	127 minutes (Started @Jul 26, 2018, 8:47 AM; Ended @Jul 26, 2018, 10:55 AM)
Downloaded:	Jun 28, 2018, 7:24 AM
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Total Number of Words in this Exam = 2271

Total Number of Characters in this Exam = 12919

Total Number of Characters in this Exam (No Spaces, No Returns) = 10653

6) Please type the answer to Essay Question 6 below

Superior Title to the Property

In order to determine who has superior title to the property, it is imparative to determine whether Hank has valid title to the property. In order for a deed to be valid it must contain the grantor's signature, evidence of the grantor's intent, a reasonable description to identify the property to be conveyed, and the deed must be validly delivered. For valid delivery, the deed need not be physically handed over to the grantee, but rather there must be evidence in the deed that the grantor intended the conveyance and the deed to be transferred to the grantee. Deeds may be valid through a land sale conveyance, intestacy, or if the land is devised through a testator's will.

Here, Although Hank prepared the deed, Mary signed it in front of a notary, Hank paid Mary the fair market value of the property, and it was delivered to him, his claim to title to the property will fail overall because he possibly obtained the deed through undue influence over Mary. Undue influence occurs may be present if there is a confidential relationship between the parties, the benefitting party took substantial steps in procuring the legal document, and acquired the substantial benefit. Here, Hank prepared the deed for the property and convinced Mary to sign in front of a notary, and took all of the benefit to title of the property. However, this claim may fail because there was no confidential relationship

because they were mother and son.

If the argument for undue influence fails, there can still be an argument that Mary did not have the intent to convey the property to Hank. Hank continuously asked Mary to deed him the house and she always refused. It wasn't until she got dementia that Hank was able to convince her to sign the deed. Due to Mary's lack of sound mind at the time she entered into the deed with Hank, and the evidence of the deed she executed to Connie two years prior, and Mary's intention to not sell the deed to Hank in the past, there is a strong argument that Mary did not have the required grantor's intent.

Therefore, if the court were to find that the deed to Hank was invalid, Connie would have superior title to the property.

However, if the court were to find that the deed to Hank was valid, the determination of superiority would depend on the applicable recording statute and rules.

Nevada is a race-notice jurisdiction. This means that in order to obtain superior title, any subsequent owner of the property must be the first to record the property and be a bona fide purchaser (BFP). A BFP is purchaser who pays value for the land and does not have any notice of a prior owner. A BFP is considered to be put on notice if there is record, inquiry, or actual notice. Record notice is established if the other titleholder has recorded his deed with the county recorder and a title

index search would reveal the deed to the property in question. Inquiry notice is established if the BFP where to physically go to the land and see whether it was occupied or in possession of another individual. Even if the BFP did not do that, anything a reasonable inspection of the land would reveal puts a potential BFP on inquiry notice. Actual notice is established when the potential BFP literally has been told by someone else or has personal knowledge that the land is owned by another individual.

Here, Hank would have superior title to the property under the race-notice statute. First, Hank was the first person to record the deed with the Elko County Recorder's Office, therefore the first requirement under a race-notice statute is satisfied. Second, Connie was not a bona fide purchaser, but rather a donee. Connie did not take the property for value, as it was deeded to her by Mary without any consideration. It states right in the deed that there is no need to pay for the property, and no other evidence of consideration is present. Connie also did not take the property without notice. The facts state that after Hank obtained the deed, the immediately recorded it. That put Connie on record notice of the deed. The facts do not indicate that Connie had inquiry or actual notice, but since the record notice requirement was present, was validly on notice as required by the race-notice statute.

Therefore, Hank would have superior title because he first recorded the deed and Connie was not a bona fide purchaser for value.

Mary's Conveyance to Connie

Mary's conveyance to Connie will not be valid if the court finds that Mary did not sufficiently describe the property to be conveyed. In order for a deed to be valid it must contain the grantor's signature, evidence of the grantor's intent, a reasonable description to identify the property to be conveyed, and the deed must be validly delivered. For valid delivery, the deed need not be physically handed over to the grantee, but rather there must be evidence in the deed that the grantor intended the conveyance and the deed to be transferred to the grantee. Deeds may be valid through a land sale conveyance, intestacy, or if the land is devised through a testator's will. Additionally, the deed need not have any evidence of consideration.

Here, Mary's deed to Connie was signed by Mary and identified Connie as the grantee of the property. The deed also expresses Mary's intent for Connie to have the property because it says explicitly that she wants her to have the property over Hank because she is her favorite child. Her intent is further evidenced by the facts stating that Mary always refused to deed the property to Hank because she wanted Connie to have it. However, if an argument was made in regard to Mary's intent based on the above argument that she has dementia and therefore does not have the valid intent or sound mind, that argument will fail because the deed to Connie was created two years ago, and Mary had only been diagnosed with dementia recently.

The deed also states that she does not need to pay Mary for the property and there

is no other monetary consideration shown on the deed. That does not cause the deed to be invalid and will not have any effect on the deed. Valid delivery also occurred because although Mary did not physically hand Connie the deed, she evidenced her intention for the property to be conveyed to her. However, the only issue with the deed that may cause the deed to not be valid is that the deed does not describe the land to be conveyed. The deed merely says "my property" rather than includes any description of metes and bounds, natural monuments or coordinates, or other landmarks to indicate what "my property" is. A court may find this description insufficient because it does not at all indentify what the property entails. We know from the facts that it includes a house, because that is what Connie tried to sell to Dan. But from the language of the land to be conveyed on the deed, it is ambiguous whether the conveyance just consists of a plot of undeveloped property, or property with a house on it. Therefore, if the court finds this description of land insufficient the deed will not be valid.

Dan v. Connie

Land Sale Conveyance

In a land sale conveyance, there are two steps. Step one is the land sale contract, where the the buyer may raise any issues with the marketability of the title of the land. A buyer may refuse to purchase the land if it is unmarketable. Land or property is unmarketable if there are any title defects, any encumbrances such as liens or mortgages on the land, any zoning violations, or any adverse possessors.

However, the buyer can only raise these issues up until the time of the closing, which is step two. Step two, the closing, occurs when the deed is transferred from the seller to the buyer making the seller the legal owner of the property. The buyer may only raise issues with the seller after the closing in regard to warranties included in the particular type of deed used to convey the land. However, issues may arise in a land sale conveyance between the buyer and seller in between the signing of the contract and the closing where the deed is conveyed. One of those issues is when the property to be sold is destroyed, damaged or suffers some loss before the conveyance.

Here, Dan and Connie have entered into a land sale contract for the sale of Property. Since the closing has not occurred, Dan is still free to raise any issues related to the marketability of the title to Property. Aside from the risk of loss caused by the fire burning down the house on Property (see below) Dan may also try to prevail before the closing on a claim that the title was unmarketable. There is arguably a title defect because there are two recorded owners to Property. If Dan were to conduct a title search search with the Elko County Recorder's Office before he closed on the property he would see that Hank and Mary both have recorded deeds to the home. However, if the court finds that Hank's deed was invalid because it was obained by undue influence, Dan's argument may not prevail because then only Mary is the appropriate legal title holder of the property. Further, if the court finds that Mary's deed is not valid (see above) Dan may have another claim for title defects in the property.

Additionally, Dan and Connie have encountered a problem where the property has been destroyed before Dan has become the legal owner. In order to determine who will prevail in the lawsuit between Connie and Dan, the court must address the appliable risk of loss rule.

Risk of Loss

Under the common law, the doctrine of equitable conversion controls which party has the risk of loss. Under the doctrine of equitable conversion, the buyer is the equitable owner of the home once the contract is signed and is therefore liable for any risk of loss/damage to the property before the closing where the buyer receives the deed. Here, if the common law were to be applied, the risk of loss would be on Dan as the equitable owner because he has already signed the contract to purchase the property and the house burned down prior to the closing. Under the common law rules, Connie would prevail and specific performance would have to occur (see below).

Specific Performance

Specific performance is appropriate if the remedy at law is inadequate and enforcement would be feasible. Sales of land are available to the remedy of specific performance because all land is unique. Uniqueness of something contracted for whether it be land or a tangible good deems the remedy at law inadequate because it cannot be accurately compensated for. Specific performance

in regard to the sale of land is available to the buyer and the seller. Here, under the common law Connie would be entitled to specific performance because it is in regard to a sale of land. Enforcement is feasible because the court can just order the other party the perform.

However, in Nevada, Uniform Vendor and Purchaser Risk Act (UVPRA) applies. Under this rule, unless otherwise addressed in the contract for the sale of land, the risk of loss is on the seller until closing and the transfer of the deed/the buyer takes possession of the home. Here, the facts state that Connie and Dan did not specify in the land sale contract what would happen if Property was destroyed before title transferred to Dan. The facts also state specifically that the home is located in Elko, Nevada.Therefore, the UVPRA rules take effect. Connie may try to argue that Dan took possession of the land because he kept some of his personal items there. However, Dan was not living in the home at the time of the fire. Also, the fire took place before the closing and when Dan was to obtain the title and became the legal owner. Still as the current owner, it was Connie's responsibility to make sure there was some type of fire insurance to cover the loss or to make sure that the eletricity was in working order so that something like this would not happen. Therefore, under the applicable Nevada rule, Dan will prevail and can recover his deposit from Connie.

Damages

In the sale of land, although entitled to specific performance due to the uniqueness

of land, a buyer or seller may always elect for damages if they choose. Compensatory damages are apporpriate in breach of contract actions to compensate for the loss suffered. An appropriate measure of damages for someone in Dan's position may be reliance damages. Reliance damages compensate for how much a party spent or how much cost the party incurred on the reliance that the contract would be completed. Here, because the risk of loss is not on Dan under the Nevada rule, he may seek reliance damages for the $25,000 he spent in reliance on performance of the land sale contract and acquiring the property with the house on it.

Overall, based on the applicable Nevada rule, Dan will prevail and be able to obtain monetary damages for the down payment of $25,000 he tendered to Connie for the conveyance of land.

END OF EXAM

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QUESTION 7

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

At Don's trial for the murder of Vern, the court should rule the following regarding admitting the evidence:

Since this trial is taking place in Nevada, the trial and evidence in question are governed by the Nevada Rules of Evidence. Under the Nevada Rules of Evidence (NRE), all evidence is presumed admissible is it is relevant, absent a showing that it should be excluded for policy reasons or because the benefits of admitting the evidence are substantially outweighed by the unfair prejudice to the Defendant. Evidence is considered relevant if it has any tendency to make a fact, defense, or claim more or less probable that be useful for the jury or judge to consider. In Nevada, even if evidence is relevant, a judge MUST not admit it if the probative value is outweighed by the substantial prejudice to the defendant.

<u>Defense's motions on evidence the Prosecution seeks to use in it's case-in-chief:</u>

1. A certified copy of a transcript of Alex's preliminary testimony

The court should deny the Defense's motion to exclude this evidence. Alex's preliminary testimony is relevant to Don's trial, because Alex testified in the preliminary hearing that he paid Don to kill Vern, which is relevant in making the decision as to whether or not Don did kill Vern because it makes it more probably

that he did. Thus, this evidence is relevant. Additionally, this evidence is nonhearsay because it was made by an a declarant, under oath, and was made in the same proceeding where the Defendant had the motive and opportunity inquire as to this statement. The fact that Alex is dead makes him unavailable. In order to admit a prior statement made under oath, the declararant must not be unavailable. A declarant is deemed unavailable in NV when he resides more than 100 miles away from the court house, claims a privilege, has died, or is incapacitated, among others.

Additionally, there is no foundation issue with this evidence because it is self-authentication. It is a certified copy of a transcript maintained by the court. Thus, even though Alex is not testifying at the current proceeding, a certified copy of his sworn statement in the same proceeding is admissible to be used at trial because it is nonhearsay since Alex is not available.

2. the police officer's testimony that because she is interested in firearms and tool marks, she fired a test round from the pistol, compared it to the bullet recovered from Vern's body, and concluded the pistol fired the shot that killed Vern.

The court should grant the Defense's motion to exclude this evidence. The police officer's testimony regarding the bullet match is relevant because it tends to make it more probably that Don's gun was used to kill Vern if a bullet from his gun matches the bullet found inside Vern's body. However, the evidence should be excluded because the police officer is not qualified as an expert witness. In

Nevada, an person is qualified to testify as an expert witness when their skills and expertise assist the trier of fact in making determinations and understanding the evidence better. Nevada does not follow the Daubert approach for certifying an expert witness, allowing for more flexibility as to who can become an expert witness. Provided that the prosecution properly notified the defense about the expert witness in a timely fashion and provided them with a copy of her report as well as general information such as her compensation, the police officer is still not qualified to testify as an expert witness. In Nevada, a defendant has a right to cross examine an expert witness and challenge their determinations, as well knowing upon which information the expert witness relied upon in order to make this determination. The prosecution is offering to have the police officer testify, so the defendants right are not being violated because he would have the opportunity to develop such testimony. However, the police officer does not qualify as an expert witness.

The fact indication that the police officer is merely interested in firearms and tool marks, not that she has any additional qualifications or studied firearms or bullet striation markings. An expert witness in Nevada needs to have the necessary skills and expertise to assist the trier of fact in understanding the evidence. it is clear that merely being interested in firearms is not sufficient to make determinations that the same gun fired both bullets. As such, the court should grant the Defense's motion to exclude this evidence and prevent this evidence from being presented at trial.

Prosecution's motions on evidence the Defense seeks to use in it's case-in-chief:

3. Don's testimony that in 2012 he read several social media posts claiming Vern bragged about stabbing eight different people

The court should deny the Prosecution's motion to exclude this evidence. Don's testimony regarding Vern's past social media posts about stabbing eight different people is relevant because it makes it more probably that Don's claims of self defense are true and goes directly to Don's state of mind. This testimony, on first glance, appears to be hearsay because it is an out of court statement offered to prove the truth of the matter asserted. That is, Don is testifying that Vern had written, several years ago, that he had stabbed eight different people. However, Don is not trying to use Vern's statement that he had stuabbed eight different people to prove that Vern had, in fact, stabbed eight different people. In fact, Don is using these testatements to prove that affect that they had on him.

The facts indicate that Don is claiming that Vern waived a large knife at him and, as a result, Don stabbed him. If Don had seen the posts by Vern, and seen Vern waiving a large knife at him, he may very well have been in fear for his life.

4. A certified copy of Alex's 2014 felony conviction of reckless driving in Washoe County, Nevada

The court should deny the Prosecutions motion to exclude this evidence. In Nevada, prior felony convictions are admissible in criminal cases, both against the defendants and to impeach witnesses. Alex's testimony is being offered by the prosecution, and in Nevada, the defense is allowed to offer evidence to impeach the now-unavailable declarant as if he were testifying, including by prior conviction.

Even though this evidence is not relevant even though Alex's testimony is being offered and he is unavailable. Alex's reckless driving several years ago does not bear any indication on his truthfulness, nor does it have anything to do with his testimony about Don killing Vern. However, in Nevada a witness can be impeached through prior convictions provided that they are appropriately authenthication and not more than ten years old. A witness's prior felony convictions are relevant, provided that they are too remote, because they speak to the character of the witness. Here, the prosecution is offering Alex's testimony and even though he is unavailable, the defense may impeach him. Alex need not be allowed respond to the claims, and the conviction may be proven by extrinsic evidence. The defense is offering evidence of Alex's prior felony convictions, the conviction is not too remote in time, and it is properly authentication. As such, the defense should be allowed to use this evidence to impeach Alex's testimony.

5. Martha's testimony that, two weeks after Don's preliminary hearing, Alex told her that his preliminary hearing testimony was false, and he testified that way just to

get a deal

The court should deny the the Proseution's motion to exclude this evidence. This evidence is relevant because it makes is less probable that the trier of fact will give weight to Alex's prior testimony because this information directly contradicts it. Additionally, it provided the defense the opportunity to impeach Alex's testimony as a prior inconsistent statement. Thus, this evidence is relevant.

This evidence is also hearsay. Martha is offering an out of court statement made by Alex, that alex's preliminary hearing testimony as false, and asserting it as true. However, this statement also falls under an exeptions to hearsay for unavailable witnesses. In Nevada, a statement made by a declarant against his interest at the time he made the statement is not hearsay if the declarant is now unavailable. the court finds this evidence not to be hearsay because it is unlikely that a declarant would lie when make a statement that he knows is against his interest. Here, Alex stating that he lied at the preliminary hearing and that his testimony is false is against his interest because it opens him up to liability for perjury, at the very least. Thus, even though Marth'a testimony is hearsay, the court should deny the prosecution's motion to exclude this evidence because it is relevant and falls directly under an exception to hearsay.

6. the police officer's testimony that Don told her he shot Vern in self-defense

The court should deny the the Proseution's motion to exclude this evidence. The police officer's testimony is relevant because it makes it more probable that Don's defense that he shot Vern is self-defense is true, because he mentioned it prior to the trial presumably has maintained this defense since talking to the officer. However, this statement is also hearsay. Hearsay is an out of court statement being offered for the truth of the matter asserted. Don is presumably offering this evidence to prove that he did, in fact, shoot Vern in self defense.

Don's statements to the police officer are also considered nonhearsay in Nevada. In Nevada, an opposing party's admissions are considered nonhearsay even if they are out of court statements being offered for the truth of the matter asserted. Don, the defendant in this case, made this statement to the police officer. As the defendant, this counts as a party admission and is considered nonhearsay. The court should deny the prosecution's motion to exclude this evidence and allow the defense to present the officer's testimony as evidence at trial.

END OF EXAM

JULY 2018
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

QUESTION 8

8) Please type the answer to Essay Question 8 below

1. Criminal Liability of David and Frank

Conspiracy

David and Frank are liable for conspiracy to committ burgarly. Conspiracy exists when two or more persons agree to commit a criminal act, made with the intention to the persons to both agree and to actually commit the act. Most jurisdictions require some additional act to be done after agreement (such as preparation), but Nevada does not.

In this case, David and Frank committed conspiracy when they agreed to "break into Whitney's house to steal valuables." Moreover, the agreement by both parties to committ the unlawful act of burglary means that the defendants have conspired.

Because David and Frank have committed conspiracy, this means that any criminal actions taken by either person during the conspiracy and in furtherance of the conspiracy will be attributed to all parties to the conspiracy. In this case, the following crimes would be implicated to both Frank and David during the conspiracy:

Burglarly / Larceny

Burglarly is the intentional breaking and entering into the building of another with

the intent to commit a felony or theft therein. Burglarly is a specific intent crime under federal law, and under Nevada law may be completed with reckless action. And the phrase "breaking and entering" merely means the unconsented entry into the building of another--no actual force need be used.

Here, David and Frank both committed burglarly because they entered Whitney's house to "steal valuables." Moreover, Frank and David both specifically intended to enter the premises unlawfull to committ larceny therein (larceny being the intentional taking of personal property from another with the intent to deprive permanently). Frank and David then actually committed larceny when they "took several items, including jewelry and three televisions" and "sped away." Though Frank and David merely entered Whitney's ome through an "unlocked windown" they stil broke and entered because they were not lawfully on the premises and came in anyway.

Robbery

Robbery is the intentional taking of personal property from another with the use of force or threat--and that use of force or threat is the actual reason that the person gives up their property. In this case, David and Frank committed robbery because they used physical force to punch Whitney in the face and tie her up, thus allowing them to take her property without her consent. Though David was the only one to punch Whitney, it may be attributed to Frank because of the ongoing conspiracy at that time and it was in furtherance of by preenting Whtiney from stopping them.

Kidnapping / False Imprisonment

Kidnapping occurs when the defendant wrongfully moves or hides a victim in a secluded place against their will. With the hiding route, this also brings a claimf or false imprisonment--which is when the defendant forces the victim into a bounded area without any reasonable method of escape. In this case, David and Frank kidnapped Whitney when they "forced her into a closet" against her will and forced her to remain inside. Further, they committed false imprisonment when they locked her in the closet--thus putting her in a bounded area with no reasonable method of escape.

Battery

Battery is the unconsented and harmful or offensive touching of the plaintiff's person--which grows to aggravated battery is substantial injury is caused. In this case, David and Frank committed aggravated battery when they "punched Whitney in the face." That is, the contact was surely harmful, and at no point did Whitney consent. Thus, David and Frank are both criminally liable for battery.

Drug Possession

Drug possession is the retention of an illegal substance with knowledge. In this case, both David and Frank were found to have "6.7 grams of heroine" in their car.

The fact are not clear that either man knew of the heroine, but the fact that they were found in possession of it and it being in their car at the time of arrest creates evidence to support their possession and knowledge. Notably, if David's statement is true that those are "not my drugs," this possession would then fall solely on Frank--because possesion of drugs was neither in furtherance of their conspiracy to commit burglary, nor a foreseeable action to commit the conspiracy.

2. Legality of the Truck Search and Admissibility

The Fourth amendment prevents government officials from committing unreasonable searches and seizures. It is applicable to state officers through the 14th amendment. A seizure occurs when a person is stopped from free mobility--including when the person would reasonably believe that they are not free to leave the presence of a government official. Further, a search occurs when the state invades an expectation of privacy. Generally, a warranty is necesary before any search or seizure to be reasonable--with exceptions discussed below.

In this case, David and Frank's challenge of the search and siezure would invoke their 4th amedment rights because the search and seizure was committed by state officials--that is, by officers. But to challenge the searches and seizures as unreasonable, the parties must have standing.

Standing

To challenge a search and seizure, the parties must have standing to assert their rights--meaning that they were personally seized as being stopped, or the state searched an are where that person individually had a legitimate expectation of privacy. IN this case, David and Frank have standing to challenge the initial stop of the police as a seizure. Moreover, by stopping the car--all occupants have standing to challenge the stop as a seizure. And here, David and Frank were both driving in the vehcile that was pulled over.

With the search, however, only David would likely have standing to challenge the search of the overall contents of the vehicle. Moreover, with a vehicle, only the driver in possesion has a legitimate expectation of privacy in the vehicle--any occupants would not, unless the vehicle is in the ownership or control of a passenger. And in this case, only David is seen as possessing the vehicle since he in the driver, and Frank has no possession interest. Though the vehicle belongs to David's mother, David as the driver still holds a legitimate expectation of privacy when he is controlling it.

Initial Stop

Officers may stop a vehicle without a warrant if they have reasonable suspicion that the vehicle has committed a criminal violation. Reasonable suspicion is based on the totality of the circumstances, and it considers evidence and knowledge of

the officers as well as any facts that show criminal action. Without reasonable suspicion or a warrant, the stop would be a violation of the driver and passenger's 4th amendment rights.

In this case, the officers did not violate Frank or David's 4th amendment rights when they stopped the vehicle because they have knowledge that a vehcile matching their description committed a burglary and contained the evidence taken. Moreover, from Whitney's call, the police "spotted a truck matching" her description, and thus had reasonable suspicion that David's car was involved in the burglary. Therefore, the police did not commit any violation in this initial stop.

Notably, with the initial stop, the officers may request the occupants to exit the vehicle if there is a reasonable suspicion that the occupants are dangerous or there is evidence for which the stop was made in the vehicle. In this case, the stop was made for two suspected burglars who used force therein. Thus, the officers has reasonable suspicion that the occupants were dangerous, and that evidence of the crime may be in the car leading to t he reason for the stop. Thus, asking David and Frank to exit the vehcile was proper.

Search of Truck

The search of truck, as stated above, would only give David standing to challenge. With a search, officers must either have a warrant or have reasonable suspicion

that the vehicle contains fruit of the crime for which the vehicle was stopped. With reasonable suspicion, the police may only search the interior of the vehicle--not the trunk. However, an automobile excecption allows officers to search the entire vehicle if they have probable cause that the vehicle contains fruits of a crime. Likewise, any evidence in plain view is admissible--that is, obviously perceivable from where the officers are legitimately present.

In this case, the initial search of the vehicle was likely proper because (1) the police had reasonable suspicion from Whitney's call that the vehicle held evidence of the burlgary inside--thus, allowing the police to search the immediate interior; and (2) because the vehicle matched the exact description of Whtiney, the police likely then had probable cause to search the entire vehcile for evidence of the robbery. Thus, the search of the vehicle by police was proper under the 4th amendment even without a warrant.

Heroine

Depending on the owner of the "black bag with a drawstring," David or Frank may assert standing as having a legitimate expectation of privacy therein. And with that expectation, police must have either a warrant to search or probable cause to believe evidence of a crime is inside. If the discovery of the item and search is connected probable cause, polce may only search areas in which they are likely to find the evidence of the crime.

In this case, the police officers' search was proper because they had probable cause that all contents of the vehicle contain evidence of the burglary. That is, the police, prior to finding the black bag, already discovered all of the televisions and stole property reported by Whitney in the car. Thus, police had probable cause to believe more stolen proeprty from Whitney may still be inside. And the black bag being the size necessary to fit jewelry (a small object) could then contain evidence for the exact objects that the police have probable cause to search for. Thus, the police properly search the black bag. And because heroine was inside that bag, the police then properly discovered it and it will be admissible at trial against either defendant to prove ownership.

3. Admissible of Statements

"Those are Not my Drugs"

Generally, a person does not have any right to exclude statements made to police unless the statement was made while the individual was in custody and during an interrogation. Custody means the person would reasonably not feel free to leave; and interrogation means any act by the state to elicit incriminating statements. If the suspect is in a custodial interrogation, that person must be read their Miranda rights under the 5th amendment--that is, that they have the right to remain silent and to an attorney. Any statements made without a Miranda right reading would be

inadmissible in trial if made in a custodial interrogation. Miranda rights must be clearly and unequivocally invoked to be operable. However, voluntary statements made by a defendant are not covered by Miranda, and are admissible against the defendant.

In this case, David's statement of "those are not my drugs" would be admissible against him at trial because it was not made subject to any interrogation. That is, though David was in custody since he was being searched by the police officers and a reasonable person would not feel free to leave during a search, the statement was not during an interrogation. In other words, the police never did anything to elicit David's statement--meaning they need not give him his Miranda rights at that time because the police were not interrogating him. And because this was not an interrogation, David's voluntary statement thus would be admissible against him at trial.

The admissible of the statement against Frank would depend on the Confrontation Clause. Moreover, the CC requires that the defendant be able to confront any adverse witness, who made a testimonial statement, in their trial to examine their testimony. A "testimonial" statement means that it was given to assist an investigation or prosecution. If the statement is hearsay and the witness is unavailable, then the statement is generally inadmissible under the CC. Here, David's statement is hearsay as it is offered for its truth and was amde out of court. Thus, to be admissible must testify in trial so that Frank can cross-examine

him.

Frank's Statements

Frank's statements occurred after the police "arrested" him and during an interview. Thus, statements were made while in custody and during an interrogation--meaning the state must have read Frank his Miranda rights. And here, the state did so because the facts say that David and Frank were "properly read their Miranda rights." However, Frank also made his statements after waiving his Miranda rights. Moreover, waiver must be clear and unequivocal--and if so will then be a voluntary statement admissible in trial. And in this case, Frank made such waiver becaue he "waived his rights and agreed to speak with police." Thus, Frank properly waived his Miranda rights, and his statements are admissible.

Confrontation Clause

Frank's statements to police implicate the confrontation clause is used against David. Moreover, as stated above for the legal standard, Frank's statements were testimonial because they were specificall made "to speak with the police" about the crime and David's criminal liability. Further, the statements are hearsay because they were mde out of court, and are now being offered for their truth. Also, David never have an opportunity to cross-examine Frank's statements when made. Thus, for these statements to be admissible, Frank must personally testify at David's trial.

END OF EXAM