Exam Information

Applicant ID:	68
Exam Date:	7/2021
Exam Name:	Question 1

Count Specifics

Total word count: 2016

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

1. Cate (C) and Jon's (J) Duties under the Nevada Rules of Professional Responsibility

New Firm Name

Duty Not to Mislead the Public: When naming a firm, attorneys in Nevada have a duty not to mislead in the title so as not to cause the public confusion. Cate and John left Big Law, Ltd. (BL) and created their own general practice firm named Nevada Attorneys General (NAG) which is problematic because the name suggests they work for the Nevada Attorney General's office which is a government entity. Therefore, both C and J will be found in violation of the rule of professional responsibility.

Restaurant Dining

Duty of Loyalty/Confidentiality: Attorneys must not engage in conduct that would adversely affect their client's position in a case and must not release information about a client to opposing parties. The only time an attorney may breach the duty of confidentiality to a client is if the client were to sue for malpractice and they have information from the representation that needs to be used or to prevent the client from engaging in criminal conduct. Neither is present here. Both C and J breached their duty of loyalty to the slip-and-fall client because even though C was the main attorney on the case, their firm is a partnership, not a solo-practice. Therefore, either of their actions may impact the client. By dining at the opposing party-restaurant they risked bringing harm to the client's case. Additionally, the restaurant's general manager is familiar with C from her time at BL and came over to greet both her and J. C specificlaly breached her duty to the slip-and-fall client by exclaiming to the manager "When my new case is over, I'll own this place." She gave up confidential information about her clients case. Then, when asked who the client was, C told the manager and asked for a copy of the restaurant's internal incident report. Exposing the name of the client was another violation of the duty of confidentiality for which C can be held liable for.

Duty to Speak with Opposing Counsel: Attorneys who are aware an opposing party is represented by counsel are not permitted to discuss matters of a case with the opposing party directly. Here, both C and J violated this rule by eating at the restaurant and engaging in conversation with the restaurant general manager about the case. Then, when C specifically asked for a copy of the incident report from the general manager she was in further violation.

Duty to Report: One of the most important rules in all of professional conduct is the duty to report other attorney's violations. Here, both C and J can be held in violation of the code if either knew of the others' misdeeds listed herein and failed to report them to the bar. Specifically, J can be held accountable for failing to inform the bar of C's statements and questions to the general manager while they dined at the restauarant.

2. C's Duties under the Nevada Rules of Professional Responsibility

Former Client from BL

Duty to Former Firm: Attorneys must act in good faith when taking clients from a former employer when there is not a non-compete clause present. The facts here do not indicate C signed a non-compete clause during her employment with BL; however, she did leave the firm for a smaller practice between herself and one other attorney. In the process, she asked one of BL's client's to leave with her. If she did not speak with BL first about taking the client, despite having performed on the case to a great extent, C could be found to have violated a rule of professional conduct.

Duty of Loyalty: Attorneys have a duty of loyalty to their clients and must not act in a manner which affects the client's legal interests. Here, C expressly asked that one of her clients from BL follow her to her new firm, NAG after C had invested a lot of time in the case. The client then agreed to follow C to NAG where C had a responsibility to act with utmost care in handing the client's case until the end or until the client decided to terminate representation.

Competence: A lawyer must be comptent in handling a client's case with regard to experience, knowledge of the law, and if not competent, must take the steps necessary to become competent in a reasonable amount of time. C was already competent in handing big law type cases after being employed with BL for several years and then

Permissive Withdrawal: A lawyer is permitted to withdraw from a clients case if it would not materially affect the outcome of the case. Here, C became upset when she learned the client was still talking to BL attorneys and questioning C's trial strategy. C then "refused to do any more work on the case and told the client to go back to Big Law" with only a week before the client's trial. With C having invested "a lot of time" in the client's case, it would be improper for C to discontinue work as it would likely materially affect the outcome of the client's trial. As such, C is likely to be found in violation of the rules of professional conduct should she seek to withdraw from the case.

Slip-and-Fall Client

Attorney-Client Relationship: The attorney-client relationship begins when a client seeks to employ an attorney for help in resolving a legal matter. In Nevada, the relationship extends to clients who simply engage in consultation with an attorney though they are not required to be hired for protection. Therefore, the attorney-client relationship began for the slip-and-fall client the moment he consulted with C and C has a responsibility to uphold the client's confidences.

Duty of Loyalty--Former Client: An attorney may not accept a case if it is likely to have a materially adverse impact on a former client unless the new client and former client consent to the representation in writing. Here, C informed her new client that they would be going against BL because the restaurant kept her former law firm on retainer for issues like this. If C had ever worked on cases for the restaurant she would know information about how things work for them and their business and could use it against them in the slip-and-fall case for her new client. To do this would be a violation of the ethical rules. Therefore, C would need to get consent from both sides

for continuing with representation. Additionally, she would have to maintain her **duty of confidentiality** to the restaurant (if one were in fact formed through C's previous employment) and therefore might not be able to represent the new client if her former knowledge and inability to disclose it due to confidentiality would be materially adverse to the new client's interests.

Fee Agreements: Fee agreements must be reasonable, not excessive, state the terms of the agreement and preferably in writing. **Contingent fees** are permitted in most cases but not criminal cases or those involving family law matters and must be in writing. Here, C and the slip-and-fall client agreed C would be paid 1/3 of any recovery, the two shook hands and the deal was "finalized." It is probably not excessive for C to be paid 1/3 of any recovery; however, she should have informed the client of any court fees that may not be accounted for in the recovery for which the client will be responsible. Additionally, the two only shook hands instead of having the agreement memorialized in writing. Therefore, C could be found liable for violating the rules of professional conduct.

3. J's Duties under the Nevada Rules of Professional Responsibility

Bankruptcy Couple

Duty to Client--Conflict of Interest: Attorneys are not permitted to take on cases that are adverse to the interests of former clients unless the client is informed of the conflict, its effects, and agrees in writing. Here, J was hired by a couple to file a bankruptcy petition. After several months of working with the couple, and while the bankruptcy case was ongoing, the wife of the pair approached J about representing her in an "uncontested divorce." An uncontested divorce is one in which both spouses agree to all material terms of the divorce and the division of assets in Nevada. Without consulting the husband, J agreed and then charged a flat fee of $50,000. Because the bankruptcy case is ongoing, J was required to speak with the husband first and ask if he would consent to the representation of the wife in the uncontested divorce. Had husband agreed to the terms and in writing, J may have been able to take on the divorce matter. However, even with the husband's consent, there is always the chance an uncontested divorce will become contested and at that point, J would not be able to adequately represent either the wife or husband in the family law matter with the bankruptcy matter still pending because he may know things about each spouse the other does not know that could materially impact the outcome of the divorce case.

Here, there is a secondary issue regarding J's **duty of confidentiality** owed to the couple. A lawyer must not share any information learned about a client during the attorney-client relationship. An attorney-client relationship is clearly formed here because J has been representing the couple in their bankruptcy action.

Fee Agreements: Fee agreements charged must not be excessive, state the terms of the representation, and preferably be in writing. J was hired by wife to represent her in an "uncontested divorce" for $50,000. The $50,000 fee agreement is likely to be deemed excessive because an uncontested matter is one in which both parties agree to the divorce and all material elements including division of assets, child custody issues, and alimony issues. It often times does not require parties to present themselves before a judge if both sides competently sign off on the court documents. Therefore, J is likely to be found in violation of the rules of professional conduct for this excessive and egregious fee agreement with the wife-client.

Competence: A lawyer has a duty to be competent when handing a matter with regard to experience, knowledge, and ability in the courtroom. Here, J took on a family law matter for the wife-client with no former experience in that area of law. He attempted to remedy the competence issue when he hired a veteran paralegal to produce the divorce documentation however, a lawyer must not **assist a non-**

lawyer in engaging in the profession of law. J allowed the paralegal (who is not a licensed attorney) to draft the legal documentation and then submitted the documentation with his signature but without reviewing the documents. While a paralegal may draft court documents, it is a lawyer's responsibility to understand the law, ensure the documents are drafted in accordance with the law and then be able to produce oral argument before a tribunal in a competent and professional manner. Here, it is arguable that J acquired this divorce case in an incompetent manner and should be held accountable for his violations if anything goes wrong.

Duty to Supervise Non-Lawyer Employees: Attorney's have a duty to supervise their employees, both lawyers and non-lawyers, to ensure they are not engaging in conduct that violates the rules of professional conduct. Here, J did not supervise the paralegal when he had her draft the divorce documents for the wife-client and then signed and filed them with the court. J; therefore, can be held responsible for violating yet another rule of professional conduct.

BL Attorneys Duties Under the Rules of Professional Conduct

Duty not to Speak with a Represented Client: BL attorneys also potentially violated the rules of professional conduct when they were giving C's client with the trial coming up legal advice if they were aware that the client had agreed to take their case to C's new firm. It is likely they were aware of the client having moved with C because the client was specifically asking about C's trial strategy.

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

Exam Information

Applicant ID: 201

Exam Date: 7/2021

Exam Name: Question 2

Count Specifics

Total word count: 2218

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

A v. AC

Negligence

A person or entity is negligent when they owe a duty, breach said duty, and that said breach of duty is the cause of damages to the injured party. Here, Alex (A) may have a claim for negligence against Allstar Cinema (AC). AC owes a duty to foreseeable plaintiffs to generally avoid harming them. Here, A is a foreseeable plaintiff because he was a patron of the business and would thus be subject to any harm caused in the regular course of conduct of that business. The standard that AC will be held to is that of a reasonably prudent person under same or similar circumstances. AC will breach that duty by acting unreasonably. Here, A will argue that AC acted unreasonably by failing to warn consumers of a sudden switch to peanut oil even after the business having received notice that some patrons had severe allergies to nuts. Causation is met if the harm would not have occurred but for the breach of duty by the defendant. Here, AC's acts were the cause of A's injuries because but for their failure to warn of the switch in oils A would not have suffered his injury. Proximate cause is met if the type of harm suffered was foreseeable from the breach. Here, injuries caused by allergies are foreseeable from a failure to warn of a change in ingredients. Finally, damages are met here because A spent several days in a hospital recovering from personal injury suffered due to his allergic reaction to the oil. Thus, A may have a valid claim for negligence against AC.

Defenses

AC will claim the defense of comparative fault against A. Traditionally, comparative fault was called contributory negligence, and completely barred recovery by a plaintiff if they were at all negligent. Now, however, Nevada has adopted a partial comparative fault basis for recovery and will allow recovery so long as a plaintiff is not more than 50% at fault in a given situation, and will reduce a plaintiff's recovery for any amount that he was negligent. Here, AC will claim that A was negligent because he failed to inquire about the oil and further because he failed to have his emergency medication on him. It is unlikely a court would find that A was unreasonable when he did not ask about the oil because he was told in the past by an employee of AC that the theatre always cooked the popcorn in canola oil, and relied on that statement for this particular situation. As for the lack of emergency medication, it is likely that a court would find that a person who knows they have a severe allergy behaved unreasonably by failing to have the medication on them at all times. This will likely not amount to being more than 50% at fault on the part of A, but AC will successfully be able to reduce the damages they owe to A on a theory of comparative fault.

AC will not be able to claim lack of knowledge about A's severe peanut allergy as a defense because a defendant always takes their victims as they find them under the eggshell plaintiff rule.

B v. AC

Negligence

Becca (B) will claim that AC was negligent in its failure to adequately warn her of the potential injury caused by her seat. In general, landowners owe duties to warn people on their property of certain features. Nevada has done away with a distinction between invitees (people invited onto property for commercial gain) and licensees (people invited onto the property generally) and thus the same duty is owed to both classes of people. Here, B is an invitee because she is a patron of the business invited onto the property by the implied invitation held out to all who go into businesses during their normal hours for the commercial gain of AC. Thus, AC owed a duty to warn of certain conditions on the premises. This duty is a duty to warn of dangerous conditions on the premises that are unknown to the invitee or licensee that the business knew of or should have discovered through a reasonable inspection of the premises. Here, B will claim that AC failed to warn her of a condition like this because there were no signs indicating why a seat was taped off in the theatre. This argument is unlikely to succeed, however, because a normal person would recognize that when there is yellow warning tape marking something that thing should typically be avoided. If a court determines that AC did breach its duty in this situation, however, B will show that but for that failure to warn she would not have suffered her damage caused by the chair snapping, and that injry from falling to the ground after a chair snapped is a foreseeable type of harm in a case like this. Finally, B suffered damages because she suffered personal injury that left her hospitalized for a couple of days. Thus, if B can show that AC breached its duty to warn her she will have a valid claim of negligence against AC.

Defenses

Assumption of the Risk

AC will claim that B assumed the risk of sitting in the chair. Assumption of the risk is a defense that can be asserted when a plaintiff was given a warning of a dangerous condition and proceeds to the condition after having gained knowledge of the danger. Assumption of the risk is a complete bar on damages. Here, AC will argue that AC assumed the risk of injury because she saw the warning tape on the chair but nonetheless proceeded to take the tape off of the chair and sit in it. It was because of this and not any fault on AC that B was injured. Thus, B is likely to be precluded from getting any recovery from AC.

Comparative Fault

Even if a court finds that B did not assume the risk of injury here, AC may still succeed on a comparative fault defense. AC will argue that B acted unreasonably by ignoring the warning tape, and further acted unreasonably by trying to force the rocking mechanism to work by using her legs to push on the chair in front of her until the chair snapped. It is likely that a court would find that B was at least partially at fault, and based on the adequate warning maybe even more than 50% at fault, but regardless AC will be able to reduce their damages in this case.

C v. D

Negligence

Charlie (C) will claim that David (D) was negligent in his medical treatement that caused the infection on his chin. A person generally has no duty to come to the aid of another. An exception to this rises when a person declares that they will aid another person, and from there a duty is imposed not to leave the person they are assisting in a worse-off position. Here, D offered to aid C by helping patch up his bleeding wound, which imposed a duty not to leave C in a worse position. D will be held to the standard of a reasonably prudent person under same or similar circumstances, and breached that duty by acting unreasonbly. It was unreasonble for a layperson to claim to know how to do a procedure such as gluing a serious cut without any previous experience other than seeing it in a movie once. It is further unreasonable to undertake a procedure like this without cleaning the cut or waiting for the bleeding to stop. Thus, D owed a duty to C and breached that duty. D's acts were the cause of C's injury because but for D's negligent medical assistance C would not have had an infected cut. An infected cut is a foreseeable type of harm from this act so proximate cause is met as well. Finally, damages are met because C suffered personal injury damages from his infected cut. Thus, C likely has a valid claim for negligence against D.

Defenses

Comparative Fault

D will defend by saying that C should be found partially at fault. D will argue that C acted unreasonably by accepting his assistance based only on the statement that he saw the procedure in a movie once without asking any further questions about D's medical experience. It is likely that a court will agree with D here and C will be found to have been partially at fault, reducing his recovery from D.

C v. AC

Negligence

Similarly to B's claim against AC discussed above, C will claim that AC was negligent by failing to warn about the cracked stair. Just like B, C is an invitee in this situation because he was a person coming onto the premises for the commercial gain of AC. Thus, AC owed C a duty to warn him of dangerous conditions that C did not know about that AC knew of or should have discovered through a reasonable inspection. AC breached this duty by failing to warn C about the crack in the stair. AC knew of the dangerous condition as evidenced by the note that D, a theatre manager, left in the main office saying that C was not the first person to fall on the cracked stair. There is nothing in the facts indicating that C saw the crack before he injured himself so he did not have any independent knowledge of the condition. Thus, AC had notice of the dangerous condition and breached its duty to C by failing to provide any warning about the dangerous condition. AC's breach was the cause of C's injury because but for the failure to warn C would not have tripped on the crack and fallen down. A concussion is a foreseeable type of injury from a case like this. Finally, C suffered personal injury damages in the form of a cut on his chin and a concussion. Thus, C has a valid claim of negligence against AC. C may claim damages for both the concussion and the infected wound on his chin because the infection was caused by negligent medical treatment, which is a foreseeable intervening force that will not cut off liability to AC.

Vicarious Liability

If the court finds that D's conduct was an unforeseeable intervening force that cuts off liability to the increased damage caused by the infection C may attempt to impose vicarious liability on AC for D's actions. Vicarious liability is imposed when a person acting as an agent does an act within the scope of that agency. If this occurs, the principal in the situation will be liable for the acts of the agent on a theory of vicarious liability. Here, C will claim that D was an agent of AC because he was an employee of AC. An employer/employee relationship creates an agency relationship for the purposes of vicarious liability, so all C will have to do is show that D's conduct was within the scope of his employment. AC will argue that the conduct was outside the scope of employment because he was off duty at the time the help was rendered. C will counter by arguing that even though D was off duty, he used the main office's supplies to perform the gluing procedure. Overall, it appears that D was not acting within the scope of employment at the time of his acts becasue there are no facts indicating that he was given permission by AC to use the supplies and did so entirely without giving notice to the theare. Thus, C's claim for vicarious liability will likely fail here.

False Imprisonment

False imprisonment is an intentional tort that occurs when a defendant intentionally confines a plaintiff to a bounded area. Intent is satisfied if it was the conscious objective of the defendant or if it was substantially certain that a result would occur. A bounded area is an area from which there is no reasonble means of escape, and can be established physically or through a threat of force. Further, a plaintiff must know of the confinement to assert a claim on this theory. Here, it was substantially certian that a person who did not do a complete inspection of a theatre before closing could lock a person inside the theatre, thus the intent element is satisfied. Further, the bounded area was established here by a physical barrier caused by the theatre being locked. However, C was asleep for the entire time of his confinement, and it does not appear he was confined when he woke up in the morning. Thus, C will fail on his claim of false imprisonment in this case.

Defenses

If the court finds that AC is vicariously liable for D's acts, AC can assert the same defenses as D did in the form of comparative fault. As discussed above, C was likely partially at fault for the infection in his cut and thus damages would be reduced for that claim. This defense will not have an effect on the recovery for the concussion suffered by C. AC is unlikely to be successful in any claim that C was comparatively at fault for tripping on the crack because there are no facts indicating that C acted unreasonable when he did so.

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

Exam Information

Applicant ID:	81
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Exam Name:	Question 3

Count Specifics

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

Fee Simple Absolute

Oscar, owns blackacre in apparent fee simple absolute. This means that oscar has the right to convey, devise, encumber, or otherwise transfer blackacre. Bob took out 2 mortages on Blackacre one from bob and one from Amy thereby encumbering the property. Nevada is a lien theory state, therefore, Oscar will retain title to the land and the mortgage lien holders will have no right to possess the land until default, and Oscar is still able to transfer, devise, convey his land.

Priority - Amy and Bob

Amy and Bob both have mortgages evidence by a deed of trust in blackacre. However, neither Amy nor Bob, recorded their mortage. Therefore neither party is protected by Nevada's recording statute. As between Amy and Bob, Amy's mortage was first in time and therefore Amy would have priority over Bob. However, since Oscar is current on the loan, oscar still has the right to title of the land and may convey it. Once, Amy and Bob later recorded, the first to record has priority, and at that point, Amy recorded first and would have priority.

Christina's Interest

Oscar had drafted a will devising blackacre to his niece Christine. No actual conveyance to Christine occured. Christine has an expentency in the land because, it is possible that Oscar could change his will to designate another beneficiary in her place to receive blackacre. Expectancy's are not a true interest in land, and are not transferable, descibidle, devisable.

Dennis vs Amy and Bob

Dennis is a bonafide purchaser for value (BFP) of blackacre. Dennis purchased the land for value ($1,000,000) and was without notice of Amy and Bob's interest in the land. Dennis would not have record notice (because the mortgages were not recorded), inquiry notice, since Amy and Bob were not present on the land or occupying the land (and he was provided misleading information by Christine that he had no reason to question), nor did Dennis have actual notice of Amy and Bob's interests.

Estoppel by Deed

One Christine actually inherited the property from oscar, she would be estopped from denying her power/right to convey the property to Dennis. Moreover, she actually continued with the transaction and conveyed the property by deed to Dennis.

Quiet Title

An action to quiet title is brought to establish the rights of each holder of an interest in real property and to determine ownership/priority in interests. Generally a bonafide purchaser of real property for value will prevail over unrecorded interests in the property under the recording statutes. The policy is to protect buyers of real property and encourage market participation. Nevada has a race-notice-statute.

Here, Dennis was a BFP of blackacre and was the first to record his dead and did so properly with the county recorder. Therefore, as a BFP who was first to record, and not having notice (actual or constructive) of any encumberances on the land, Dennis will be entitled to take possession of blackacre and he will not be personally liable for the mortgages on the land since he did not assume the mortgages.

Chain of Title

Amy and Bob failed to record their mortgages. Therfore, when Dennis conducted a record search for blackacre, he did not discover any superior interest in blackacre because no such interes was contained in the records. A BFP with no notice will generally take free and clear of unrecorded interests in the land when they record first. Moreover, the failure to record the mortgages will ultimately result in them not running with the land since they are not purchase money mortgages and the only remedy that Amy and Bob will have is against Oscar's estate. They will not be able to foreclose on Blackacre.

Therefore, Dennis will prevail against Amy and Bob in his quiet title action and take free and clear of Amy and Bob's liens. However, as Oscar's sole beneficiary/heir, Christina may still be liable if/when Amy and bob attempt to recovery from Oscar's estate. Amy and Bob were still in privity of contract with oscar.

Dennis vs. Christina

A general warranty deed contains six warranties including the covenent of seison (posses the interest they purport to convey), the power/right to convey the property (grantor is authorized to make the conveyance), the warranty of marketable title, the warranty of quiet enjoyment, the duty to provide further assurances.

Here, Dennis may argue that Christine breached the covenant of seisin. Dennis would likely succeed since at the time of the conveyance, Christine had no transferable interest in blackacre. However, she later obtained title to blackacre and this claim would be futile for Dennis unless he wanted to rescind the entire deal.

Dennis will also argue that Christine failed to deliver marketable title. Title is unmarketable if there are encumberances on the title at the time of closure. This warranty may only be breached at delivery. A seller has a right to use proceeds from the sale to expunge any liens/encumberances on the property. Here, Christine conveyed blackacre to Dennis without knowledge of the loans but quickly discovered them. Christine did not provide marketable title to Dennis and may be liable for the breach of warranty.

Duty to provide further Assurances

The seller under a warranty deed has a duty to protect and defend against all suits brought against the grantee (buyer of the land). Here, Christine will have a duty to attempt to remedy the breach and will have to defend Dennis against Amy and Bob's claims in the quiet title

action.

Defenses: Estoppel by dead. As to the covenant of seisin, as dicussed, Christine will be estopped from agruing that the did not have the right to the property and the right to convey blackacre one she actually inherited it. Therefore she would not be able to defend against Dennis's claims on thise ground.

Christine may also argue that she was able to provide martable title because she did not discover any other possible encumberance until after the transaction and that the purported encumberance was in fact, not still on the land.

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

Exam Information

Applicant ID: 52

Exam Date: 7/2021

Exam Name: Question 4

Count Specifics

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

1. Motion to Remand

Procedural Requirements -- Removal

A party may bring a motion to remove a case to federal court if such motions is brought within 30 days of when grounds for removal become apparent. All defendants must agree to the removal.

In this case, Drive brought the motion to remove 20 days after being properly served. Thus, the procedural requirements for removal are met.

Remand -- Subject Matter Jurisdiction

A court shall grant a motion to remand where the court lacks subject matter jurisdiction over the claim. Subject matter jurisdiction pertains to the courts jurisdiction with respect to the claim. A court hearing a claim for a case removed to federal court must have either federal question jurisdiction or diversity jurisdiction. Under the well-plead complaint rule, federal question jurisdiction exists when the plaintiff raises a federal issue or asserts a federal right on the face of the complaint. Diversity jurisdiction exists when the plaintiff is of completelty diverse citizenship from the defendant and the amount in controversy exceeds $75,000. Alternatively, in class actions where there are 100 or more members, jurisdiction exist if the one member of the class is diverse from the defendant and the amount in controversy exceeds 5 million dollars (class action fairness act). Citizenship for a person is based on their domicile -- present place physically with a present intent to remain permanently. Citizenship for a corporation is where there principal place of business is located (nerve center) and their state of incorporation.

In this case, federal question jurisdiction does not exists because Paul (P) is bringing a breach of contract action, which is a state law claim and thus does not plead a federal issue. Standard diversity jurisdiction does not exist in this case because the amount P seeks to recover is $20 for the service fee that he was charged. Further, class action diversity does not exists because although P, an Arizona resident, is of diverse citizenship from Drive (D), who is a Nevada citizen given that it is a corporation and principal place of business are both in Nevada, and the class is estimated to be 150,000 people, the amount the class is seeking a for is approximately $20-$30 per person (or 3 million to 4.5 million). The amount in controversy does not meet the requirements for diversity jurisdiction.

In conclusion, there is not subject matter jurisdiction.

Remand -- Procedural Requirements

A motion to remand on the basis of lack of subject matter jurisdiciton may be brought at any time.

In this case, the motion to remand was properly brought because a motion to remand on the lack of jurisdiction may be brought at any point.

2. Motion to Certify

A class action is approrpriate when 1) the number of plaintiffs is so numerous joinder is impossible, 2) the claims presented are typicial of those in the class, 3) the representative party can adequately represent the class, 3) the claims of the parties are common. For classes for damages it must also be shown that the class action method is a superior method of resolving the dispute and a similar issue predominates over individual issues.

In this case there are so great a number of plaintiffs that joinder is not feasible given the fact the class is likely 150,000 people or more spanning the United States and the World Internationally. D raises the argument that it would be impossible to notify everyone who rented a car, but this argument will likely fail because notice may be provided in numerous ways. Notification may be difficult given that D has implemented a new reservation system, however, P is required to establish the class and D should have records for those individuals. P's claim that annual repeat visitors record is likely insufficient as a member of a class must be properly notified to be bound by the terms of a class action. Such records will only cover repeat visitors, single time visitors will still need to be tracked down.

The claims presented by the class representative are typical of the class as the class is for the "concession and Service fee" specifically charged by D at its Las Vegas location. The fee is $20 to $30 per day, a comporable amount, and all claims will focus on the reasonableness of that fee. The claims may not considered to be typical as the type of car rented, the length of the rental, who was a member of the loyalty program, and who purchased rental insurance will all vary by class members. Those issues might be said to make the presentation of each class members case different and therefore not typical.

It is a greater question whether P's attorney can adequately represent the class. P's attorney is a solo practioner and is seeking to represent a very large class. Additionally P is an Arizona based resident. P's attorney is permitted to practice in Nevada so that doesn't preclude him. Additionally P's attorney represented P in a slip and fall case, which is significantly different from a mass litigation class action. Thus, it is questionable wether P's attorney can adequately represent the class.

The claims represented by the parties are common in that they all focus on the same fee charged. However, D avers that the the claims are not common in that with some renters the fee was waived by certain action or that it varies based on the car rented and the length of the rental. Further the fee varies between $20 and $30. It is possible that given the discrepancy in how the fee was charged the claims of the class are not common. But, the claims are common in that they are all in regards to the same fee type.

Lastly, class action may be the superior method in asserting this claims as the fee is of a very small amount and parties will generally not bring suit in asserting their rights for this case. Further, the issue of the fee is a predominating issue related to memebers of the class.

In conclusion, the court did not properly decide the motion to certify because there is likely insuffucienty commonanlity and typicality, and there is a concern about how well P's attorney can adequately represent the class.

3. Motion to Approve the Settlement

A representative party may seek settlement on behalf of the class. In doing so, the court must approve the settlement. Class members have "opt-out" rights meaning that a party to a class that is properly notified has the right to opt-out of a settlement reached by the parties and pursue their own litigation. In deciding whether to accept a settlement on behalf of the class, a court will get input from both named and unnamed members of the class to determine whether the settlement is in the best interest of the class.

In this case, P settled on behalf of the class for a $20 coupon to be applied to a future rental from D. Facially, the settlement may seem fair as the amount charged ranged from $20 to $30 a person. However, such a settlement may be unfair since many of the people in the class were repeat visitors and thus a settlement of one coupon may be considered insufficient. In determing whether to accept the settlement the court should solicit input from both the named and unamed class members. P and his lawyer immediately agreeing does not make it automatically make the settlement binding to the entire class. Here there may be concerns the fee is not reasonable as 100 members objected to thsettlement as not being fair or in their best interest. However class members have opt-out rights and they have the right to pursue a claim against D on their own. It is unknown whether the judge solicited members of the class regarding the settlement as the order only states that the record is being approved based upon the record and good cause appearing. Such general statement does not show the judge solicited the input from members of the class.

Another issue arises is the signficant legal fees to be paid to P's lawyer. P will be paid $200,000 for his work on the case. However at this point no discovery seems to be completed and the case seems to be in the initial stages of litigations. Such fee may be unreasonable and instead would better be spent towards compensating the class.

In concluion, based on the totality of the circumstances, assuming the judge solicitided the input from members of the class, the court properly ruled on the motion to approve the settlement.

4. Terms of the settlement legally permissible

A court may enter a settlement where the terms of the settlement are fair and equitable with respect to both named and unnamed class members. As part of a settlement a court may include reasonable attorney fees to be paid to the class's attorney. However such award may be limited to a maximum percentage of the recovery.

In this case, the settlement provided a $20 voucher. Such voucher is a permissible type of compensation because it provides an award to the class for damages it suffered as part of its action. It is permissible to put place the terms of the agreement in the form of services. The voucher is also a fair and reasonable settlement as the fee charged ranged from $20 to $30 a day. Arguably such a fee might not be reasonable if it is shown most persons rented for more than just one day or if the majority of the class's members were charged the $30 fee.

The settlement also raises concerns regarding the amount of attorney's fees awarded to P's lawyer. A lawyer may be awarded attorney's fees but the award may exceed the maximum percentage of recovery. A $200,000 fee is signficiant given the amount of work completed the case (as discussed above).

In conclusion, the settlement with respect to the coupon is legally permissible but the award of attorney's fees may not be if it exceeds the maximum percentage.

5. Appeal of the Settlement Order

Appeals may generally be heard only when a final judgment has been entered. A final judgement is an order that disposes of all issues between the parties. A court may here an issue less than a final judgment if it is collateral to the issue at hand and is otherwise unreviewable if the issue is not appeal or if the issue pertains to a dispute regarding a genuine dispute of controlling law.

In this case, the court issued an order that approved the terms of the proposed settlement. The acceptance of the proposed settlement constitutes a final judgment because by accepting the settlement it disposes of all issues with respect to the class litigation. The settlement determines all issues between the classes, and those who object to the settlement, have the right to opt-out but must bring their own case. Thus those seeking to appeal the settlement may because the settlement is a final judgment.

In conclusion, the group objecting to the settlment may appeal the court's order approving the settlement.

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

Exam Information

Applicant ID: 124

Exam Date: 7/2021

Exam Name: Question 5

Count Specifics

Total word count: 2710

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

Criminal Trial

1. D request to admit Steve's testimony

Relevance:

In order for evidence to be admissible it must be relevant. Relevant evidence is evidence that makes a fact in consequence more or less probable. Relevant evidence will be deemed inadmissible if its probative value is substantially outweighed by its unfair prejudice

Here, Steve's testimony is relevant because it is probative of Dan's (D) character for peacefulness as a means to refute the claim that D would punch Peter (P) for any other reason than to defend himself.

Lay/Character Witness

In order for a lay witness to testify. that witness must be competent and their testimony must be helpful for the jury to reach an ultimate conclusion on the issue. A lay witness is competent so long as they have personal knowledge of the incident and/or person that they are testifying to. Lastly, in a criminal case the defendant may offer character evidence through reputation and opinion testimony but not specific acts.

Here, Steve is acting as a character witness. Here, Steve's statement that "Dan is a person of good character and would never start a fight" is character evidence. There is no evidence to suggest that Steve does not personally know Dan, as to render him incompetent to testify to Dan's character. Further, the fact that Dan and Steve were drinking presumes that they spend time with one another and went out together.

In a criminal case, a defendant's character is always put in issue. Further, a character for peacefulness is relevant to the charge here.

However, the statement "never starts a fight" is likley inappropriate in that it establishes habit, and that D by his own habit would likley conform to that behavior in this instance. Habit may be used to prove Motive, Intent, Lack of Mistake, Identity, or Common scheme or plan.

Further, in order for habit evidence to be admissible, it must be specific. Generally, statements like "always" or "never" do an act are too general to be used as habit evidence.

As such, S may testify to D's peaceful character but not by using specific acts such as "would never start a fight." Thus, this testimony as it stands is likley inadmissible.

2. State's request to admit George's Testimony

Lay Witness

George is the bar tender at the bar where D and P engaged in their altercation. Based on the content of his testimony, regarding D always drinking too much, D must frequent the bar often on the basis that George is testifying to Dan's drinking habits and intoxicated behavior. Thus, George is likley competent to testify as a lay witness.

Character Evidence Rebuttal

Once defendant offers evidence of good character, he opens the door for the State to admit evidence regarding evidence of D's bad character. This evidence is admissible in the form of reputation, opinion, and specific acts.

Here, State is requesting to admit evidence by George regarding D's character that he "drinks too much, gets belligerant, and gets into arguments challenging people to fight." However, this character evidence is likley improper.

The State may argue that George's testimony satisifes habit evidence because it shows that D acted in conformity with the way he always acts when he drinks, however this is a propensity argument, which would render it inadmissible on the basis, as stated above, statements like "always" are too general to convey habit.

The State may rebut D's testimony with specific acts of misconduct, even if those acts did not end in conviction but those specific acts must point to a specific occurence, not a general propensity that D will drink too much adn then strat fights. As it stands, George's testimony is inadmissible as character evidence.

403 Balancing

403 provides that relevant evidence will be inadmissible if its probative value is substantially outwieghed by its unfair prejudice.

Here, the probative value of George's testimony substantially ouweighed by its unfair prejudice in that it is only being admitted to paint D as a belligerant drunk, and would likley mislead the jury into believing that D is "always" drunk and belligerant so he must have been

drunk and belligerant on this specific occasion. Thus, this testimony is likley inadmissible.

3. D's request to admit evidence of P's prior conviction

Relevance

The rule for relevance is above. Here, the conviction is not too remote because it is not older than 10 years and theft may be probative of truthfulness, thus the evidence is relevant.

Character Evidence

Defendant may impeach a victim by attacking that victim's character for truthfulness. It is for the jury to decide the weight that is given to impeachment evidence.

Here, defendant seeks to impeach P's character by admitting evidence of P's prior theft conviction. Theft is arguably a crime that is probative of truthfulness. As such, this evidence is able to be used as impeachment evidence but will not be admissible as substantive evidence, as in evidence to prove something relevant to the charge.

Best Evidence Rule

Best evidence rule (BER) is triggered where a proponent seeks to prove the contents of the writing and does not have personal knowledge of that writing. BER requires the original to be produced and if it cannot be produced, the admitting party must provide sufficient explanation for the document's absence such as: the document is being held by the opposing party who refuses to procure it or the document has been lost or destoryed, not by the admitting party's own negligence or wrongdoing.

In NV, copies will satisify the reuqirement that an original has been produced.

Here, D seeks the admit evidence that P was previously convicted of felony theft in 2017. The eivdence which D must provide is the actual judgment of conviction. Since this judgment can be gained from the courts, there is no excuse why the original or a copy of the original stamped by the clerk of the court cannot be produced.

However, as discussed above, this is impeachment evidence. This will not be used as substative evidence as it is not probative of anything besides P's truthfulness.

403 balancing

The 403 rule is stated above. Here, the felony of theft could likely and reasonably be considered a crime probative of truthfulness. As such, a NV court does **not** have discretion in balancing whether this evidence is substantially outweighed by unfair prejudice. The

conviction, being that it is not too remote because it is not older than 10 years and because it is a crime of truthfulness must be admitted as character evidence against P to refute his credibility and truthfulness.

Petrocelli Hearing

Nevada courts have petrocelli hearings in which a defendant may argue that certain bad acts should not be heard by the jury at trial.

Here, in order for P to dispute the prior conviction, may have attempted to request a petrocelli hearing in which he could argue why the conviction should not be admissiblel. However, P is not on trial. He is merely a victim and as such not party to this case. Thus, no petrocelli hearing may be held for P.

In conclusion, the judgment of conviction from 2017 is admissible as impeachment evidence against P while P is on the stand and he may be confronted with such evidence as a means to impeach but will not be admissible for any substantive evidence.

Civil Trial

As a policy matter, the civil case will likely be stayed until the criminal case has been fully litigated on the basis that D is facing criinal charges for battery and any evidence or admissions made in the civil case would be extremely detrimental and unduly prejudicial to him in the criminal trial. As such, the civil proceedings would likely not begin until the criminal case is resovled.

4. D's request to admit settlement offer

Policy Exclusion - Settlement offer

Relevant evidence will be deemed inadmissible if it is barred by a policy exlcusion, which includes settlement offers. Settlement offers and statements made in the course of settlement negotiations are inadmissible on the basis that Courts want parties to freely negotiate.

Here, defendant seeks to admit evidence that D, P and the Bar participated in a settlement conference where P was offered $100k to settleme the civil case. Such a statement was made during the settlement conference, and as such it is inadmisisble for public policy reasons.

Impeachment - Bias

A declarant must be confronted with evidence of bias so that they can explain or deny that bias. If the declarant denies the bias, the examiner may enter extrinsic evidence of the bias.

Defendants will typically introduce settlement offers to prove biases against witnesses who have been paid a sum of money in exchange for testifying, while this would be relevant and admissible, here, P denied the offer and P is the plaintiff. As such, there is no bias to be shown.

Even if D argued that the settlement amount is probative of P's inability to be reasonable or of proof of D's willingness to cooperate, it remains that the evidence is inadmissible for policy exlcusion.

5. P's request to admit Steve's testiomy about D's statements

Hearsay

Relevant evidence is inadmissible if it is hearsay. An out of court statement used for the truth of the matter asserted is hearsay and is inadmissible unless it falls into an exception.

Here, the evidence is relevant because it is probative of the issue of wehther or not D can be liable for battery and wehther he was the aggressor.

P requests to admit testimony from Steve, who is D's friend that was drinking with him at the bar. Steve wants to testify to a statement that D made after the altercation. The contents of this statement are not being introduced to prove that it was said but rather are being used to prove its truth, that D over reaccted that night and that he would like to pay for P's medical bills. Thus, the statement is inadmissible unless it falls into an exception.

Statement against Interest

Statements that are made against a person's pecuniary or punitive interests are admissible hearsay exceptions so long as the declarant is now unavailable.

Here, if D seeks to testify, he is not an unavailable witness. As such, the statement will be inadmissible under this exclusion unless he refuses to testify.

Non-hearsay excemption - Party Opponent Statement

A party-opponent's statement is a statement made by a party that is now being used against that party by the opposing side.

Here, the statement that D made was that he "wishes he didn't overreact that night and feels bad for Peter and would like to pay his medical bills." P is seeking to admit that statement to be used against D. Thus, D's statement falls into the non-hearsay excemption as party-opponent statement.

Non-hearsay exemption - admissions

An opposing party's admissions will be admissible as a non-heasay exemption.

Here, although D never explicitly states that he did in fact commit a battery against P, he does claim that he overracted and that he feels bad and would like to pay P's medical bills. As such, P could argue that this is an admission by D and falls into the admissions by a party-opponent exemption because a reasonable person who acted in self-defense with a reasonable force in response to the aggressor would not feel bad and would not say they wanted to pay medical bills.

Policy Exclusion - offer to pay medical bills

Offers to pay medical bills, although relevant, are inadmissible as policy exclusions.

Here, D may argue that his statement was an offer to pay for medical expenses. However, such a statement was made by D to Steve, not to P. As such, this statement will not fall into the offer to pay medical bills.

Thus the statement is admissible under non-hearsay exemption for statement made by party-opponent.

6. D's request to admit P's medical records

Best Evidence Rule

The rule for best evidence is stated above.

Here, admission of the medical records are being used to prove that P was intoxicated. As such, BER is triggered because D wants to prove the contents of the medical records and as such the original or a copy of the original must be provided.

Relevance

The medical records are relevant to support a finding regarding P's injuries however, the decision to admit them solely to show that P was intoxicated may be probative of P's inability to control himself because of his dimished capacity or of his inability to properly recall who was the first aggressor because of hsi intoxication.

Impeachment - Sensory Deficiency

A declarant's credibility may be impeached by providing proof of a sensory deficiency. The declarany may be asked while on the stand whether such a sensory deficiency was present at the time of the incident to which they were testifying and they may also be confronted with such eivdence if they deny the sensory deficiency.

Here, D may admit the evidence as impeachment evidenc in order to attack P's credibility and statements regarding the incident. P was drunk and it is likely that D will use the medical records to show that it is possible that P does not correctly recall the timeline of events or did not accurately preceive the events while intoxicated.

As such, the evidence is probative of P's credibility and may be used for impeachment purposes.

Business Records

Business records are the records that are routinely created in regular business. Medical records fall into this exception and as such is an exception to the hearsay rule. These are Paul's medical records, and unless other facts are given, the medical records may be found in an ordinary place in ordinary condition and will be deemed trustworthy documents.

7. D's request to amdit George's testimony of Alice's statements

Relevant

This statement is relevant because it is a statement made by the only eye witness that actually saw P and D fighting in the alley behind the bar and may be used to prove who threw the first punch.

Unavailable witness

A statement made by an unavaialble witness that is testimonial in nature triggers the confrontation clause in criminal cases and will be deemed inadmissible because the defendant would be unable to confront their accuser. If this were a criminal case, Alice's testimony coupled with the inability for P to cross her would deem her testimony inadmissible however this is a civil case.

An unavailable witness must be either dead, ill, live more than 100 miles away from the NV court in which the case is being held, or simply refuse to comply with a subpoena to testify. A witness is not unavailable if their unavailability was procurred by wrongdoing of either party.

Here, it is a civil trial for battery and negligence and as such, the confrontation clause is not triggered. Further, Alice is in Canada, which is more than 100 miles away from NV and as such she is deemed an unavailable witness. So long as there is an applicable hearsay exception the testimony will be admissible

Hearsay

The rule for hearsay is stated above. Here, the statement is being admitted, not to prove that it was said, but to prove the truth of the matter, that P threw the first punch. Such a statement, if not made by the declarant, is hearsay and inadmissible unless it falls into an exception.

Present Sense Impression

Present sense impression is a statement made by a declarant during or immediately after an incident and describes the events which occurred. It is immaterial whether the declarant is present or absent.

Here, the statement may fall under the present sense impression statement because Alice made the statement "I looked out the back door and saw peter throw the first punch." No time frame is offered and the statement is not in present tense however, its content seems as if it was said immediately following the altercation.

If the statement was in fact made immediately following the event, then it is a present sense impression and thus, admissible.

Excited Utterance

Excited utterance is a statement made under the excitement or stress of the event. Here, based on the punctuatiion of the statement, it is not likely that Alice was under any stress upon making the statement so this exception is likley not satisfied.

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

Exam Information

Applicant ID: 279

Exam Date: 7/2021

Exam Name: Question 6

Count Specifics

Total word count: 1586

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

I. The methamphetamine evidence

In order for a search to not violate the Fourth Amendment it must be reasonable. A search without a warrant is presumptively unreasonable, and the burden rests with the State to demonstrate that the search met one of the exceptions allowing a search without a warrant. In this case, Officer Smith did not have a warrant to search the house when he found the methamphetamine evidence, therefore his serach must meet one of the exceptions allowing a warrantless search for the methampetamine evidence to be admissible.

A. Were there exigent circumstances?

One of the exceptions allowing a warrantless search is when police have exigent circumstances justifying the search. Exigent circumstances exist when the police reasonably believe there is no time to obtain a warrant in order to prevent the destruction of evidence, the flight of a suspect, or risk of injury to the police or others in the area. The State may try to argue that Officer Smith had exigent circumstances because he was responding to a disconnected 911 call, he saw blood around Mrs. Davis's nose, and Mrs. Davis stated that her husband had hit her during an argument. The State may argue that this led Officer Smith to reasonably believe that there was a risk of danger to himself or others within the house due to a violent person being in the house.

However, exigent circumstances will not justify the search that led to Smith finding the methamphetamine because although he may have had exigent circumstances to initially enter the house, he would not have them to re-enter the house after Mr. Smith had been arrested and placed in the patrol car. At that point any reasonable potential danger to the police or other persons had been neutralized, and Smith would not be able rely on exigent circumstances to justify the search that resulted in the finding of the methamphetamine.

B. Did Officer Smith conduct a valid Search Incident to Lawful Arrest?

The search incident to lawful arrest (SITLA) exception permits the police to search the immediate vicinity of a suspect placed under lawful arrest for any potential weapons or contraband in order to prevent the destruction of potential evidence or danger to the police or other persons. In this case, the State may attempt to argue that the search that resulted in the finding of the methampetamine was a SITLA because it was conducted after the arrest of Mr. Davis, but this argument is unlikely to succeed for several reasons.

First, the arrest of Mr. Davis was not lawful, as a police officer may only arrest an individual in a private residence if they have a valid arrest warrant for that individual. Smith did not have an arrest warrant for Mr. Davis and therefore his arrest was not lawful to begin with. Also, even if the arrest was lawful, Smith's search was not a valid SITLA because it was not limited to Mr. Davis's immediate vicinity such that potential contraband would have been in lunging distance of Mr. Davis. Mr. Davis was arrested outside of his house, and therefore would not be in lunging distance of anything inside the house let alone something in the upstairs master bedroom. Therefore, Smith's search resulting in the methamphetamine evidence was not a valid SITLA.

C. Did Officer Smith have consent to the search?

Another exception to the warrant requirement for a search is if the officer had consent to conduct the search. Consent can be given by anyone who has actual authority over the area to be searched. Mrs. Davis would likely be found to have actual authority to grant consent to the search of her house as she lived there.

However, a determination of whether consent is given considers the totality of the circumstances, and if the consent was not voluntary, then the search is not valid. First, it is unlikely that consent, voluntary or not, was ever given by Mrs. Davis to Smith to search the house. The only potential indication that Mrs. Davis gave consent for Smith to search the house was that she stepped aside letting Smith enter the residence as he pushed the door open. It is highly likely that Mrs. Davis was simply getting out of the way of the advancing Smith and therefore never gave any form of consent.

Even if Mrs. Davis's action was construed as giving Smith implied consent to search the house, this consent would not have been voluntary. Smith told Mrs. Davis that he needed to come in and check to see if anyone else was injured. Any potential consent Mrs. Davis would have given would have been involuntary because Smith's statement made her reasonably believe she had no choice in whether to let him in or not. Therefore, Smith did not have consent to search the house.

D. Did Officer Smith conduct a valid protective sweep?

Finally, the last exception that could potentially apply to Smith's search resulting in the methamphetamine evidence would be that he conducted a protective sweep of the residence. Following an arrest, and officer may conduct a protective sweep of the house if her reasonably believes there are other people in the house that may pose a danger to the police, and if so that search is limited to where those people could potentially hide. This exception has not been met in this case because the only other person that Smith could reasonably believe might be in the house would be the Davis' son, and even then Smith would have no reason to believe that the son

would pose any danger to the police or anyone else. Thus, Smith's search did not meet the exception allowing for a protective sweep of a premises.

Therefore, Smith's search does not meet any of the exceptions allowing for a warrantless search and the search is therefore unreasonable under the Fourth Amendment. Additionally, Mr. and Mrs. Davis have standing to seek the exclusionary rule as their constitutional rights were violated by Smith's search of their property. Thus, the trial court should grant Mr. and Mrs. Davis' joint pretrial motion to suppress the methamphetamine evidence.

II. The heroin evidence

A. Was the search that resulted in the heroin evidence fruit of the poisonous tree?

After Smith found the methamphetamine in the house, he had probable cause to believe that there may be more drugs in the house because a reasonable person could conclude that finding some drugs inside a house means that there is likely more somewhere else in the house. Because Officer Rogers conducted her search pursuant to a warrant backed by probable cause, it would normally be considered reasonable under the Fourth Amendment. However, the fruit of the poisonous tree doctrine causes evidence that is found as a result of a prior violation of the Fourth Amendment inadmissible under the exclusionary rule. Because the probable cause for the search warrant was based on Smith finding the methamphetamine, which was a result of an unreasonable search in violation of the Fourth Amendment, the heroin evidence would normally be considered fruit of the poisonous tree and inadmissible.

However, there are exceptions to the fruit of the poisonous tree doctrine, specifically independence, inevitability, and attenuation. If the State can show that the evidence would have been found independently of the violation of the Fourth Amendment, then the evidence will be admissible. That does not appear to be the case here, as Rogers would have no reason to search the house if not for Smith finding the methamphetamine. Similarly, the inevitability exception makes evidence admissible that the police would have inevitably found regardless of the Fourth Amendment violation. This is also not the case as the heroin likely would not have been found had Smith not originally found the methamphetamine. Finally, under attenuation, a court should admit evidence even if it is fruit of the poisonous tree if it is so far removed from the initial violation that it would be unjust to exclude the evidence. The State may attempt to argue that because it was a different officer that conducted the search, the heroin evidence was too far attenuated from the methamphetamine evidence to justify exclusion. This argument is unlikely to succeed however because although it was a different officer, the search resulting in the finding of the heroin was relatively close in time and in the chain of events connected to the finding of the methamphetamine and therefore the attenuation exception does not apply either.

The finding of the heroin evidence therefore does not meet any of the exceptions to the fruit of the poisonous tree doctrine and the heroin evidence would normally be inadmissible under the exclusionary rule. However, there is an exception to the exclusionary rule that states

that evidence found by an officer that acts in good faith on a search warrant that is later deemed to be unreasonable is admissible. In this case, there is no evidence to indicate that Rogers was not acting in good faith when acting on the search warrant as the warrant seemed valid on its face. The warrant was based on probable cause and was reasonably narrow in scope permitting Rogers to search the residence for drugs. Therefore, although the search warrant is unreasonable due to the fruit of the poisonous tree doctrine, because Rogers acted in good faith in acting on the warrant, the heroin evidence meets this exception to the exclusionary rule. Thus, the trial court should deny Mr. and Mrs. Davis join pretrial motion to suppress the heroin evidence.

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

Exam Information

Applicant ID: 109

Exam Date: 7/2021

Exam Name: Question 7

Count Specifics

Total word count: 2340

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

1) Contract between Alice and Carol

a) Choice of law

Article 2 of the UCC covers goods. Whereas the common law covers service contracts and contracts of land.

Here, the contract would be for a good, as wine is a movable thing. Thus, the contract would be governed by article 2.

b) merchants

The UCC has special rules for merchants. A merchant is a person that regulary deals or sells an item or good.

Here, Alice would be a merchant because she is in the business of selling wine through her Store. Carol would not be considered a merchant because she is only looking to buy the wine for her daughter's wedding. This one time purcahse would not make her a merchant.

c) Valid Contract

For a contract to be enforceable, there must be mutual assent (offer and acceptance) and consideration.

i) Offer

An offer is a manifestation to be bound. The terms of an offer must be certain and definite.

Here, there was an oral offer when Carol called Alice and requested 500 bottles of a french wine at $10 a bottle to be delivered before August 15.

ii) Acceptance

An acceptance is a manifestation of assent to the terms of the offer. Under the common law mirror image rule, an acceptance must mirror the terms of the offer. However, under the UCC battle of the forms provision, an acceptance can occur with additional or different terms. (discussion if the additional terms will come into the contract in terms section).

Here, Alice accepted the offer when she sent an email stating "will get the order of white wine as you requested." This would be sufficient to be an acceptance because it manifests assent to the offer. Therefore, Alice has accepted this offer.

iii) Consideration

Consideration is a bargained for exchange. Here, the contract would contain consideration because Alice is supplying 500 bottles of wine whereas Carol is promising to pay for the wine.

Conclusion: There is a valid contract between Carol and Alice.

d) Terms of the contract

a) battle of the forms

Under the battle of the forms provision, when a contract is between two merchants additional terms of a contract can be entered into the contract if do not material alter the contract or if they are not rejected to by the other party. However, for contracts between a merchant and non merchant additional terms are viewed as mere invitations of bargaining and do not enter the contract unless they are agreed too. Different terms of a contract are subject to the knock out rule, the knockout rule holds that different terms of the contract will knockout each other and be replaced with UCC gap fillers.

i) additional term delivery on august 12

Here, Carol tried to propose an additional term asking for delivery date and time no later than August 12. This could be viewed as a time is of the essence clause because it is requesting a delivery date "no later than August 12." Here, this term would not enter the contract because this is a contract between a merchant and nonmerchant. The only way this term would have entered the contract is if Alice would have agreed to it.

ii) invoice to Carol

The invoice that carol sent would not be valid as an additional term because Carol is not a merchant. thus, none of these terms would enter the contract.

Thus, the terms of the contract are an order of 500 bottles of a $10 French wine to be delivered before August 15.

2. Carol's and Alice's claims

a) perfect Tender

Under the UCC a seller must perfectly tender the goods. This means that every aspect of the delivery of the goods is perfect. Thus, even if one of Bob's bottles of wine would not be french hite wine he would breach the contract. If a buyer discovers that a seller did not perfectly tender the goods the buyer can 1) accept the goods; 2) accept the conforming goods and reject the nonconforming goods and sue for damages or 3) reject all the goods.

Here, Alice did not perfectly tender the goods of the contract by not providing all 500 bottles of french wine. Upon this delivery of the nonconforming goods, Carol could reject all the goods and sue for damages. Thus, when Carol refused Alice's delivery it was proper because it did not contain 500 bottles of white wine. Therefore, Carol properly refused delivery.

b) Statute of Frauds

The statute of frauds requires a written document in some contracts by the party to be charged. The statute of frauds would be applicable to this contract because the value of the contract is $500 dollars or more (wine ordered 500*10=<500). Thus, the contract must be written. Under the UCC the statute of frauds requires that at least the quantity term is in the writting.

Here, the only written documetn between Alice and Carol is the written email by Alice is "will order white wine" and Carol's only written document is "sounds good confrim delivery." These writtings would not be sufficient under the statute of frauds because they do not have the quantity term. Thus, the contract would not be valid under the statute of frauds. An exception may apply that the contract was fully performed because Alice delivered the wine to Carol which would make the contract valid under the statute of frauds. To disccus damages this will be assumed.

c) Damages

i) expectation damages

Expectation damages put the party in the position they would have occupied if the other perty would fully performed. Under the UCC this is typically determined by the cost to cover. The cost to cover is the fair market price of the goods minus the contract price. Here, assuming that $14 was a fair market price the damages would be $4 per bottle of wine.

ii) incidental

Incidental damages are damages suffered by the party when dealing with the breach. Here, the costs taht Carol incurred when trying to find a replace wine would be recoverable as incidental damages are always recoverable.

iii) consequential damages

Consequential damages are damages that occurred due to the parties particular circumstances. They must be known to the other party and be reasonable. Here, the damages that may have resulted due to not having wine in time for Carol's daughter's wedding would be recovered because Alice knew of these damages and they would be reasonable. It does not appear that she has any.

3. Contract between Carol and big Bob.

a) Choice of law

As stated above, this contract would be for goods. As the contract is regarding wine. Thus, article two of the UCC would apply.

b) merchants

The UCC has special rules for merchants. A merchant is a person that regulary deals or sells an item or good.

Here, Bob would be a merchant because he is in the business of selling wine through his Wholesale store.Further, as established above, Alice is also a merchant. Thus, this contract would be between merchants.

c) Valid Contract

For a contract to be enforceable, there must be mutual assent (offer and acceptance) and consideration.

i) Offer

An offer is a manifestation to be bound. The terms of an offer must be certain and definite.

Here, there was offer by alice when she called Bob and ordered 500 bottles of Frnech white wine and told him she would need the white wine before August 15.

ii) Acceptance

An acceptance is a manifestation of assent to the terms of the offer. Under the common law mirror image rule, an acceptance must mirror the terms of the offer. However, under the UCC battle of the forms provision, an acceptance can occur with additional or different terms.

(discussion if the additional terms will come into the contract in terms section).

Here, Bob told Alice that he had French wine availabel at $8 a bottle and later stated, "Order for 500 bottles of French White wine confirmed at $8 a bottle, plus shipping costs of $100 per case; delivery before August 15." This would be a valid acceptance under the UCC as he provided a manifestation of assent to the terms of the offer. His acceptance would not be invalid because he added the additional terms of shipping costs in his acceptance because this is a contract under the UCC. Therefore, Bob validly accepted the contract.

iii) Consideration

Consideration is a bargained for exchange. Here, the contract would contain consideration because Bob is supplying 500 bottles of wine whereas Alice is promising to pay for the wine.

Conclusion: There is a valid contract between Bob and Alice.

d) Terms of the contract

a) battle of the forms

Under the battle of the forms provision, when a contract is between two merchants additional terms of a contract can be entered into the contract if do not material alter the contract or if they are not rejected to by the other party. However, for contracts between a merchant and non merchant additional terms are viewed as mere invitations of bargaining and do not enter the contract unless they are agreed too. Different terms of a contract are subject to the knock out rule, the knockout rule holds that different terms of the contract will knockout each other and be replaced with UCC gap fillers.

i) additional term of shipping costs and price

Here, since this is a contract between merchants, additional terms may enter a contract if they do not materially alter the contract or if they agreed upon. Here, it can be argued that Alice agree to these terms by stating "Ok" in her email to Bob. This would be effective to have the additional term enter the contract. Further, if the price is considered an additional term as well it will enter the contract under the same rationale of Alice agreeing to it. if Alice can make a colorable argument that her response was not an argeement to the these additional terms, it is still likely that they would enter the contract. As the shipping costs of $100 per case seems reasonable considering wine has to be carefully shipped because it has a glass bottle and it could spoil if it is left out in the sun. However, Alice could argue that $100 per casewould materially alter the cost of the contract because these additional costs would make the contract worth substantially more than an ordinary contract. This is an issue that a court could decide either way, but due to the fact that Alice stated an assent to the price, I will operate under the context that she agreed to these terms.

b) terms of the contract

The terms of the contract would be "500 bottles of French White wine confirmed at $8 a bottle, plus shipping costs of $100 per case; delivery before August 15."

4) Claims against Bob and Alice

Alice's claims

a) perfect Tender

Under the UCC a seller must perfectly tender the goods. This means that every aspect of the delivery of the goods is perfect. Thus, even if one of Bob's bottles of wine would not be french hite wine he would breach the contract. If a buyer discovers that a seller did not perfectly tender the goods the buyer can 1) accept the goods; 2) accept the conforming goods and reject the nonconforming goods and sue for damages or 3) reject all the goods.

Here, Bob did not perfectly tender the wine when he delivered only 300 bottles of French white wine and 200 bottles of a pahrumpt white wine (discussion of accomdation in defenses). Upon, failing to deliver 500 bottles of wine he failed to perfectly tender the goods. However, upon recieving the goods Alice accepted them and sent the goods to Carol. Once a person, accepts the goods they cannot later sue for breach of perfect tender unless the defect in the goods would not be noticeable under reasonable inspection. Here, Alice did not ever inspect these goods and could have easily discovered they were non conforming.

b) Defense-Accomodation

An accomodation is viewed as a counteroffer. An accomodation occurs when the seller cannot accomodate the buyers order and sends written notice to the buyer of the accomodation they have made to the buyers order. Under this rule, the buyer is not subject to breach under the perfect tender rule because there shipment of goods is viewed as a counteroff that the buyer can accept or reject.

Here, Bob sent an email to Alice stating he did not have enough wine wine and would be able to provide 300 bottles of French wine and 200 bottles of Pahrumpt white wine all at 10 a bottle. Further, he increased the shipping costs to $115 a bottle. Since, Bob sent this to Alice in writting before he tendered the goods, this would be viewed as an accomodation. Thus, when alice accepted the goods she accepted the terms of this contract. Thus, she would be liable for breach under this contract.

C) merchants confirmatory memo

A merchant can satisfy the statute of frauds through there own signed writting. The memo must be signed by the mercahnt and not objected to within 10 days.

Here, Bob's email to Alice stating the new terms and items of the delivery would be enough to statisfy the statute of frauds under this rule.

c) Damages

Expectation damages

Incorporate rule from above

Here, bob would recieve damages that would place him as if the contract had been fully performed. These would be the damages between what he resells the wine at and the price of the contract.

Lost volume seller

A lost volume seller damages are measured by the profit they would have made if the contract was performed. To be a lost volume seller the merchant must have enough customers that they would have been able to make a sell if it would not have gone to the other party.

Here, if Bob is considered a lost volume seller, he could recover the profits he would have made

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

Exam Information

Applicant ID: 176

Exam Date: 7/2021

Exam Name: Nevada PT - 1

Count Specifics

Total word count: 1811

******* Nevada PT - 1 STARTS HERE *******

TO: Specialty Solar Installations, Inc.

FROM: Applicant

SUBJECT: Specialty Solar Installations' Rights to Solar Panels

DATE: July 29, 2021

Introduction.

Good afternoon. It appears that Specialty's security interest in the solar panels and their proceeds has priority over both PSF and Bob.

The first section of this letter explains why Specialty has priority over PSF. This section includes a discussion of why the solar panels are not fixtures before turning to the attachment and perfection of Specialty's security interest vs PSF's. The second section of this letter explains why Specialty has priority over Bob.

Specialty's Rights to the Solar Panels: Specialty has Priority over PSF.

Characterization of the Solar Panels.

The photovoltaic solar panels are consumer goods. Under NRS 104.9102, consumer goods are those used or bought for use primarily for personal, family or household purposes. Here, the photovoltaic panels are designed for single-family residential homes. Therefore, they are consumer goods.

The sale and installation of the solar panels is a consumer-goods transactions because a natural person (here, Darby) incurred the obligation primarily for personal, family or household purposes, and a security interest in consumer goods was acquired primarily for personal, family or household purposes, satisfying the two-part test in NRS 104.9102.

Specialty's Security Interest: Not a Fixture

Specialty's security interest is not in Darby's home. Instead, it is in the solar pannels. A judge cannot decide, as a matter of law, that the solar panels are fixtures.

A fixture is chattel that has become "so related to particular real property that an interest in them arises under real property law." NRS 104.9102. Although the NRS lays out certain rules for transactions other than consumer-goods transactions, NRS 104.9103 holds that courts must determine the proper rules in consumer-good transactions. Because the solar panels here are part of a consumer-good transaction, whether the solar panels are fixtures must be determined by case law rather than a portion of the NRS.

Leasepartners (SC of NV, 1997) confirms that a three-part test is used to determine whether a chattel's characterization as a fixture is a matter of law or fact. If it is a matter of law, then a judge can decide the issue alone. If it is a matter of fact, then a trier of fact (such as a jury) must decide the issue.

The three-part test considers annexation, adoption, and intent. The test for **annexation** is met when the chattel is "acutally or constructively joined to the real property." When the chattel is "firmly secured" to the real property, there is no reasonable conclusion but that the chattel is annexed, and so annexation is met as a matter of law. The test for **adaptation** is met when the chattel is adapted to the use to which the real property is devoted. Adoption is evidenced by specially-designed products, whereas modular chattel is less likely to establish adoption. Finally, **intent** is the most important factor. Contracts between parties indicate whether the parties intended that the chattel be characterized as a fixture. Conflict between contracts means that intent cannot be established as a matter of law.

Here, the three-part test does not conclusively establish, as a matter of law, that the solar pannels are **fixtures**. They are **annexed** to the prpoerty when Specialty installs them to the roofs of a home by means of bolting the steel frames to the house roof joists. They are "firmly secured" to the property because they must be able to withstand winds in excess of 60 miles per hour. However, they are not clearly **adapted** to the property because the solar panels are not specifically designed for specific homes; instead, they are modular, capable of affixing to any home. The most important factor, **intent**, is unclear. On the one hand, there is some evidence that the solar panels are fixtures because Darby's financing statement addendum marks the solar pannels as fixtures by check-marking the box stating that the financing statement "is filed as a fixture filing." However, Specialty Solar's financing statement does not indicate that the solar pannels are a fixture filing.

Be advised that PSF might argue that the solar panels are fixtures because the facts indicate that they would not be removable without damage to the property, citing Reno Electrical Works (SC of NV, 1929), where electric fans were not fixtures because they were removable without injruy to the property. However, that would ignore the fact that the three-part test is weighted more heavily with regards to **intent**. Ultimately, this argument is most likely to fail.

Because only one part of the three-part test (**annexation**) is clearly met, a judge cannot decide, as a matter of law, that the solar pannels are fixtures.

Specialty's Security Interest: Attachment

Attachment makes a security interest enforceable against the debtor and third parties. Attachment requires: that value be given for the collateral; that the debtor had rights in the collateral; and that the debtor authenticated a security interest. NRS 104.9203.

Here, Darby is the debtor and Specialty is the secured party. Darby had rights in the collateral, the solar pannels, because she purchased them on 1/15/18. She paid value, about $25,000, for the purchase and installation. She appears to have authenticated a security agreement in the solar pannels because Specialty always requires the buyer to execute a security agreement. Therefore, Specialty's security interest **attached**.

PSF's Security Interest: Attachment

Again, Darby is the debtor, but here PSF is the secured party. Darby had rights in the collateral, the solar pannels, because she purchased them from Specialty on 1/15/18. As mentioned above, she paid value and appears to have authenticated a seucrity agreement. Therefore, PSF's seucrity interest also **attached**.

Specialty's Security Interest: Perfection

Specialty's Security Interest in the solar panels is a purchase-money security interest in consumer goods. It is a purchase-money security interest because the goods are purchase-money collateral with respect to the security interest, per NRS 104.9103. A purchase-money security interest in consumer goods perfects upon attachment, per NRS 104.9309. Therefore, Specialty's security interest is also **perfected**. Moreover, because the solar panels are not conclusively established as fixtures, it is appropriate for Specialty to file its financing statement with the Office of the Secretary of State pursuant to NRS 104.9501(1)(b).

PSF's Security Interest: Perfection

PSF improperly filed its financing statement (marked as a fixture filing) with the Secretary of State. PSF should have filed its financing statement with the office designated for the filing or recording of a mortgage on the real property pursuant to NRS 104.9501(a)(2). Therefore, PSF's security interest is not **perfected**.

Priority

A security interest in fixtures is subordinate to a conflicting interest of an encumbrancer or owner of the related real property other than the debtor. NRS 104.9334(3). Here, Darby is the debtor. PSF is the encumbrancer of the real property. If the solar pannels were fixtures, then Specialty's security interest in them would be subordinate to PSF's security interest in the property. However, the solar panels are not fixtures, so NRS 104.9334(3) does not apply.

Instead, NRS 104.9322(b) establishes that a perfected security interest has priority over a conflicting unperfected security interest. Specialty's security interest is perfected, but PSF's security interest is not.

(Note, however, that if a court were to find that PSF did perfect its security interest despite filing at the wrong office, then Specialty should be prepared for PSF to argue that PSF has priority under NRS 104.9322(1)(a), which establishes that conflicting perfected security interests rank in according to priority in time of filing or perfect. In this case, despite the fact that Specialty's security interest perfected automatically on 1/15/18, PSF filed its financing statement on 12/30/17, so PSF would appear to have priority. Yet Specialty should be prepared to argue that Specialty has priority under NRS 104.9324, which establishes that a perfected purchase-money security interest in consumer goods has priority over a conflicting security interest in the same goods. PSF's security interest is in the solar panels, which are the same goods, but PSF's security interest is not a purchase-money security interest, so Specialty's purchase-money security interest would have priority.)

Therefore, Specialty has priority over SPF's security interest according to NRS 104.9322(b) and NRS 104.9324.

Specialty's Rights to the Solar Panels: Specialty has Priority over Bob.

Bob is not a buyer in the ordinary course of business and does not satisfy the test laid out in NRS 104.9320(2) which would allow him to take the solar panels free of Specialty's security interest. Bob bought the solar panels from Darby, another consumer, not from a company or person in the business of selling solar panels. Bob bought the solar panels from a person (Darby) who used and bought the solar panels "for use primarily for personal, family or household purposes" as defined in NRS 104.9320(2). In this instance, Bob would take the solar panels free of Specialty's security interest, even though Specialty's security interest is perfected, if Bob bought them according to the four-part test in NRS 104.9320(2). Here, Bob meets the first three parts of the test (he bought without knowledge of the security interest, he gave value, and he bought them for his own personal use), but he fails to meet the fourth part of the test because he never filed a financing statement covering the solar panels.

Therefore, Bob took the solar panels subject to Specialty's security interest because Specialty's security interest is effective according to the jurisdiction in which the seller (here, Darby) is located (NRS 104.9320(3)). Darby has moved to New York, meaning that the jurisdiction is governed by NRS 104.9316. It appears to have been more than 4 months since Darby moved, but Specialty's security interest was perfected prior to this point and the other timeframes in NRS 104.9316. Therefore, Specialty's security interest remains perfected as against Bob.

Moreover, Specialty can also rely on NRS 104.9324 as against Bob. NRS 104.9324 establishes that a perfected purchase-money security interest in the proceeds of consumer goods (such as Specialty's security interest in the proceeds of the solar panels) has priority as long as the purchase-money security interest is perfected when the debtor receives possession of the collateral or within 20 days thereafter. Because Specialty's security interest is a purchase-money security interest, it perfected automatically.

(Regarding the proceeds: Bob purchased the solar panels for $5,000. This $5,000 constitutes proceeds. NRS 104.9203 states that attachment of a security interest in collateral gives the secured party the rights to proceeds. As established above, Specialty's secured interest in the solar panels attached. The $5,000 are proceeds from the sale of the solar panels. Therefore, Specialty has rights to the proceeds.)

Pursuant to NRS 104.9324 and NRS 104.9320, Specialty has priority over Bob in terms of the solar panels.

Conclusion

As discussed above, Specialy has priority over both SPF and Bob.

We hope this information is helpful. Please do not hesitate to contact us if you have any questions or concerns.

Sincerely,

Senior Partner

******* Nevada PT - 1 ENDS HERE *******

Exam Information

Applicant ID: 256

Exam Date: 7/2021

Exam Name: Nevada PT -2

Count Specifics

Total word count: 2437

******* Nevada PT -2 STARTS HERE *******

MEMORANDUM

To: District Attorney

From: Applicant

Subject: Procedural Due Process Rights Implicated by Stage I Procedures

Date: July 29, 2021

District Attorney:

This memorandum is to confirm your request for review of County Medical Center's Stage I procedures prior to disciplinary actions. Specifically, you have requested that I review the Stage I procedures to ensure that they comport with the Nevada and the United States Constitution's guarantee of procedural process rights to individuals.

Statement of Facts

Sandra Hernandez, Medical Director of the County Hospital, seeks to suspend Dr. Adams, Dr. Baker, and Dr. Carlaw immediately. Dr. Adams has clinical privileges at the hospital but is not an emlpoyee. He was in an accident, in which he seriously injured a pedestrian. Her was arrested and charged with DUI for being impaired by cocaine and meth in violation of NRS 484C.100. Dr. Baker also has clinical privileges at the Hospital and is not an employee. He was a passenger in Dr. Adams car and was arrested for interfering with a police officer, but was not charged. Finally, Dr. Carlaw is an employee at the Hospital. He has allegedly been accused of having discrepancies in his cancer research. These discrepencies could lead to the Hospital losing the ability for any of its employees to get funding from the National Federation to Fight Cancer, who has funded the research. Hernandez has reached out to our firm to determine whether her suspensions of the employees would be valid, and whether they would comport with Nevada and the U.S. Constitution's Due Process Clauses.

Section 1 of the Fourteenth Amendment to the United States Constitution guarantees that the State shall not deprive any person of life, liberty, or property, without due process of law. The Nevada Constitution, consistent with the Fourteenth Amendment, guarantees due process of law to its citizens as well, providing that no person shall be deprived of life, liberty, or property, without due process of law. Under the decision in *Olsen*, any claim that fails under the Fourteenth Amendment also fails under Article I of the Nevada Constitution because Nevada's due process requirements are largely coextensive with those of Fourteenth Amendment.

The United States Supreme Court has established a method of ensuring that any action by the State comports with procedural due process. The court in *Chudacoff* held that a Due Process analysis is comprised of an analysis of two steps: [1] the State must have interfered with a protected liberty or property interest, and [2] if it has, the procedures attendant upon that deprivation must have been constitutionally sufficient.

I. Has the state interfered with a protected liberty or property interest as to the three doctors?

The determination of whether the State interfered with a protect liberty or property interest under depends largely on what interest the person purports to have. An individual can have either a property or a liberty interest that is recognized and protected by state law. Under *Eureka*, for example, an individual has a property interest in water rights. Further, under *Gilbert*, a University police officer has a property interest in continued employment as law enforcement officer of the State. Similarly, under *Vatner,* tenured professors have a property interest in continued employment. Finally, and most relevant to the issue at hand, the court in *Chudacoff* held that physicians have a property interest in practicing medicine, citing NRS 630, which governs the licensing of physicians in the state. The court there ultimately held that physicians have the right to enjoy medical staff privileges in a community hosptal, subject to reasonable rules and regulations. In a more pointed decision, the court in *Tate* held that while physicians have a property interest in practicing medicine *generally*, that interest does not extend to an employment position providing one of several different avenues by which the employee can exercise those privileges. There, the plaintiff failed to show that his property interest was deprived, because, despite being removed from the Truama Department call schedule indefinitely, he nevertheless possessed clinical privileges to practice medicine at that hospital, just under a different avenue.

a. Dr. Adams

Here, Dr. Adams is a licensed physician. As such, he has a property interest in his employment, because his license is governed by the State of Nevada. Further, and more to the point of the case at hand, much like the plaintiff in *Chudacoff*, Adams has clinical privileges. Consistent with that case, Adams has a property right in his employment. if Hernandez immediately suspends his privileges, he will not be able to practice at that hospital at all. Further, unlike the plaintiff in Tate, there is no indication that Adams has other avenues within the hospital in which to practice. Thus, Adams has a property right in his employment and is afforded Constitutional and statutory substantive due process.

b. Dr. Baker

Here, like Dr. Adams, Baker is a licensed physician. For the same reasons, he has a property interest in his employment as a physician generally. Any deprivation of his license by the State would subject him to due process. However, the issue is whether Baker has a right from deprivation by the hospital. Here, the facts tell us that he on the "call list" for emergency surgical services. Like Adams, Baker is not an employee but has clinical privileges. As such, the facts here do not indicate that removal from the call list would still give Baker an opportunity to work at the hospital, but merely within a different avenue. As such, he too was afforded substantive due process rights.

c. Dr. Carlaw

Here, Dr. Carlaw is a licnesed physician and an employee of the County Hospital. If Hernandez suspends Carlaw without pay immediately until this is worked out, Carlaw will not be able to practice medicine. Much like Adams and Baker, Carlaw does not have other avenues within the hospital to practice. Further, unlike Baker and Adams, Carlaw, as an employee of the hospital, would not be able to merely find work for another employer. As such, he was afforded substantive due process rights.

II. If so, were the procedures attendant upon that deprivation constitutionally sufficient?

As for the second step, the court in *Mathews* posited that the pretermination process includes notice of charges, explanation of employer's evidence, and opportunity for employee to tell his side of the story. Due process is flexible, and sometimes the State must act quickly. As such, predeprivation hearings are not necessary if the State must act quickly, or it would be otherwise impractical. Postdeprivation process hinges on an analysis of the following three factors: [1] the private interest that will be affected by the official action, [2] risk of erroneous deprivation of such interest through the procedures used, and the probable value of additional or substitute procedural safeguards, and [3] the State's interest.

Here, the relevant hospital bylaw that must comport with procedural due process is as follows: "The Hospital has temporary authority to take any immediate, temporary disciplinary action at the discretion of the Medical Director."

a. Dr. Adams

The first issue is to determine the private interest that will be affected by the official action. The court in *Gilbert* held that while it is severe to deprive someone of the means of his livelihood, one must take into account both the length and the finality of the deprivation. Here, Adams has a significant private interest in the uninterrupted receipt of his paycheck. However, Stage I provides only that the Hospital will take "temporary" disciplinary action. Therefore, any suspension, presumably, would be short and not final.

The next issue is whether there is a risk of erroneous deprivation of the interest through the procedures used. This requirement ensures that any pre-deprivation hearing is founded in some reasonable dispute, and that there is some validity to the dispute the requires immediate suspension. The court in *Gilbert* held that the purpose of any pre-suspnesion hearing would be to assure that there are reasonable grounds to support the suspension without pay. That deprivation, according to the court, is satisfied by the arrest and filing of charges. Here, Adams was arrested and charged under NRS 484C.110 and NRS 484C.430. These charges provide a sufficient basis to ensure that there are reasonable grounds to support Hernandez's suspenion without pay.

The final issue is the State's interest in the deprivation. The court in *Gilbert* held that the interest of a police officer who was suspended for committing felony drug possession was outweighed by the interest of the State, since the the State has a significant interest in immediate suspension of an employee who occupies positions of great public trust and who has felony charges filed against him. The employer, the court posited, also has an interest in preserving public confidence in the employees, in a way that a brief period of suspension prior to a hearing was proper. Here, Adams is charged with violating NRS 484C.110 and NRS 484C.430. Because Adams proximately caused substantial bodily harm to another person in the commission of the DUI, he is being charged with a felony. Under *Gilbert*, both the Hospital and the state have an interest in preserving public confidence by suspending Adams quickly - it would diminish public confidence if the hospital allowed a doctor to continue practicing despite the cocaine and meth possession, DUI, and injury to another person.

As such, this factor weighs heavily and Adams was likely not denied due process by being suspended immediately. However, because Adams has a property right, he is entitled to a fair hearing on the matter when the times comes, to explain his side.

b. Dr. Baker

The first issue is to determine the private interest that will be affected by the official action. Much like Adams above, Baker has a significant interest in continued payment for his "call list' services. Any deprivation would cut off his right to payment. However, similarly to the above, this procedure only allows for "temporary" suspension. As long as the employee has the right to continued employment after a fair hearing, this is not a violation of Baker's substantive due process

The next issue is whether there is a risk of erroneous deprivation of the interest through the procedures used. Here, unlike Adams, Baker was arrested but was not charged for interfering with a police officer in violation of NRS. Here, because there was no charge, there is a significant risk that Baker will be deprived without first being "heard." Under *Chudacoff*, the court found that a physician was not given an opportunity to be heard when his privileges were suspended without him ever even knowing that his privileges were in jeopardy. It is important to note that an arrest could put Baker on notice that his privileges *might* be in jeopardy. However, there is a compelling countervailing interest in preventing this deprivation, since the suspension would have dramatic consequences on Baker that, once the damage is done, might be hard to undo. As such, this factor weighs in favor of giving Baker a pre-deprivation hearing.

The final issue is the State's interest in the deprivation.Here, the state has a compelling interest in disciplining doctors who commit crimes and other bad acts. Though the court in *Gilbert* held that an individual charged or indicted with a felony would give rise to a compelling state interest insuspending doctors immediately, there appears to be language in *Vatner* that provides that merely *being arrested* would give rise to the Hospital and State's interest in suspending the individual without pay. Here, however, because there is such a risk that Baker will be erroneously deprived without having his side told, and the facts do not indicate that a pre-deprivation

hearing would be impractical, this factor weighs in favor of Baker as well. In sum, Baker should be entitled to a pre-deprivation hearing on the matter.

c. Dr. Carlaw

The first issue is to determine the private interest that will be affected by the official action. Here, much like Baker and Adams above, Carlaw's interest is in receiving continued payment. Unlike Baker and Adams, this appears to be Carlaw's only source of income since he is actually an employee of the hospital. The deprivation, however, is temporary. As such, this factor tips somewhat in Carlaw's favor, because there is no indication he would be able to continue his livelihood within a reasonable period.

The next issue is whether there is a risk of erroneous deprivation of the interest through the procedures used. Here, Hernandez is furious and wants to deprive Carlaw immediately. Doing so would be gravely erroneous. According to the Letter from NFFC, Research Director Jones is giving Carlaw sixty days to refute or explain the apparent discrepances as the first stage in the Investigatory Review. If they are not satisfied, the review will be continued further. Only after that if they determine Carlaw has violated NFFC standards, the committee *can* withdraw all pending funding. This process takes a total of nine months. Hernandez's immediate suspension would be a hasty decision that would serve no purpose other than to give her instant gratification, since Carlaw has ample opportunity to explain any wrongdoing. Moreover, unlike Adams and Baker, he was not arrested or charged with a crime. This explanation to NFFC would be his best opportunity to explain his side of the story, and any deprivation before then would not satisfy the best interests of the Hospital, Carlaw, or the NFFC. In sum, there is a significant risk of erroneous deprivation if Hernandez suspends now.

The final issue is the State and Hospital's interest in the deprivation. Here, unlike Adams and Baker, there is no risk that Carlaw's actions will affect the public perception of the hospital. Of course, it is not ideal that Carlaw's research may be flawed. However, this issue does not involve quality of care, or malfeasance in the sense that the public would be harmed if Carlaw continued to practice medicine. As such, this interest tips in favor of providing a pre-deprivation hearing.

III. Conclusion

Adams, Baker, and Carlaw all have a property interest in their employment as licensed physicians. Any deprivation by the State or the Hospital must thus comport with Nevada and United State's Due Process Clauses. These Clauses, according to relevant case law, and as applied to the three doctors, require that Sandra Hernandez give Baker and Carlaw a pre-deprivation hearing. However, because the Hospital and the State have a significant interest in protecting public trust and confidence, a post-deprivation hearing for Adams would be proper and would comport with the limitations imposed by both Due Process Clauses.

Please contact me at your earliest convenience to further discuss this matter.

Best,

Applicant

******* Nevada PT -2 ENDS HERE *******