JULY 2022
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

Question 1

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

In tort law, there are intentional torts which require proof of a voluntary act, an injury or harm (damages), and actual and proximate causation of that injury or harm. There are also negligence torts, which require proof of a duty of care, breach of that duty of care, injury or harm (damages), and actual and proximate cause for the injury/harm. Nevada follows comparative fault and negligence principles, meaning that there can be a proportion of fault between separate tortfeasors and, depending on the circumstances, with the plaintiff himself for a breach of a duty of care. If the plaintiff is more at fault than the defendants, then he cannot recover under Nevada law for negligence damages. The normal duty of care is the reasonable person standard - that of a reasonably prudent person in the same or similar circumstances.

Felicia's claims

Felicia has a claim against Ellen for conversion of chattels. The crime of trespass to chattels takes place when a tortfeasor voluntarily interferes with the personal property rights of another unlawfully, or without consent. When that interference is so substantial as to completely strip the plaintiff of her rights to that property, this tort raises to the level of conversion of chattels. Here, Ellen took Felicia's new expensive bike without her permission. She took it on the bike race, committing an act of asportation. It is clear from the fact pattern that her decision was deliberate and voluntary. If she had returned it, the tort would simply be trespass to chattels and damages would be those incidental to repairs and so forth, if any - or nominal damages. Here, though, Ellen could not return the bike because she abandoned it. Because it was never recovered, this has risen to the level of conversion of chattels. As for damages, Felicia is entitled to fair market value to replace her bike, along with any incidental damages she incurs, though she has a duty to mitigate those.

Ellen may claim a defense of consent, but it is unlikely to prevail. She was housesitting and hoped that Felicia wouldn't mind, per the fact pattern, but she had no basis for that thought. Housesitting doesn't create additional rights, and even if she had consent to use the house, consent to use the bike exceeds the scope of that consent.

George

George has a claim against David for trespass to land. This tort happens when someone intentionally causes a physical invasion of the land of another, unlawfully/without consent. Here, David committed the voluntary, intentional act of going down George's driveway. His deviation of the path is the actual and proximate cause. George may recover any damages he incurred, but can also bring a suit if damages are only nominal.

David may try to claim a defense of lack of awareness of the property line or its owner, but neither are a defense to trespass to land. There is no evidence to suggest necessity (where a tort is excused because it is committed in order to avoid a greater harm that the tortfeasor did not cause, ie a natural disaster) and there is no evidence to support consent.

It should be noted that David's status is that of a trespasser, either known or unknown.

David

David has a potential claim against George for the conduct of his dog and a potential claim against GB for negligent conduct of the race.

Claim against George -

David sustained a dog bite from George's dog. Where domesticated animals are known to be dangerous, an owner generally has strict liability to protect against harm caused by that animal. The prima facie case for strict liability is Absolute duty on the part of a defendant to make a condition safe, breach of that duty, causation (actual and proximate), and damages. Here, George knew that his dog was vicious based upon his "not again" comment. Knowledge of prior incidents indicates awareness of the danger and triggers an absolute duty. He did not fulfil that duty by failing to secure his dog and failing to stop it from biting David. The fact that the dog was unsecured is the actual, "but for" cause of the bite, and the actual bite is the proximate cause of the injury. Damages include the injury, which drew blood and required stitches and infection. If liable, George is liable both for the wound and for the infection, which is still foreseeable even if it arises from negligent medical care (which is foreseeable).

George's attempted defense would likely center around a claim of lack of duty to a trespasser - which would likely fail in the strict liability question, but is more relevant below. In normal circumstances, property owners have limited duties to trespassers in comparison to invitees and licensees. David was not invited (for commercial purposes for George) or licensed (permitted to be present) to be on the property. He was a trespasser. There is question of whether he was known or unknown. If George is aware that people commonly use this road, and that trespass commonly takes place, then trespassers, including David, are known. If not, or if this was an unusual/rare use of this road, then he would be an unknown trespasser. Common law has established a hierarchy of care for negligence claims against property owners based on classification, but Nevada has instead adopted a general duty of care (that of a reasonably prudent person under same or similar circumstances) to licensees and invitees, a duty to warn/make safe known, highly dangerous, artificial and concealed hazards when it comes to known trespassers, and **no duty** to unknown trespassers. So negligence questions - but not strict liability - turn on the status of David's trespass. See below.

David could also attempt to claim negligent infliction of emotional distress because he was "shaken" by the dog attack. NIED is the negligent breach of a duty to avoid infliction of emotional distress. NIED is present where there is a duty of care, breach, causation (actual and proximate), and damages. NIED requires an additional showing in Nevada courts - that of physical symptoms to support the claim of distress.

Here, David was "shaken," and had physical symptoms from the bite, but without more a court is unlikely to find that he suffered physical symptoms actually and proximately caused from the *emotional* trauma of the bite. This will be one of George's succesful defenses to this tort. The other, potential defense depends on the status of trespasser. If he was an unknown trespasser, no duty was owed. Regardless of duty, this tort will not be proven.

David, Carl, and Ellen - negligence action against GB.

All three may attempt to bring various negligence actions against GB. Negligence exists where it is proven that there is duty, breach of that duty, actual and proximate cause, and damages arising from that breach. A general duty of care exists and is that of a reasonably prudent person in the same or similar circumstances. GB had a duty of care to ensure that the race was conducted properly, and a duty to choose a route, conduct the race, issue warnings and notices, and have personnel present that saw to it that the duty was met. Here, GB chose a race route that may or may not have been safe and included a specific warning about deviating from the course. They did, however, choose an intersection that was "widely known" for having an inordinate amount of accidents. This in itself could be a breach of the duty.

Defenses: one possible defense GB could hope for is assumption of risk. Assumption of risk can be express or implied under common law. Express assumption of risk is when someone takes on that risk by word or writing. Here, GB forgot to get waivers so cannot assert express assumption of risk. In Nevada, where comparative negligence exists on a partial comparative fault system, implied assumption is mostly subsumed by this doctrine. A plaintiff cannot recover if their negligent breach of duty of care is more than the defendant's, and their damages are reduced by their own negligence by proportion as determined by a factfinder - usually a jury.

David against GB - attempted negligence claim for bite

Here, **David** deviated from the course and ignored the warning on the map. He went into George's yard and got bit by the dog. David can attempt to claim that GB was responsible, but this attempt would likely be unsuccessful. GB warned against this very conduct and lacks causation for the bite. GB will successfully use this defense, and will also argue that David's own breach of duty of care was beyond what a reasonably prudent person would do in entering the yard. David's conduct was the "but-for" cause of the bite, with George's conduct as a contributing, supervening tortfeasor. GB will not be liable to David for the bite.

Carl

Carl against GB - negligence claim for race route, accident at intersection

Carl may attempt to bring negligence action against GB. Negligence exists where it is proven that there is duty, breach of that duty, actual and proximate cause, and damages arising from that breach. A general duty of care exists and is that of a reasonably prudent

person in the same or similar circumstances. GB had a duty of care to ensure that the race was conducted properly, and a duty to choose a route, conduct the race, issue warnings and notices, and have personnel present that saw to it that the duty was met. Here, GB chose a race route that may or may not have been safe and included a specific warning about deviating from the course. They did, however, choose an intersection that was "widely known" for having an inordinate amount of accidents. This in itself could be a breach of the duty.

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Here, Carl was hit by a car on the race route and suffered serious, extensive damages. Carl's conduct would be judged against GB's negligent selection of this race route and failure to warn of the danger in this intersection. He also possessed a duty of care to ride in a reasonably prudent manner. He slowed down but did not stop - this will likely be deemed to have been a contributing factor. A factfinder will determine who contributed more and will apportion fault proportionally among Carl, GB, and Ian. Carl can recover damages, including medical costs, lost wages, pain and suffering, and so forth.

Carl against Ian -

Carl has a claim against Ian for the accident and for breaching a duty of care to drive in a safe and reasonably prudent manner. The fact pattern says that he was speeding. If he was going past the speed limit or violating traffic laws, his violation of statute constitutes negligence per se. Carl would be in a protected class for that statute (pedestrians, other motorists, cyclists), and this would be the protected harm (accidents and injuries arising from them) - meeting the standards of negligence per se. His driving in that intersection is a but-for cause of the accident and is also a proximate cause of Carl's extensive injuries. Carl can recover damages, including medical costs, lost wages, pain and suffering, and so forth. Comparative fault rules will apply, and a fact finder will determine proportion of fault as discussed above, taking into account Carl's slowing but failure to stop as discussed above. That breach of duty on Carl's part will be Ian's main defense.

Ellen

Ellen was a racer on the course and saw her husband struck by the car driven by Ian. She can attempt to bring an action for NIED against GB and against Ian.

NIED is the negligent breach of a duty to avoid infliction of emotional distress. NIED is present where there is a duty of care, breach, causation (actual and proximate), and damages. NIED requires an additional showing in Nevada courts - that of physical symptoms to support the claim of distress. NIED exists in "near miss" cases - where someone fears being struck by a vehicle themselves, for instance (not applicable here); or it can take the form of bystander NIED. This exists where someone who is physically present witnesses the injury of a close relation.

Here, Ian struck Carl, Ellen's husband, right in front of her. There is no proof of a near miss but she was a bystander. She saw the accident, screamed, and rushed to Carl. She suffered physical symptoms, including nightmares and headaches for months. She meets the standard, and can recover actual damages relating to her distress, including any lost wages, incidental damages, and potentially pain and suffering.

Regarding GB, as discussed above, GB was negligent in the selection of the race route and failure to take other measures to make the race safe. A fact finder will determine the extent to which the emotional distress she experienced belongs to Ian or GB in a proportional manner per standards of comparative negligence, as discussed above.

Hector

Hector has a claim of battery against David. Battery is an intentional act causing a harmful or intentional touching of plaintiff's person. Nominal or actual damages are ok, but causation for those damages must be proven. Here, David touched his person (which extends to his bike since it was attached to him at the time) and pushed him over. This was without consent, and exceeded the expectations of a reasonable person concerning consent and lawfulness. He can bring suit and can recove.r David cannot claim defense of necessity or otherwise - he could have moved past in a different manner. His claim that he had to do this to help his friends will not carry the day.

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

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APPLICANT'S ANSWERS TO QUESTIONS
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Question 2

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

1) Wendy's Motion

a) Retroactively increase her alimony award.

Alimony award modificaitons are prosepective, meaning they can be modified going forward, but not backward. Alimony can be modified upon a showing of a change in circumstances. Modification is at the discretion of the court, whether or not it has retain jurisdiciton to modify the award. Courts will consider changes in the payor's ability to pay or the recipient's needs as well as inflation. In Nevada a change of 20% or more in teh gross montly income of a spouse who is ordered to pay alimony consitutes a changed circumstances requiring a review for modification of aliminy.

Here Hank earns a salary of 25% higher than his income at the time of the divorce. Thus there is a change in circumstances such that the court should review the alimony award. This review will not be retroactive.

W will argue that COVID was not contemplated in July 2019 when the parties entered into the MSA, such that Hank's argument that the MSA contimplanted that over time Wendy would earn more money and would need less alimony. Thus, in order to conitnue to rehabilitate herself she will need prolonged additional rehabilitative alimony. As Wendy will also note that her career has been largely upended in every move for Hank's military service in that she give up her clients and established new ones with each move.

See infra as to Hank's arguements against an increase are set out in his arguments "for" terminating the alimony.

Thus, while the Court will have discretion in this motion - it cannot increase the award retroactive to March 2020.

b) Community Propery Interst in Hank's miliary disability benefits

Nevada is a community property state. All property acquired durign the course of the marriage is presumed to be community property. All property acquired before the marriage or after permanent separation is presumed to be separate property. In addition, property acquired by gift, devise or bequirest is presumed to be separate property. In order to determine the character of any asset, courts will

trace back to the source oft he funds unsed to acquire the asset. A mere change in form of an asset does not change its characterization. With these basic principles in mind, we can now turn to the military disability benefits at issue.

In general retirement benefits are considered community property for the portion earned during the course of the marriage. In instances where disability benefits are taken in lieu of retirement benefits, the disability benefits are treated as retirement benefits.

Here Hank severed 20 years in the military - 12 of which during marriage, thus 12 years of his retirment benefits were earned during the marriage. Hand was injured after the marriage in Nov. 2021 and took military disablity in lieu of retirment.

Wendy will argue that since the MSA omitted the benefits she is entitled to her share as community property.

However, there are special rules applicable to Military Disablity Benefits arising under federal law. Under the Supremecy Clause, federal law preempts inconsistent state laws. In some instances, federal law preempts Nevada from applying its community property concepts to certain assets. Military retirement benefits are subject to equal divisoin upon divorce; however, military disability benefits are the separate propety of the service member. Courts may not consider these benefits in making awards. Thus, Wendy's motion should be denied.

c) Credit Card Debt.

Wendy is claiming financial hardship such that Hank should now have to pay a credit card that teh MSA assigned to her. Here the MAA was approved and merged into their Decree of Divorce. If, as here, the agreement states that merger of the MSA into the Divorce Degree thus an injured party cannot sue for breach of the agreement and can only rely on the proceedings to enforce teh divorce degree itself. While Nevada Courts are not bound by the agreement of the parties - the MSA is merely evidentiary, the court can reject it and make its own order based on what justice requires. Here, the Court in the July 2019 divorce was not required to accpet the MSA but it did so and merged in into the divorce decree. Thus, Hank should be able to rely on that settlement and should not now have to pay the debt Wendy was ordered to pay.

Thus, the Court should not force Hank to pay the credit card debt.

2) Hank's Motion

a) Eliminate alimony

While Hanks' alimony obligations include a termination date, Hank can argue for modification to terminate of modify future alimony. Note that the court may modify future alimony, but past due amounts (arrears), if any, cannot be modified. Alimony ceases when either party dies or the recipient remarries. However, Cohabitation without getting married, can consitute a change in circumstances that the court can excersize discretio to termiate alimony.

Here Hanks points to the fact that Wendy lives with her boyfriend. He also shows that when her boyfriend's income is taken into account Wendy's household income is greater than his. Wendy cannot prolong her alimony obligations just by not marrying her boyfriend. Hank will also point to the number of vacations taken, and the fact that she is not working.

It should be noted that Wendy is not working due to COVID in that she had to homeschool their daughter, so the fact that she was unable to work in a hair salon, an industry that was largely shut down during COVID, should not be counted against her. Thus, the court will have to weigh both sides and do what justice would require in its discretion in making the decision whether or not to eliminate the alimony.

b) Modify Child Support Retroactively

- Like alimony, child support cannot be modified restroactively. Child support payments can only be modified prosepectively, not retroactively.

Parents owe a duty of support to their minor child. For the most part, support ordered are directed at the non-custodial parents. Here, when the parties divoced Wendy was awarded primary phyical custody of Debbie, thus she was entitled to child support in the divorce in July 2019.

As of December 2021, the parties have agreed to share joint physical custody. In Nevada the basic child support obligation under the guidelines is a percentage of the non-custodial parent's gross monthly income based on the number of children who will receive support and the level of income. When a joint physical custody arrangement exists, each parent's obligation to pay support is calculated using the Nevada Child Support Guidelines. The difference between the 2 support amounts is calculated, and the higher income parent is obligated to pay the lower - income parent the difference. As noted, Hank should have made a request based on a change in circumstances in December 2021, he cannot get his support reduced retroactively.

Further, Nevada law provides that child support must be reviewed by the Court at leaset every 3 years if requried by a parent. So given this is 3 years from their divorce in July 2019 - it is time to review the child suppport as requested by Hank in any event. Here, it may not work out as Hank wants for the following reasons:

1) Hank is now earning 25% more than he did at the time of the divorce and 2) Wendy is now not earning as much money as she previously did due to COVID. Thus, without more we cannot calculate the award, but the Court will apply the NV guidelines and award going foward as it find.

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

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Question 3

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

1)Crimes Chargeable Against Bill

A) Burglary

The issue is whether Bill can be charged with burglary. Burgarly is the breaking and entering (forcible entering) of a dwelling with intent to commit a felony therein. Burgarly is a specific intent crime. Here, Bill broke a kitchen window and entered the house with the intent to commit larceny (discussed below). Thus, Bill's actions constituted Burglary.

B) Home invasion

In Nevada, a person who forcibly enters an inhabited dwelling without permission, whether or not a person is present at the time of the entry, is guilty of invasion of the home. A person "forcibly enters" a dwelling if they enter by any act of physical force that results in damage to the structure. Here, Bill forcibly entered the home without permission. The question of whether the dwelling was inhabited might have been close normally in the off-season, however, here it was factually inhabited at the time of his forcible entry. Thus, Bill is likely guilty of home invasion as well.

C) Larceny

i. The issue is whether Bill would be guilty of Larceny. Larceny is the trespassery taking and carrying away the personal property of another with the intent to permanently deprive that person of the property. The intent to permanently deprive must be present at the time of taking. A person commits petit larceny in Nevada if the property take is worth less than $1200, and grand larceny if 1200 or more. Here, Bill committed larceny when he took the firearm from Ann with the intent to permanently deprive her of the item. It is unclear whether the gun was worth more or less than $1200. This however, will be a lesser included of robbery, below.

D) Robbery

The issue is whether Bill can be charged with robbery. Robbery is the taking of the personal property of another from the other's person or presence by force or threat of imminent death or injury with the intent to permanently deprive. In Nevada, robbery is a general intent crime, so even if a defendant did not intent to take the item when they began the encournter, they can be charged if the commit larceny during the forcible encounter. Here, Bill struggled with and shot Ann. He then took the opportunity to take her gun, with no intention of returning it. Accordingly, he is likely guilt of robbery.

E) Murder (felony murder)

i. Statutory first degree murder

The issue is whether Bill is guilty of first degree murder. Nevada defines first degree murder as one purpetrated by means of poison, lying in wait or torture, or by any ither kind of willful, deliberate, and premeditated killing. Included in statutory first degree murder is murder committed in the attempt of kidnapping, robbery, burglary, invasion of the home, and assorted other inherently dangerous felonies. Here, although Bill likely did not possess the requisite intent to be guilty of premeditated murder: he cased the home and believed no one was present, he is nevertheless guilty of statutory first degree felony murder because he shot Ann during the course of a host of inherently dangerous felonies.

ii. statutory second degree murder

The issue is whether bill is guilty of statutory second degree murder. In Nevada, second degree murder is all other types of murder that possess the requisite intent to kill or inflict great bodily harm, or a reckless indifference to human life, or felony murder of all other felonies. Here, Bill's actions likely constitute at least a reckless indifference to human life, in rushing Ann and firing her gun, and second degree felony murder. However, this would be a lesser included charge to first degree murder.

F) Conspiracy

The issue is whether Bill (and Dane) can be charged with conspiracy. Conspiracy is an agreement between two or more people to accomplish an unlawful purpose with the intent to accomplish that purpose. It is not necessary to prove the overt act in furtherance of a conspiracy in Nevada. Because conspiracy is a specific intent crime, each co-conspirator must have the intent to agree and the intent to cmmmit the underlying criminal objective. Here, Bill and Dane made a formal agreement to drive to Ann's house and burglarize it. Dane agreed to drive. Neither ever withdrew from the agreement. Accordingly, both are guilty of conspiracy.

2)Whether Dane Possesses Accomplice Liability

The question is whether Dane is liablke for all the crimes committed by Bill as an accomplice or co-conspirator. An accomplice is a person who, with the requisite mens rea, aids or abets a principle prior to or during the commission of a crime. An accomplice is resposible for the crime to the same extent as the principle. If the principle commits crimes other than those which the accomplice has provided aid or encouragement, then the accomplice is liable for the other crimes to the extent they were natural and probable consequences of that crime. However, in Nevada for an accomplice to be held liable for the specific intent crime of another under this theory, the aider and abbetor must have knowingly aided the other with the intent that the person commit the charged crime. It is insufficient that a specific intent crime was the natural and probable consequence. The prosecution must prove the aider and abettor possesed the requisite mens rea.

Here, Bill is an aider and abettor with respect to the robbery, home invasion, burgarly, and larceny because he either had the requisite mens rea or should have known that they were probable and foreseeable crimes for the one in which he agreed to help commit: burglary. The question on first degree felony murder is much closer. Generally first degree murder is considered a specific intent crime. Thus, even though felony murder is a probable and foreseeable consequence of the crime he agreed to aid and abet, Dane's requirements that he stay in the car, etc might indicate that he did not have the requisite mens rea under Nevada law. Nevertheless, he is likely guilty of second degree murder/felony murder under the accomplice liability.

3)Whether Dane's statement is admissible against him

The issue is whether Dane's statement made was in violation of his Miranda rights and whether it could be used against him at trial. The Fifth Amendment, applicable to Nevada by the Fourteenth Amendment provides that no person shall be compelled in any criminal case to be a witness against himself, and a suspect has a constitutional right not to be compelled to make incriminating statements in the police interrogation process. Any incriminating statment obtained as a result of custodial interrogation may not be used against the suspect as a subsequent trial unless the police provided procedural safeguards effective to secure the privilege agaisnt self-incrimination (that is, gave the suspect his Miranda warnings). The warnings, which must be given before the interrogation begins, need not be virbatim. Law enforcement must however inform the suspect of their right to remain silent, that any statement uttered may be used in court, of the right to consult an attorney and have that attorney present at the interrogation, and that an attorney will be appointed for indigent defendants. A detention is custodial if it would appear to a reasonable person that he was not free to leave. A question is an interrogation if it is reasonably likely to elicit a response. Any waiver must be knowing and voluntary. A statement given in violation of miranda can be used for impeachment purposes if the defendant takes the stand.

Here, the Dane was likely in a custodial interrogation. First, when the police officer requested that Dane come in for questioning, Dane asked if he had a choice. The officer explicitly stated "Not Really." This statement alone would likely leave a reasonable listener under the impression that he was detained by police and not free to leave. Moreover, after this statement the officer conducted a frisk of Dane and locked him in the backseat of his car. The frisk would indicate that the officer had reasonable suspicion against Dane, and locking him in the backseat of a police car almost certainly indicated that Dane was under arrest. Thus, Dane was in custody. Then, the officer directly asked Dane about his truck's presence at the crime. This question would reasonably elicit an incriminating response. Accordingly, Dane was in a custodial interrogation when he made the incriminating confession. Moreover, prior to beginning the

interrogation, there is no evidence that the officer provided Dane with anything near a Miranda warning. Thus, the statement would not be admissible at trial unless Dane testified (since it was not obtained through force).

4) Whether, if admissible, Dane's statement could be used against Bill at a joint trial.

The issue is whether, at a joint trial, the admission could be used against Bill under the confrontation clause. The Sixth Amendment, applicable to Nevada through the Fourteenth, provides, among other things, that the accused shall have the right to confront and cross examine witnesses against him. The admission of a confession by a non-testifying co-defendant at a joint trial against a defendant violates the Sixth Amendment. A limiting instruction will not cure the defect. If the co-defendant testifies, then the rule does not apply. the accused may assert a demand for a severance of the trial whenever the prosecution intends to introduce a confession that is hostile to one co-defendant, and the confession implicates the confessing defenadnt but is not admissible against the non-confessing defendant and cannot be edited to exclude inculpation of the non-confessing defendant.

Here, Dane's statement is clearly a confession that implicates Bill. In the event that Dane chooses not to testify at trial, as any competent counsel would advise him, then the statement cannot be used at a joint trial, let alone be admitted against Bill. Even if Dane chooses to testify, it is highly unlikely that the confession could be used against Bill.

Although co-conspirator statements are admissible against defendants, this is only true when, among other things, the statement was made in furtherance of the conspiracy. A confession is never in furtherance of a conspiracy, accordingly, the out of court statement, made for the truth of the matter asserted, would be excluded as inadmissible hearsay. Thus, Bill would have a right to request severance of the trial and the statement could not be admitted against him either way.

4) Whether Dane's statement is admissible against Bill in a joint trial

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

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Question 4

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

Jason has committed several violations of the Nevada Rules of Professional Conduct.

Conflict of Interest of Government Attorney

- Except when expressly permitted by law, a lawyer who leaves government service and enters private practice must not represent a private client in a matter in which the lawyer participated personally and substantially while in government service, unless the government agency gives informed consent, confirmed in writing.

Additionally even if a lawyer is not involved in a matter involing a specific party or parties - if the lawyer received confidential government information about a person whil ein government service, the lawyer must not later represent a private client whose interests are adverse to that person when the information could be used to the material disadvantage of that person.

The facts do not give us enough information to determine whether these professional rules of conduct have in fact been violated; however, there is enough information to determine that they likely have. To begin, Jason's client was the Nevada Division of Water Resources for over a decade. The facts state that "soon" after he opened his solo practice WCR hired him to defend a lawsuit filed by the State of NV in federal court over a complicated water rights dispute. Certainly a "complicagted water rights dispute" required much work on the front end before an actual lawsuit was filed, thus, we can infer that Jason's only client, Div. of Water Resources was investigating and/or in pre-litigation of this matter prior to his departure. Thus, Jason would have likely needed the government agency informed consent, confirmed in writing (neighter of which he has) in order to take the representation of WCR.

Naming the Lawfirm, Lincoln Litigators

A lawyer must not use any firm name, letterhead logo, URL or other professional designation tha tis false or misleading. While using the name of a deceased or retired partners name is permitted, using the misleading name of any lawyer (desceased or living) who as not associated with the firm is prohibited.

Here Jason named the practice Lincoln Litigators and included the picture of Abraham Lincoln in his business cards. This is misleading as it inpropery included names of lawyers Abe Lincoln never associated with the firm. Additinally, the name "litigators" is also misleading to the public since this is a solo practice and not more than one litigator.

Litigation Specialists

A lawyer may communicate the fact that they do or do not practice in particular fields of law. However, a lawyer must not communicate that they are a "specialist" or expert in a particular field unless:

1) they are cetified as a specialist of expert by an organization approved by the bd. of gov. of Nv. Bar 2) devoted at least 1/3 of the practice area of law in each of the proceding 2 calendar years 3) completed 10 hours of CLE in the area of law in the last year 4) carry min 500K malpractice ins. and 5) register w/ NV Bar pay a fee and submit reporting and compliance forms annually.

Here Jason is far from in compliance with the rules in this regard. He has not been certified as a specialist in litigation. In fact he has only administrative hearing experience. He wanted to deceieve clients by his "branding". The other requirements are not met. He just started is practice,so he cannot have 1/3 of his practice dedicated to this area of law in the last 2 calendar years. The facts are silent as to the other factors,but failing one means he is not in complaince wiht the rules and thus has an ethical violation.

Duty of Competence

Jason has a duty of competence to his client WCR, meaning he must act competently with the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. If a lawyer is not competent, he must become so by either declining to take on the representation unless they can 1) consult w/ a lawyer who is competent or 2) learn it without undue expense of delay to the client. Here, Jason has only adminsitrative hearing experience. To now take on a complicated water rights dispute in federal court may be a bit outside his competenence even if he has the legal substantive knowledge. He may have commited an ethical violation here as well.

Sexual Relationship w/ Riley

In general a lawyer must not have a sexual relationship w a current client, even if the client consent and even if the client is not harmed - unles their consentual sexual relationship predated the lawyer-client relationship. In Nevada, this rule does not apply to prohibit sexual relationships w/ persons involved in an organziation when the client is the organization. Here Jason's client is WCR, not Riley;however, Riley is Jason's primary contact at WCR. Thus we need to determine if the sexual relationship creates a conflict that would "materially limit" the lawyer client relationship under the general conflict of interest rule for current clients.

There are 2 general types of conflict of interests w/ current clients 1) direct adversity conflicts and 2) material limitation conflicts. Where a conflict exists, the lawyer must not accept or continue the representation unless the conflict is properly waived. A lawyer generally must not represent a client if there is a significant risk that the representation fo the client will be materially limited by the lawyers own interests. Here it is likely that by starting this sexual relationship it created a personal interest in the matter for Jason such that he violated this rule. As shown when he "lost interest" in Riley with whom he had to work as the primary contact for the WCR, he likewise lost interest in representing WCR.

Termination of Client Relationship

Losing interest in a client is not a valid reason to terminate the client relatioship. The rules lay out several mandatory withdrawal situation (none of which are applicable here) as well as some permissive withdrawal including if it can be accomplished without material adverse effect on clients intersts. Client persists in course of action that lawyer believes is criminal or faudulent. Client used lawyers service to perpetrate a crime. Client insists on taking action lawyer considers repugnant or in fundamental disagreement. Representation will financial burden the lawyer. The client is unreasonably difficult. Client stops paying bills or "other good cause". Here Jason merely lost interest. Even so, He may not just withdraw without notifying WCR. He has violated the ethical rules in this regard as well.

Duty of Communication

Jason has a duty of communication to his clients. A lawyer must communicate with their clients and explain the matter to extent necessary to permit client to make informed decisions, keep client reasonably informed about the status of the matter and promptly comply with all reaosnable requests for information from the client.

Here, Jason failed to communicate with his client whatsoever. He also failed to even get the Court's approval for the termination.

Duty of Confidentiliaty

A lawyer must not reveal information relating to the representation of a client unless the client provides informaed consent. Here Jason referred the client matter to his lawschool friend Christian without any consent of WCR much less informed consent to make the referral.

Unauthorized practice of Law (Christian)

Christian has engaged in the unauthorized practice of law. The ethical rules apply to graduates who have or are sitting for the bar exam to the same extent as a practicing admitted attorney. Therefore, by accpeting the representation before graduating law school, Christian has engaged in the unauthorized practice of law. Settlement negotiations and taking a client representation are the unauthorzed practice of law.

Jason is also in violation for Christian's unauthorized practice of law in that he referred the matter knowing Christian had not yet passed the bar exam. The rules similarly prohibit assisting another person in the unauthorized practice of law.

Offer of Judgment

As noted above Jason had a duty to communicate w/ his client. This includes the duty to communicate and notify the client of any settlement offer or proffered plea bargain. In this instance, he failed to communicate the Offer of Judgment to his client, WCR. Sending or attempting to send the offer to Christian was yet another breach of confideniality (noted above). He also had a duty to explain to his client what an offer of judgment does and what the consequenes are if they did or did not accpet it.

Duty to Supervise Non-lawyer

Jason has the duty to supervise his staff/non-lawyers. That Jason's secretary was "negligent" in failng to send the offer to Christian is ultimatelly a rules violation for Jason as well as he had the duty to make sure the work was done correctly. He must make reasonable efforts to ensure that the nonlawyers conduct are within the rules of conduct. Here he could have verified she sent the offer or asked to be CC'ed on the communciation, but he did not.

Duty of Diligence

A lawyer must act with reasonable diligence and promptness in representing a client. Diligence includes acting w/ dedication to the client's interests and pursuing them to completion. Here Jason breach the duty of diligence to WCR. He failed to pursue their interests and failed to prepare a defense to the State's Motion for Summary Judgment.

Duty of Candor to Court

A lawyer is requested to present the law facts and evidence to the tribunal in a truthful manner. A lawyer must not knowingly make a false statement of fact or law to the tribunal. Here Jason lied by falsely claiming to have Covid to gain addtinoal time for the hearing so he could prepare.

Duty to Profession

A lawyer also owes a duty to the professional and must report when they know of a RPC violation. Here Jason knew of the unauthorized practice of law and his own misconduct.

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

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EXAMINATION ANSWERS

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Question 5

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

I. The issue is whether there is a contract under Nevada law between Alex and Barry, and if so, what the legal terms of the contract are.

A. Common Law v. UCC / Merchants

There are two bodies of law that govern contracts. Common law is used when the contract regards real estate or services whereas article 2 of the UCC governs when the contract deals with goods. When a contract involves goods and services, the court will first determine whether the contract is divisible into two separate contracts. When it is not, the court will then use the predominant purpose rule by asking what is the main reason for entering the contract. When both aprties are merchants, special rules apply. A merchant is a person who regularly deals in the type of goods involved in the transaction or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction.

Here, Alex is selling carpet and padding. Carpet and padding is a goods and is governed by the Article 2 of the UCC. However, he also offers installation services. This would be governed by the common law. The court would have to look at the contract to see if it is divisible. Here, because Barry's email states that he will pay $10,000 for the carpet and padding and $5,000 for the isntallation fee, it is likely that a court will find that the contract is divisible. Thus, the carpet and padding will be governed by Article 2 of the UCC while the installation will be governed by the common law.

Additionally, a court will likely find that Alex and Barry are merchants. Alex buys carpet and padding from his friend at a discount and then sells them at marked-up prices to the general public from his garage for cash. Barry owns several commercial office buildings in Las Vegas and requently remodels the office suites for his tenants. It would appear that both of these individuals are persons who regulatly deal with carpet, carpet padding, and installation. This is evident as Barry had a friend recommend him to see Alex. Thus, Alex is someone who holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction. As such, the court will likely find that they are merchants.

B. Offer

A contract is a legally enforceable agreement formed through the process of mutual assent and consideration absent any valid defenese to contract formation. Mutual assent consists of an offer and acceptance. An offer is an objective manifestation of willlingness to enter into an agreement (by the offeror) that creates a power of acceptance (in the offeree). This is governed by an objective test. A valid offer must be directed to a specific offeree, unless it is a contest offer or reward offer. A valid offer must convey the power of acceptance. Advertisments generally are considered invitations to receive offers from the public, unless associated with a stated reward. An advertisment that is sufficiently specific and limiting as to who may accept may also qualify as an offer. Under common law, all essential terms (i.e. the parties, subject matter, price, and quantity) must be covered in the agreement whereas under the UCC, only the quanitty needs to be specified for a valid contract. The price is not necesssary because the UCC will gap fill.

Here, Barry sent an email to Alex seeking to buy carpet and padding, plus installation, for one of his office buildings. His email stated "I am remodeling a 5,000 square foot office suite in one of my office buildings. I need light brown, high-grade commercial carpet and foam

padding. I will pay you $10,000 for the carpet and padding and $5,000 for the installation. I will pay $10,000 in cash upon installation and the remaining $5,000 in cash 30 days after installation. Installation within seven days." This is a valid offer. Because it is an email, it is directed towards a specific individual. Furthermore, the portion of the contract regarding the installation fee requires the parties, subject matter (carpet install), the price ($5,000) and the amount (5,000 square feet). Thus, the installation portion of the contract is specific enough to satisfy the specificity requirement. Additionally, the carpet and padding portion of the offer lists the price. As such, the specificity requirement is met and this is a valid offer.

C. Acceptance

An acceptance is an objective manifestation by the offeree to be bound by the terms of the offer and the offeree must communicate the acceptance to the offeror. The offer must be sepcifically directed to the person trying to accept it and the offeree must accept in the way that the offeror states. However, an offer requireing a promise to accept can be accepted either with a return promise or by starting performance.Common law follows the mirror image rule. According to the mirror image rule, the acceptance must mirror the terms of the offer exactly. Any change to the terms of the offer, or the addition of another term not found in the offer, acts as a counteroffer.

Here, Alex responded to Barry's email stating "I will sell you a light brown, low-grade commercial carpet, and non-foam padding. The carpet and padding will cost $10,000 and installation will cost $7,500, all payable upon installation of the carpet and padding. Installation within 10 days." Because this contains new terms that are different from the terms laid out in Barry's offer, this is not an acceptance, but a counter-offer.

D. Counter-Offer / Common Law

Common law follows the mirror image rule. According to the mirror image rule, the acceptance must mirror the terms of the offer exactly. Any change to the terms of hte offer, or the addition of another term not found in the offer, acts as a counteroffer. A counteroffer is a rejection of the original offer and a new offer. A counteroffer terminates the offer and acts as a new offer from the original offeree when there is conditional acceptance.

Here, Alex's response said that he would still install the carpet and padding (provide the service, governed by the common law), but that the install would be $7,500 and would be done within 10 days. These are new terms and, because, under the common law, these are new terms, they do not govern the contract but act as a new offer.

Barry did not respond to Alex's new offer and therefore did not accept. Typically a party must communicate his or her acceptance to the other party to be effective. Acceptance without communiation (by silence) is appropriate in certain circusmtances including when past history or silence served as acceptance or the offer says that acceptance must come by silence and offeree intends to accept the offer by silnence. Implied in fact contracts occur when communication by gestures or actions consitutes acceptance. A person's assent to an offer may be inferred solely from the person's conduct. To be contractually bound, a person must (i) intend the conduct and (ii) know or have reaosn to know that conduct may cause the offeror to believe the offer was accepted.

Here, Barry did not respond to Alex's email. Nonetheless, ten days later, Alex intalled the light brown, low-grade commercial carpet and non-foam padding in Barry's office building suite. Alex left an invoice for Barry for $17,500 with the following breakdwon of costs "$10,000 for light brown, low-grade commercial carpet and non-foam padding, and $7,500 for installation, all payable in cash immediately." Upon receiving this, Barry sent an electronic payment to Alex's personal checking account in the amount of $7,500. Thus, Barry accepted the installation work and formed an implied-in-fact contract through his acceptance. By paying Alex the payment that was due for the installation fee, Barry accepted his work and formed a valid contract.

E. New Terms & Acceptance / UCC

In some cases, a purported acceptance that does not match the terms of the offer exactly can sitll count as a legal acceptance. First the court must determine whetehr the additional terms constitute an acceptant. UCC Sec. 2-207(1) states "a definite and seasonable expression of acceptance (or written confirmation) which is sent within a reaonble time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional upon assent to the additional or different terms."

Here, Barry's email never made acceptance conditional on the terms of him needing light brown, high-grade commercial carpet and foam padding. The fact pattern is silent as the to thiming that Alex responded to Barry, but assuming Alex responding to Barry in a reasonable amount of time, this can operate as acceptance.

Next, the court will need to determine whether the new terms in the acceptance control. UCC 2-207(2) states that the new term in the acceptance may control only if all the following are true: (i) both parties are merchants, (ii) the new term does not materially alter the deal, (iii) the initial offer did not expressly limit acceptance to its terms and (iv) the offeror does not object or reject within a reaosnable time to the new term.

Here, Barry and Alex are both merchants (as previously analyzed). Barry will likely argue that the new term does materially breach the deal wheras Alex will argue that it does not. Alex is still offering light-brown carpet and padding. However, he is offering low-grade commercial carpet rather than high-grade and non-foam padding rather than foam padding. Nonetheless, Barry did not expressly limit acceptance to his terms and he did not respond to Alex's email.

Thus, if a court can find that these new terms do not materially alter the contract, then the new terms in the acceptance may control the portion of the contract regarding the carpet and padding.

F. Consideration

Consideration requires bargained-for legal detriment, which can involve both performance and forbearance. Consideration must be bargained for and cannot be nominal or illusory.

Here, there was valid consideration as Barry was paying for both the carpet and the service of installation.

G. Statute of Frauds

Certain contracts are subject to the statute of fraudds and require a higher and special form of proof. The goal is to prevent false assertions about a contract that was never really created. The statute of frauds applies to marriage contracts, suretyship, contracts that cannot be performed within one year from its making, real property, and any goods contracts for a price of $500 or more.

Here, Barry is purchasing $10,000 worth of carpet and padding (goods). As such, this portion of the contract is subject to the statute of frauds.

The statute of frauds can be satisfied by a signed writing. The writing must be signed by the party against whom enforcement is sought and contain the essential elements of the deal. The UCC requires a memorandum of the sale that must indicate that a contract has been made, identify the parties, contain a quantity term and be signed by the party to be charged. A signature includes any authentication that identifies the party to be charged, such as a letterhead on the memorandum. Writing need not be formal and the memorandum sufficient to satisfy the statute of frauds does not need to be written at the time a promise is made.

The statute of frauds can also be satisfied by part performance. This satisfies the statute of frauds but only for the quanitty delivered and accepted.

Here, Barry will try to argue that the statute of frauds has not been satisfied because he did not sign the email. However, an email can constitute a signed writing. Thus, the emails back and forth contain the essential elements of the deal and satisfy the statute of frauds.

- In conclusion, there is a valid contract between Barry and Alex. The terms of the contract is that Alex will sell Barry light brown, low-grade commercial carpet, and non-foam padding. The carpet and padding will cost $10,000 and installation will cost $7,500, all payable in cash upon installation of the carpet and padding. Installation will occur within 10 days.

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

JULY 2022
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

Question 6

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

1. Was action properly removed to district court?

Under 28 USC 1441, a defendant may remove an action filed in state court to federal court. Removal is permitted only if the plaintiff could have brought the action in federal court. If there are multiple defendants, like here, removal requires the consent of all defendants.

First, for removal to be proper the federal court must have subject matter jurisdiction over the claims asserted. Federal courts have SMJ over claims involving federal questions (arising under federal law), diversity jurisdiction, or supplemental jurisdiction. The burden of showing that the court has SMJ is on the party seeking SMJ, here the defendant.

Here, there is no federal question claim as the suit at issue concerns state law negligence claims, not any federal claim (like bankruptcy). Thus, for removal to be proper diversity jurisdiction must be proper.

Supplemental jurisdiction exists under 28 USC 1367, and allows a federal court to hear a related claim even if it does not have independent jdx over that claim. There must be at least one claim with independent jdx for this to apply. Here, as there is only a state law negligence claim, supplemental jdx does not provide independent grounds of SMJ.

Diversity jurisidcition requires complete diversity between the parties and the amount in controversy has to exceed $75,000. Complete diversity means that no plaintiff is a citizen of the same state as any defendant. Citizenship is measured at the filing date.

For people, citizenship is dicated by domicile. A person's domicile is where they have a physical presence with the intent to remain indefinitely. Here, P's domicile is NV, and D's domicile is Florida. Corporations on the other hand can be citizens of multiple states and they are a citizen of every state they are incorporated in and th eone state of their principal place of business. Under the Hertz nerve center test, the principle place of business is where the high level officers control the company. Here, Midwest is headquarted or incorporated in Indiana, with principal place of business in Missouri, thus has both those states as its domiciles. At the time of removal, as P was a NV resident, and the defendants were citizens of Indiana, MO, and FL, complete diversity existed.

Next, diversity jurisdiction requires that the amount in controversy exceeds $75,000. This will be satisfied if the plaintiff's complaint in good faith asserts a sum greater than $75,000. Here, facially plaintiff's complaint asserted damages "in excess of $15,000" which is not that close to the $75,000 mark. Despite this, Midwest the party with the burden to show SMJ was proper, included in its notice of removal a summary of recent jury verdicts showing that the case was properly valued in the $80-100k range in the same jurisdiction, which would meet the amount in controversy requirement. As such, it is likely that the AIC should be met here and diversity jurisdiction exists at time of removal.

For removal to be proper it must occur within 30 days after the case becomes removal, and if the basis is diversity, may not exceed 1 year after the filing date. Here, Midwest removed the case 20 days after being served, which is within the 30 day period allowed to do so, and thus removal was timely.

A defendant seeking to remove must file notice and serve all parties. Once this is done, the case is removed and the state court no longer has authority over the case. Additionally, as mentioned above, when multiple defendants are involved, all must consent for removal to be proper. Here, as Midwest did not obtain the consent of David prior to removal, removal likely was not proper, and the action should not have been removed. Had M obtained D's consent and provided service to him, then removal would have been proper at this time.

2. Was service proper?

A complaint must (1) be properly served on the defendants and (2) meet notice requirements of due process. Under the federal rules uyou must serve within 90 days, and under NV law, you have 120 days from filing to serve.

Proper methods of service in NV include if defendant was served by someone who is 18+ and not a party by personal service, substituted service, service on agent, waiver by mail, or any other method allowed by the forum states laws.

Personal service occurs when the lawsuit, incldluing the summons and complaint, is handed to the defendant personally while they are anywhere in the forum state. Here, no personal service transpired.

Service on corporations is proper if the summons and complaint is personally delivered to an officer or the regisered agent authorized by law for the service of process. IN NV you can also serve the secretary of state if the registered agent cannot be served. Here, P did not serve the registered agent of Midwest, but instead personally served the corporate secretary at their office in Saint Louis. It is unclear from the facts whether the "corporate secretary" would constitute an officer of the corporation sufficient to satisfy service, but assuming the corporate secretary is akin to the role of the officer who keeps the board minutes of a corporation, such service would be sufficient. If this service instead was just to a literal secretary who worked for the corporation, such role is not an officer and not qualified to receive service on behalf of hte corporation, which would be improper service.

Service by mail is proper if the defendant receives and returns a waiver form sent to them. If they do so, defendant is given additional time (60 days) to respond. If the waiver form is not returned then the plaintiff must erve the defendant personally or use substituted service. Here, P's lawyer mailed only a copy of the complaint, not summons, nor waiver form to D, which does not constitute proper service. Further, even if a waiver form had been mailed, upon D not replying, P would have been required to personally serve or serve via substituted service for service to be proper. As such, facially service was not proper here.

Even if mechanics of service were proper, it still must staisfy constitutional requirements. Due process requires notice to be "reasonably calculated" under all circumstances, to apprise interested parties of pendency of action and afford them an opportunity to present their objections. Here, the notice to D, was sent to his address listed on the police report and thus likely was reasonably calculated to apprise him of the pendency of the action. Nonetheless, at the point no response was given, it was apparent service was not properly effectuated and due process concerns implicated, as D had no clue the action was going on. As such, even if mail service was proper (which it was not), notice did not meet due process here.

3. Permissible for Pete to file amended complaint?

Once the action was removed to federal court, Pete was operating under the FRCP. Under FRCP 15(a)(1) all parties have the right to amend their pleadings once within 21 days after it was served. If the original pleading requires a response, then the party gets 21 days after being served with the response. No court permission is needed to do so. After that, a party may amend only if they seek and receive the court's permission. Of note, courts freely grant this permission.

Here, Pete filed his amended complaint 25 days after serving Midwest (20 days after service Midwest removed + 5 days after removal P filed). While this is more than 21 days after service, the complaint requires an answer, and Pete would have 21 days after the answer to amend his complaint. As such, it is likely that Pete was within his rights to file an amended complaint as a matter of right here, as an answer had yet to be served (and Pete would have 21 days after that to file).

If applicable, relation back deems an amended filing to have been filed on the date of the original complaint. An amended pleading seekign to add a new party where teh statute of limitations has not run is permitted. Here, the SOL had not run, thus adding a new party is permissible.

4. Did court correctly rule on motion to remand?

If a case is improperly removed from state to federal court, the federal court will remand the case back to state court. A motion for remand must be filed within 30 days of removal if based on a defect other than lack of SMJ. Remand based on lack of SMJ may be filed at any time. Here, it is unclear when exactly P's lawyer filed the motion to remand, but as the motion was based on a lack of SMJ it could be filed at any time and thus was timely.

Pete's lawyer may have argued that either the amount in controversy was not satisfied, and thus the court lacked diversity jurisdiction, or alternatively (and likely more successfully) argued that upon addition of Speedy Tire as defendant, diversity j was destroyed, and the court no longer had SMJ.

Pete's first contention may have been that the court lacked SMJ due to the case not satisfying the amount in controversy requirement of $75,000, as only $15,000 was plead in the complaint. Despite this, the Court would likely find that as Midwest was able to show that comparable cases often were in the range of $80-100k jury verdicts, the case value actually satisfied the amount in controversy here.

Pete's better argument would be that diversity jurisdiction was destroyed and complete diversity did not exist at the point that Speedy was added to the case, thus the court did not have SMJ over the action. Under the home state (or instate) defendant rule, a defendant cannot remove a case based on diversity jurisdiction if the defendant is a citizen of the forum state. However, a defendant is permitted to remove under federal question jurisdiction. While the in state defendant rule would have precluded removal if Speedy was joined at the time removal occurred, as they were not, the rule actually doesn't retroactively bar the removal or make it improper. What does make the continued jurisdiction improper, however, is that now with Speedy joined complete diversity has been destroyed as Speedy is domiciled in NV.

Speedy may raise in defense that if a P fraudulently adds a D to destroy diversity jurisdiction, removal is not proper. This doesn't appear to be the case here, however, as Speedy was the business that serviced the brakes at issue in the accident, and thus no fraudulent joinder occurred.

As the federal court no longer had SMJ over the case, remand was proper and the court decided correctly the motion to remand.

5. Should court consider motion to set aside judgment?

A party can make a motion to set aside a judgment if it is requested within a reasonable time. Grounds for this motion can include if there was a mistake made in the trial, newly discovered evidence was found, fraud was committed, or the judgment issued is void. Under NV law, you must bring such motion within 180 days.

Dave's Motion

Here, Dave is bringing a motion to set aside the judgment, likely because he would argue the judgment is void as his due process rights were violated and he was never provided notice of the judgment or impending trial and thus was deprived of his right to jury trial, or right to defend himself in the litigation. He would also argue the judgment should be void as they failed to join an indispensable party. Under NV law, D would have 180 days after trial to bring such motion. Here, he brought the motion to set aside five months after the judgment was entered, or 180 days roughly on the dot, and likely thus could be able to timely make this motion. As such, the Court should consider Dave's motion to set aside the judgment for failure to join a necessary party and failing to ever provide proper notice to one of the defendants.

Midwest's Motion

Here, Midwest is moving to set aside the judgment due to fraud on the court and the fact that P and his doctor falsified medical records. Such motion can generally be made on the grounds that fraud was committed or newly discovered evidence found. Here, Midwest would argue that P committed a fraud by falsifying key evidence, and such evidence would justify setting aside the judgment. The second element required to set aside a judgment, however, is that such motion must be brought within a reasonable time. Under the federal rules there is not a strict time limit and Midwest would claim that they only just discovered the fraud, and likely would be able to set aside the judgment. Under NV law, which applies as this case is in NV state court, Midwest only had 180 days to make the motion, and has just moved to set aside judgment 7 months or nearly, 210 days after trial concluded. Thus, the court will not consider Midwest's motion to set aside the judgment, and it will not be granted.

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

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Question 7

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

Beginning of Question 7 Answer

As a preliminary matter, we must establish that there was a valid lease, what the terms of that lease were, as well as what the responsibilities under that lease were.

Lease Between L and M, N, O, and P

L has created a leasehold for a term of years with M, N, O, and P. A leasehold for a term of years is a lease for a definite period of time with an articulated termination date. It must be in writing if the lease is longer than 1 year to satisfy the statute of frauds. Here, L signed individual leases with each of M, N, O, and P. The leases state that they will be for a period of two years at a rate of $500 per month. The leases were signed by L, M, N, and O, therefore valid leases were created with each of the three listed above. P did not sign his lease, however he has a valid argument that the lease should be enforced anyway. When a party to a property agreement does 2 of the following 3 things, the agreement will be deemed valid and enforceable: (1) take possession of the property; (2) make substantial payment for the property; or (3) modify the property. As a result of this exception, P will also have been found to enter into a valid lease agreement with L.

L's Duties to the Tenants

L has duties of the implied covenant of quiet enjoyment and teh implied warranty of habitability. The implied covenant of quiet enjoyment (ICQE) gives tenants the right to use and enjoy the property without the landlord's interference. If the implied covenant of quiet enjoyment is breached, the tenant must prove constructive eviction through substantial interference on behalf of the landlord, provide notice of the problem and the landlord must fail to fix it, and the tenant must vacate the property within a reasonable time. The implied warranty of habitability (IWH) provides that a property is fit for basic dwelling. Bare living requirements must be met according to local housing codes or case law, such as heat, water, and plumbing. If the implied warranty of habitability is breached, the tenant may vacate the property, repair and deduct the reasonable costs of repair from rent, withhold rent (but must place the rent into escrow to show good faith), or continue paying rent and remain in possession but seek money damages.

Tenant's Duties to L

The tenants have a duty to repair and a duty to pay rent. The duty to repair, when the lease is silent, has a duty to make routine repairs that are not a result of ordinary wear and tear. This includes a duty to not commit voluntary, permissive, or ameliorative waste. The duty

to pay rent means the tenant must pay ren t to the landlord as agreed. If the tenant breaches this duty but remains in possession of the premises, the tenant becomes a tenant at sufference and the landlord may evict through courts or continue the relationship and sue for the rent due. If the tenant breaches the duty but does not remain in possession, the landlord may consider the tenant's claim to the property surrendered or the landlord may ignore the abandonment and hold the tenant responsible for rent as if the tenant were still there.

Larry's (L) Suit Against Morris (M)

Breach of the Duty to Pay Rent

M has breached his duty to pay rent. At issue here is whether M could have properly refused to pay rent in this scenario. As stated above, M as a valid tenant has a duty to pay rent at $500 per month to L. M has stopped paying rent but remained in control of the property. Since M remained in possession of the property, despite his sublease, L has a right to consider the lease agreement surrendered and reclaim the property. In this scenario, L would be able to release the room and sue M for the unpaid rents, as well as any rents due under the lease agreement for months where L is unable to mitigate damages by releasing. L must make a good faith effort to release, however. L could also ignore the abandonment and permit the tenant to continue living there, holding the tenant responsible and suing for damages.

M will defend that L breached the warranty of habitability as described above. Assuming one of M's rooms is the unusable rooms damaged by the water heater, M would have a valid argument that his ability to use the room he leased is barred by the damage. M would have a valid argument that the property leased is unfit for basic habitation. The argument would likely prevail, though M will have issues with where the money is being held. The facts do not indicate that M put the money into any kind of escrow account. In fact, when he sublet the room, he accepted rent from Q but did not pay M. Therefore, the argument will run into problems. M may run into further problems since he remains in possession of one of the remaining rooms. L can likely successfully argue that his lease agreement only assigned him a room, not a specific room, and M has possession of a room. As a result, he may argue that even though two rooms are inaccessible, M's lease has not been breached. This argument may prevail and M would be liable for all unpaid months of rent.

Breach of Duty to Repair

L may try to pursue a claim for the breach of the duty to repair, but will likely fail. As described above, tenants have a duty t okeep the property in good repair and is liable for routine repairs. Here, the tenants would likely not be liable because damage from a burst pipe would not constitute routine repairs as it is not reaasonably forseeable. As a result, L would not be able to recover under this theory.

The Sublease

L will not be able to recover for M's sublease of the agreement. At issue here is whether M was permitted to sublet. Subleasing occurs when a tenant rents his land to a sublessee but has some interest left, thus the sublessor is still liable on the lease under privity of contract and estate. The sublessee is not liable to the landlord on the lease, but may be sued by the sublessor. Further, when a lease agreement is silent on the issue of subleasing, a presumption raises that subleasing the agreement is permissible. Here, the lease agreement is silent on

the issue of subleasing. M sublet the property to Q and has not breached the lease agreement by the fact of his sublease. Therefore L will not be able to recover against M for subleasing, but will be able to recover for any months that rent is unpaid since M is still liable under the original lease agreement.

L's Suit Against Nan (N)

Breach of the Duty to Pay Rent

L has a suit against N for breaching her duty to pay rent. As described above, N has a duty to pay rent just like M. N has breached that duty by failing to pay. As a result, L will be able to pursue the same remedies against N as he will against M for the months of unpaid rent leading up to 30 days after notice of the TPO was received or the end of the current rental period, whichever was left. This will be explained in N's defenses to the breach.

N will defend on the same breach of the IWH that is described above for M. N will have teh same issue regarding the money being held into escrow since she withheld rent as her remedial option for the breach. N may also argue, unlike M, that she was no longer receiving the benefit of her lease agreement because she no longer had her own room. Her agreement was for an individual room, and her accomodation to live with M does nto relieve L's duty to provide a room under the lease agreement. As a result, she is likely to succeed in her claim that L breached the duty of IWH.

N will successfully be able to terminate the lease due to her conflict with M. In Nevada, a tenant who is a victim of domestic violence, harassment, sexual assault, or stalking may terminate a lease at the conclusion of the current rental period or in 30 days, whichever is less, by giving the landlord notice and proof of the domestic violence, harassment, sexual assault, or stalking. Here, N has proof by way of her TPO and properly presented the TPO to L. Upon N's notice, she may effectively terminate her lease at that time and will be liable only for rents currently due.

Breach of the Duty to Repair

As above, L could unsuccessfully pursue a claim for breach of the duty to repair. N would use the same argument as M and L would likely fail on this claim.

L's Suit Against Olivia (O)

Breach of the Duty to Pay Rent

L has a suit against O for breaching her duty to pay rent. As described above, O has a duty to pay rent just like M. O breached that duty by failing to pay. As a result, L will be able to pursue the same remedies agaisnt O as he will against M for the months of unpaid rent.

The facts indicate that O remained on the property for several more months without paying rent, therefore L will have a claim for all unpaid rents due.

O will defend on the same breach of the IWH that is described for M. O will also have the same issues regarding the money being held in escrow since she elected to not pay rent. She may argue that this was out of private necessity because she had nowhere else to go, which may help her succeed in her claim but will not relieve her of her duty to pay rent for the unpaid months. I naddition, O was able to retain her own room, so L will likely successfully argue that O continued to receive the benefit of her lease agreement and is fully liable for unpaid rents, just like he will argue for L.

Breach of the Duty to Not Commit Waste

L will have a claim that O committed voluntary waste on the property. At issue here is whether the removal of the trees is truly considered waste. As stated above, a tenant has a duty not to commit acts that would injure the property, such as waste. The landlord could sue for damages or seek an injunction. Here, O likely committed voluntary waste for removal of fixtures. Voluntary waste is a voluntary injury to the property by teh tenant that results in the deterioration of value. Removal of fixtures generally constitutes voluntary waste. A fixture is a chattel affixed to the property such that it should reasonably be considered part of the property. Here, there were two large trees on the property that provided shade to the house. These would be considered fixtures, as they are chattels on the property so affixed that the cahracter of the chattel is to be part of the property. O cut down the trees without seeking permission from L, and since the trees provided shade, the removal likely injured the property and reduced the value. As a result, L would have a successful claim against O for breaching her duty to commit waste and may seek money damages.

O may argue that removal of the trees did not injure the property in any way and therefore should not constitute waste. If it does constitute waste, she could ague that it is ameliorative waste, which is a change that benefits the property economically or represents a substantial change in the neighborhood. O is unlikely to succeed on either of these arguments, as the tree is very likely to simply be a positive fixture and removal constitutes voluntary waste.

Breach of the Duty to Repair

As above, L could unsuccessfully pursue a claim for breach of the duty to repair. O would use the same argument as M and L would likely fail on this claim.

L's Suit Against Peter (P)

Breach of the Duty to Pay Rent

L has a suit against P for breaching her duty to pay rent. As described above, P has a duty to pay rent just like M. P breached that duty by failing to pay. As a result, L will be able to pursue the same remedies agaisnt P as he will against M for the months of unpaid rent. The

facts indicate that P remained on the property for several more months without paying rent, therefore L will have a claim for all unpaid rents due.

P will defend on the same breach of the IWH that is described for M. P will also have the same issues regarding the money being held in escrow since he elected to not pay rent. He may argue that this was out of private necessity because he had nowhere else to go, which may help her succeed in her claim but will not relieve her of her duty to pay rent for the unpaid months. Unlike O or M, P was unable to retain his own room and was deprived of the benefit of his lease agreement as the result of the water damage. As a result, he will likely successfully argue that he was deprived of his IWH and should not be liable for rent for the months since the breach. Had P placed the money into an escrow account, he would likely succeed on not having to pay any rent for those months. Since he did not, he will have to find some way to prove good faith.

P may also attempt to argue he never had a lease agreement with L because he did not sign one. As stated above, P has performed two of the three necessary elements to enforce the lease agreement on him as justice and fairness requires. If the court did not do this, P would have been unjustly enriched for the time prior to the breach of the IWH because he was able to live on the property for free. In addition, if the court found that there was no lease agreement, there would have been no breach of the IWH because L would have owed no duty to P. Thus L should be able to recover some money damages from P.

Breach of the Duty to Repair

As above, L could unsuccessfully pursue a claim for breach of the duty to repair. P would use the same argument as M and L would likely fail on this claim.

Larry's Suit Against Quincy (Q)

Breach of the Duty to Pay

L does not have a case against Q. Q, as a sublessee, is liable to his sublessor, M. M is still liable for all duties under the initial lease agreement with L. As stated above, the sublessee is only liable to the sublessor, in this case M. M chose to withhold the rent that Q paid him from L. Therefore L would not have a valid claim for any kind of breach for failure to pay because he is not in privity of contract with Q. Q has duly paid his rent to M, but M did not duly pay his rent to L. Since Q, as sublessee, is enjoying the benefit of his sublet lease agreement, M has a duty to fiulfil his obligations to L. L should pursue M for any claims that he wishes to pursue against Q.

Breach of the Duty to Repair

As above, L could unsuccessfully pursue a claim for breach of the duty to repair. Q would use a slightly different argument, stating that his duty to repair is to M instead of L, but just like M, he does not have to fulfill the obligation to repair

End of Question 7 Answer

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

JULY 2022
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

Nevada Performance Test - 1

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

Memorandum

To: Senior Partner

From: Applicant

Date: July 27, 2022

Re: Our Client, CEI

Introduction

Our client, Consumer Electronics, Inc ("CEI") sells home entertainment systems. CEI sells almost exclusively on credit and to purchase on credit, a consumer has to complete a credit application and sign a CEI Cardholder Agreement. A consumer of CEI, Hillary Smart, purchased a home entertainement system from CEI and then defaulted. This memo is going to discuss if CEI can file a claim to recover the entertainment system, the priority of rights parties have in the entertainment system, and any recommendations for how CEI can update their policies.

Facts

Hillary Smart ("Hillary") purchased a $10,000 home entertainment system from CEI on April 15, 2022. She executed the CEI Cardholder Agreement and was able to purchase the entertainment system on credit.

Hillary took out a home equity loan with Last National Bank ("LNB") in the amount of $50,000. She secured the loan with her condominium unit and her personal property located in the condominium as collateral. LNB filed a UCC-1 Financing Statement on December 15, 2019.

Hillary had a judgment entered against her in June 2022 for failing to pay child support. Her former husband obtained a writ of possession and served the writ on June 15th with instructions to levy all of Hillary's personal property located in her residence.

Hillary failed to make payments and is in default under her CEI Cardholder Agreement. She also has breached her home equity loan duties of repayment. Additionally, Hillary sold the home entertainment system to Darrin on June 17th. Moreover on June 17th, the sheriff levied on the home entertainment system and seized the system.

Analysis

1. Claim to Recover

CEI would have a claim to recover because they have a perfected security interest in the home entertainment system.

A. Type of Security Interest Owned by CEI

Under NRS 104.9103, a perchase money security interest ("PMSI") means to the extent that the goods are purchase money collateral, which are goods or software that secures a purchase money obligation incurred with respect to that collateral, with repsect to that security interest.

CEI would have a PMSI in the entertainement system sold. The CEI Cardholder Agreement grants CEI a security interest in goods purchased on credit using the consumer's account. CEI is giving the credit needed to purchase the good and then taking a security interest in the good that they gave the credit for the consumer to purchase. Thus, a valid PMSI would be created.

B. Attachment of Security Interest

According to NRS 104.9203, a security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment. A security interest is enforceable against the debtor and third parties with respect to the collateral only if: (a) value has been given, (b) the debtor has rights in the collateral or power to transfer rights in the collateral to a secured party, and (c) the debtor has authenticated a security agreement that provides a description of the collateral. Under NRS 9108, a desription of collateral reasonably identifies the collateral if it identifies the collateral by any other method, if the identity of the collateral is objectively determinable. However, a description only by type of collateral defined in the UCC is an insufficient description in a consumer transaction.

Here, value has clearly been given. CEI gave the home entertainment system and credit so that Hillary could purchase the system and Hillary gave a promise to pay for the system. Hillary would have rights in the collateral because once it has been passed to her, she now is the owner of the entertainment system. Proving that the debtor has authenticated a security agreement that provides a description of the collateral is going to be hard to prove here. Hillary authenticated a blank security agreement that said that she was granting CEI a security interest in any electronic consumer goods purchased on Consumer's account. The home entertainment system would be an electronic consumer good that was purchased on Hillary's account. Thus, it is likely that the collateral is objectively determinable. CEI is going to be able to open a customer's account and see which items were purchased on credit with CEI's credit card and thus, this is an objective method for determining the identity of the collateral that CEI has a PMSI in.

Thus, attachment occured when Hillary signed the Cardholder Agreement on April 15, 2022.

C. Perfection of Security Interest

According to NRS 104.9309, a purchase money security interest in consumer goods, perfect when they attach.

Here, CEI has a PMSI in consumer goods. Hillary bought a home entertainment system for personal household use, and thus that is a consumer good. Therefore, the PMSI perfected upon attachment on April 15, 2022.

D. Ability to Enforce

Under NRS 104.9201, except as otherwise provided in the UCC, a security agreement is effective accroding to its terms between the parties, against purchasers of the collateral, and against creditors.

As part of the terms of the Cardholder Agreement, CEI is granted permission to enter a consumer's premises at a rasonable time and upon reasonable notice in the event of default in order to repossses the consumer electronic purchased with the CEI credit card. Thus, as long as the consumer electronic purchased remains in the buyers possession CEI can reposses the good. However, the entertainment system is not int he posession of Hillary and thus, CEI cannot just go and repossess it.

Conclusion

CEI has an attached, perfected security interest in the home entertainment system. CEI cannot go an repossess the system on their own because Hillary is no longer in possession of it. However, because CEI has a perfected interest, they have a claim to at least recover the cost of the entertainment system and can sue Hillary for breach of the agreement.

2. Priority of Rights

CONCLUSION

A. Rights of LNB

Hillary pledged her personal property located in her condomimium as collateral to a home equity loan from LNB. A home entertainment system would be considered personal property and it was located in her condomium unit and thus, could be subject to LNB's security interest.

Attachment

NRS 104.9203, states that a security interest is enforceable against the debtor and third parties with respect to the collateral only if: (a) value has been given, (b) the debtor has rights in the collateral or power to transfer rights in the collateral to a secured party, and (c) the debtor has authenticated a security agreement that provides a description of the collateral. NRS 104.9108, explains that a description of collateral reasonably identifies the collateral if it identifies it by category but that a description of all of the debtor's personal property does not reasonably identify the property. NRS 104.9204 states that a security interes does not attach under a term constintuing an after aquired property clause to consumer goods.

Here, LNB gave value in the form of the loan and Hillary gave value by promising to pay the loan back. Hillary had rights in the collateral once the bank transferred the money to her. Hillary signed the Home Equity Loan Agreement which described the collateral as all other personal property located within the condominum including consumer electronics, jewelry, and other consumer goods with a

value in excess of $1,000 now owned or later acquired. Because the description does not only say all personal property of the debtor and instead says personal property and then gives category descriptions, this will be a valid description.

Thus, attachment will have occured on Hillary's consumer electronics, jewelry, and other consumer goods in excess of $1,000 that Hillary currently owns. However, in regards to the after aquired consumer goods, LNB's security interest does not attach. Because the Home Equity Loan Agreement was signed on December 31, 2019 that is when it attached to Hillary's personal property.

Thus, because Hillary purchased the home entertainment system after this security agreement attached, LNB would not have a an attached right in the system.

B. Rights of Bob

Bob obtained a judgment on June 1st to levy Hillary's personal property at her residence. Bob then served the writ on June 15th and the sherif seized the entertainment system on June 19th.

Under NRS 104.9315, a security interest continues in collateral notwithstanding sale, lease, license, exchange or other disposition therefof unless the secured party authoried the dispostion free of the security interest.

Here, CEI's security interest would continue in the collateral becuase they did not authorize the seizure of the property by Bob.

Bob has rights in the collateral because he is a lein creditor. Under NRS 104.9317 if a security interest is subordinate to the rights of a person that becomes a lien creditor before the earlier of the time the security interest is perfected. However if a person files a financing statement with respect to a purchase money security interest before or within 20 days after the debtor receives delivery of the collateral, the security interest takes priority over the rights of a buyer, lessee or lein creditor which arise between the time the security interest attaches and the time of filing.

Bob became a lein creditor on June 1. CEI's security interest perfected on April 15th and Darrin became a buyer on June 17th. Thus, CEI would have a priority over Bob and Darrin only because they have a perfected security interest before Bob became a lien creditor. Bob would have priority over Darrin because he is a lien creditor and Darrin does not have a perfected security interest.

C. Rights of Darrin

Darrin purchased the home entertainment system on June 17th from an online service DBay for $3,000. Thus, Darrin may have an interest in the home entertainment system.

Under NRS 104.9315, a security interest continues in collateral notwithstanding sale, lease, license, exchange or other disposition therefof unless the secured party authoried the dispostion free of the security interest.

Here, CEI's security interest would continue in the collateral becuase they did not authorize the sale to Darrin. However, NRS 104.9320 would provide an exception.

NRS 104.9320 provides certain protections for certian buyers of goods. This section states that a buyer in the ordinary course of business takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its exisitance. Moreover, a buyer of goods from a person who used or bought the goods for use primarily for personal, family, or household purposes takes free of a security interest, even if perfected, if the buyer buyers (a) without knowledge of the security interest, (b) for value, (c) primarily for his or her personal, family, or household purposes, and (d) before the filing of a financing statement covering the goods.

Here, it is likely that Darrin is not a buyer in the ordinary course of business. Since it is an online site it is probably where many different types of goods are sold and thus, he would not be a buyer in the ordinary course. However, he most likely would fall under the second exception. Hillary bought the home entertainment system for her own personal use. Darrin would have bought the system without the knowledge of the security interest becuase he bought it online. He paid $3,000 for it and thus he bought it for value. We do not know what Darrin is using the system for and this analysis would turn on how he is using the system. Lastly, CEI never filed a financing statement covering the goods and thus, he would have taken the goods before a statement was filed.

Thus, Darrin could claim an interest in the home system if he is using the goods for personal, family,or household purposes because he would fall under this exception. If this occurs then CEI would not be able to take the goods from Darrin. However, if it is discovered that he does not fall under the exception then CEI would be able to claim priority over him and take the system.

3. Recommendations

The recommendation I would give CEI is to require a financing statement to be filed even thought they have a PMSI in the goods. If they file a financing statement then a lein creditor cannot take priority over their security interest if they happen to get the security interest after the lein creditor. Also they will have power over a later buyer if they have a financing statement filed.

Additionally, CEI should give more rights in repossession where buyer has to repay full loan and has to try and recover the system if an outside buyer bought it. Lastly they could require more of a definite description of the collateral so that attachment is easier.

Conclusion

CEI has priority over Bob in the home entertainment system because they perfected first. However, they may not have priority over Darrin because he would fall under the protected buyer rule. They minimally have a valid claim against Hillary and the some of the other creditors for possession over the system.

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

JULY 2022
EXAMINATION ANSWERS

APPLICANT'S ANSWERS TO QUESTIONS
NEVADA BOARD OF BAR EXAMINERS

Nevada Performance Test - 2

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

To: Judge Smith

From: Applicant

Re: Bench Memorandum Regarding Probate Matters Scheduled for Next Week

In re Estate of Allen

(1) The first issue is whether the court has jurisdiction over Mr. Allen's estate.

(2) Analysis

Section 136.010 governs jurisdiction in probate proceedings. Subsection 1 provides that jurisdiction is proper in any county in this state where any part of the estate is located or where the decedent was a resident at the time of death. Alternatively, subsection 2 provides that, if the decedent was a resident of Nevada at the time of death, jurisdiction is proper in any county in this State regardless of whether "the death occurred in that county or elsewhere." §136.010(2). However, before exercising jurisdiction under this subsection, the court should take into consideration the convenience of the forum to (1) the personal representative or trustee; and (2) the heirs, devisees, intreested persons, or beneficiaries of the estate and their legal counsel. Importantly. under secton 132.265, a personal respresentative is synonymous with administrator.

On the facts, the court should exrcise jurisdiction over Mr. Allen's estate by applying either subsection. Mr. Allen was a resident Nevada. His estate is in Elko County, Washoe County, and Carson County. Therefore, jurisdiction would be proper here in Carson City because part of his estate is there, assuming that this court sits in the same county as the property in Carson City.

Alternatively, ,the court can exercise under subsection 2 so long as the decedent was a Nevada resident and it is convenient to interseted parties. As discussed below, the adminsitator is in Washoe County, which is not too far away from Carson City. And Mr. Allen is a Nevada. Therefore, jurisdiction is proper here under subsection 2 as well.

(3) Conclusion

The court should exercise jursdiction over the estate.

(1) The second issue is who is entitled to stand in as Adminstrator of Mr. Allen's estate.

(2) Analysis

Section 139.010 defines the qualifications of who is entitled to adminster an estate. They must (1) be of majority age; (2) not have been conviction of a felony, unless the court determiens that the conviction is not disqualifying; (3) is adjudged to be disqualified by reason of "conflict of interest, drunkenness, improvidence, lack of ingreity, or other compelling reason; or (4) is not a resident of Nevada, subject to various exceptions.

Meanwhile, section 139.040 provides the order of a priority the court must consider in determining who should be administator. The fixing of priority provdied in this section is mandatory. See Dickerson.

Taken together, the court should appoint the Public Adminstrator of Washoe County as administrator. The high-school aged grandson is automatically disqualified because he is a freshman in high school and is not the age of majority. With respect to Mr. Allen's son, he is the age of majority. However, he has been convicted of security fraud in the past. This security fraud conviction bars his appointment because the statute generally provides that the court shall not appoint an individual who has been convicted of a felony or be adjudged to "lack . . . integrity." Assuming the securities fraud conviction is a felony, the court should reject the son's petition if he had not supplied proof that the conviciton should be disqualifiying. Even then, however, the nature of a securities fraud conviction is likely one that implicates one's integrity. On balance, the court should therefore reject the son and grandson's petitions and appoint the Public Administrator.

(3) Conclusion

It is recommended that the court appoint the Public Adminstator of Washoe County as adminsitator.

In re Estate of Brown

(1) Statement of Issue

The issue is whether the no-contest clause is effective to forfeit a beneficiary's share who has challenged the designation of a beneficiary via the testator's payable-on-death (POD) account and what the burden of proof should be for such a contestant.

(2) Analysis

Notably, a no-contest clauses are contained in wills and effective as to those devises and beneficiaries delineated in the will. See 137.005. Accordingly, a no-contest clause in a will is not applicable to transfers outside of the will. Under section 132.237, a nonprobate transfer is one that is made by operation of law or by contract that is effective upon the death of the decedent. A POD account is one such probabte transfer, as they "generally do not pass into the estate" but are payable on death to the named beneficiary. Schrager (citing NRS 111.759(2). When a contestant wants to challenge such a testamentary transfer for undue influence, their burden of proof is the preponderance of the evidence. *Betherum*.

Here, the challenge to the POD account is not a challenge under the will. Threfore, the no-contest clause in the will does not apply. To be sure, the clause in the will limits its language to devises and devisees in the will: "The gifts in this, my Will, ar emade on the express condition that none of the beneficiaries shall oppose or contest the validity of this Will . . . ." As a result, the no-contest clause is ineffecitve to the challenge of the POD account. Moreover, such a contestant has a burden of preponderance of the evidence to show undue influence.

Conclusion

It is recommended that the clause does not apply to the POD challenge. The contestant will be requred to proffer a preponderance of the evidence.

(1) Statement of Issue

The second issue is whether the no-contest clause is effective to forfeit a beneficiary's share who has filed a will contest based on undue influence because the testator's attorney--unrelated to the testator--is one of the will beneficiaries.

(2) Analysis

A no-contest clause is one that "reduce[s] or eliminate[s]" a devisee's share "based upon conduct that is set forth by the testator in the will[.]" §137.005(3). In Nevada, will contest clauses are generally enforceable. See 137.005. Public policy favors upholding the intent of the testator. Id. However, the enforceability of such clauses is subject to several limitiations. A court must not enforce a no-contest clause if, among other reasons, the court determines by "clear and convincing evidence that the conduct of the devisee was a product of coercion or undue influence." Moreover, the clause will apply if a devisee institutes a legal action in good faith and based on probable cause. Probable cause exists if "based on the facts and circumstances available to the devisee who commences such legal acton, a reasonabl eperson . . . would concldude that the will is invalid."

In I*n re Estate of Betherum*, the court recognzied that "a presumption of undue influence arises when a fiduciary relationship exists and the fiduciary benefits from the benefited transaction." Those who stand in a confidential, fiduciary relationshiop with a testator raise this presumption of undue influence. See Bethurem. Once the presumption arises, the burden shifts to the beenficiary to show by clear and convincing evidence that there is no undue influence.

Here, the contestant is challenging a devise made to an attorney who drafted the will. This is the type of confidential, fiduciary relatinships that raise the presumption. As a result, it is likely that the contestants legal action has both good faith and probable cause. In the alternative, given the presumption, it is possible that he court could find on their own that there is clear and convincing evidencee of undue influence. Taken together, the no-contest clause should not apply to the contestant.

(3) Conclusion

The court should not apply the clause to the contestant of the devise to the attorney.

In re Estate of Carter

(1) The first issue is what amount of compensation the personal representation should take pursuant to section 150.020.

(2) Analysis

Under section 150.025, an attorney who is retained as apersonal repesentation can receive compensations in their capacity as an attorney or personal representative, but not both unless the court has approved a different method of compensation in advance and finds that the method of compensation is to the estate's best interests. If a party consents to an agreement governing the compensation, they have waived their ability to challenge.

Here, tf thre was not a previosu agreement, the attorney would not be able to recover both as a personal representative and an attorney. But because there is a written agreement on point, the agreement controls, so long as those services rendered are for the estate's benefit. See Schrager.

(3) Conclusion

The court should approve the compensation provided for in the agreement, assuming the services rendered beenfit the estate. If they do not, the amount should be recalcuated accordingly.

(1) The second issue whether the court should permit extroadinary attorney expenses.

(2) Analysis

Genreally, sections 150.060 and 150.061 provide guidance on the compensation for attorneys of the personal representative. Under section 150.060, an attorney is entitled to reasonable compensation for their services to be apid of of the estate. They can be absed on the hourly rate, value of the estate, or an agrreement .

Further, section 150.030 also delienates several types of extradoinary services an attorney can render to the estate, including estate taxes, litigation,will contests, or other business. Section 150.061 provides the type of compensation that can assesed for such services, and includesthat an attorney can take into account their paralegal's work. Moreover, section 150.061 provides that the petition mus tmake reference to time, narture and extent, complexity of the issues. However, Schrager has recognized that the payment out of the estate pursuant to 150.061 for attorney fees cannot be based on services that did not benefit the estate. Indeed, Schrager did not provide attorney fees for services that involved transfers that passed outside of the estate. See also section 150.025 (an attorney who is retained to perform services may receive compensation . . . unless the court . . . finds the method of compensation to be for the advantage, benefit, and best interest of the decedent's estate.) Moreover, 150.061 still provides that compensation must be just and reasonable.

Here, most of the services are for the benefit of the estate and are the types of activities contempalted in section 150.030. However, some of the fees attached are not rasonable. First, as noted above, it is in the testator's interest to protect their intent. Therefore, the services for the will contest are for the estate's benefit. The 10,000$ for 200 hours of work is not unreasonable. The preperation for the tax hearing is likely also in the estate's interest and the fee is not unreasonable, at 20$ an hour. However, the quitclaim deed fee of $20,000 for 2 hours is unreasonable. Finally, the life insurance proceeds are like not probate property, like the POD account in Schrager, so it cannot be for the estate's benefit.

(3) Conclusion

The court should permit the expenses for the tax hearing and the will contest only.

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