



**JULY 2024
EXAMINATION ANSWERS**

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

QUESTION 1

Question 1 - Selected Answer 1

Professional Independence

Karen is a licensed attorney. However, Mike is an engineer and therefore is not allowed to practice law. Karen and Mike formed a partnership together. This is not allowed, as lawyers are not allowed to form partnerships with nonlawyers if any of the organizations activities consist of the practice of law. AI Attorneys is clearly practicing law and therefore her partnership with Mike was improper. Karen could be subject to discipline for both her actions and any actions of Mike since she has engaged in business with him and is assisting him in the unauthorized practice of law as further explained below.

Attorneys are also not allowed to share legal fees with a nonlawyer. Karen and Mike's agreement in their partnership was to split all fees earned. This is an improper arrangement and prohibited by the rules of professional conduct.

Misleading Name

An attorney must not name a firm in a way that is false or misleading. The name "AI Attorneys" is misleading because there is only one attorney, not multiple attorneys. Karen is allowed to form a solo practice but she cannot imply that there are multiple attorneys and mislead a potential client into thinking so.

Unauthorized practice of law

Mike engaged in the unauthorized practice of law. He is not a licensed attorney, but he single handedly took Betty's case and drafted the demand letter and handled her case. The demand letter was engaging in settlement proceedings, and he even settled the case by cashing the check. Mike could be subject to discipline as it is a crime in the state of Nevada to engage in the unauthorized practice of law, or the State bar of Nevada could initiate a civil proceeding against him as well. Karen is also subject to disciplinary proceedings, as she is a licensed lawyer but in forming this partnership with Mike, she assisted him in the unauthorized practice of law. If she had set up her practice correctly without Mike as a partner and the illegitimate fee sharing deal, she could have delegated tasks to him as a nonlawyer employee but she must supervise him carefully and be responsible for the results.

Duty of Confidentiality

An attorney owes a duty of confidentiality to not reveal information relating to the representation of a client unless the client provides informed consent or an exception applies. Here, client information was entered into BratGPT where it is unclear the level of security of this program. Client information could be used in their software development or anywhere since it is an AI program. Nothing in the facts indicate that these clients gave informed consent for their information to be entered into BratGPT and potentially be disclosed.

Betty's Fee Agreement

Contingency fee agreements must be in writing and signed by the client, and must clearly state in boldface type terms such as: how the fee is to be calculated, what expenses are to be deducted from the recovery, what expenses the client must pay, that in the event of a loss, the client may be liable for the opposing party's fees and costs, and that a suit brought solely to harass or coerce a settlement may result in liability for malicious prosecution or abuse of process. Betty had a contingency fee agreement with AI Attorneys. This was an oral agreement, however contingency fee agreements are required to be reduced to writing. Furthermore, she reluctantly agreed to a 75% contingency fee. This is not a reasonable fee for a firm to take, especially given the provided facts that the only work performed was a demand letter was sent.

Duty of Communication to Betty

Attorneys must keep the client reasonably informed about the status of the matter. The facts do not directly indicate whether Betty consented to the amount in the demand letter, but an attorney must get client approval to make a settlement offer. AI Attorneys did not notify Betty that they received a check for the full amount of the debt collected as soon as they received the check as they are required to. These are breaches of the duty of communication.

Commingling Betty's funds

Attorneys must place client funds into a client trust account, separate from the lawyers own accounts. Mike placed Betty's settlement check into the firm's operating account instead of a trust account. The firm has not yet earned those fees until they provide her with a written statement showing the outcome of the case, the remittance to the client, and how the remittance was calculated. This was an improper commingling of client funds. Furthermore, Mike decided to pay Betty with fees from future cases so it seems he is commingling more funds. Client property must be kept separate and they are to be paid out of their own funds, they are not to be commingled. Lawyers have a duty to maintain accountability of client funds at all times.

Conflict of interest between Larry and Terry

Karen agreed to create a lease for Larry and Terry. This creates an immediate conflict because these two parties have adverse interest and Karen cannot represent both of them. However, Karen may act as an intermediary in order to draft this contract but she must reasonably believe that the matter can be resolved on terms compatible with their best interests, and must obtain informed consent in writing and inform each party that she is not their lawyer and attorney client privilege does not apply since she is acting as an intermediary. Furthermore, she must withdraw from the common representation upon the request of any client or if any of those conditions are not longer satisfied. Therefore, when an actual dispute over the provisions of the contract arose, she was required to withdraw and cannot represent either party. Karen's call to Terry was improper because she was now acting on behalf of Larry when she is prohibited from doing so due to the conflict.

Duty of Competence to Larry and Terry

An attorney owes a duty of competence to the client to act with the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. The facts list that Karen is a licensed attorney, but however has no legal experience. An attorney is able to consult with lawyers who are competent or learn the subject matter in order to become competent, but in these facts presented, Karen has done neither but instead relies upon BratGPT in order to conduct her job. This is a breach of the duty of competence. Furthermore, with regard to the lease Karen created, she did not even look at it before having her clients sign the lease. The lease did not even specify that it was for property in Nevada and she omitted terms. Attorneys must review work even if prepared by a paralegal or other legal support staff. Here, the

document was prepared by an AI program and Karen did not review it before signing. This is a breach of competence and she had a responsibility to become competent in the area and to review the document to ensure it was correct. As a result of her oversight, several mandatory provisions were omitted and she arguably committed malpractice.

Communication with represented party

In the course of representation, a lawyer must not communicate about the subject of the representation with a person they know to be represented by counsel in the matter unless the counsel has granted permission or the lawyer is otherwise authorized by law to make direct communication. This was not the case here, Terry was represented by a new lawyer that emailed Karen. Karen then called Terry directly which is prohibited, instead she was required to contact only Terry's attorney. This was clearly about the subject matter of the representation because the phone call concerned the clause in the lease.

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

Question 1 - Selected Answer 2

Karen and Mike have violated several rules of the Nevada Rules of Professional Conduct (NRPC):

DUTY TO REPORT:

First, each lawyer has a duty to report any violations of the NRPC that they know have been violated and that raises a substantial question as to a lawyer's honesty, trustworthiness, or fitness as a lawyer, including his or her own violations. Therefore, Karen and Mike both violated the rules by not reporting each other and themselves. The violations discussed below raise a substantial question as to both their honesty, trustworthiness, or fitness as a lawyer.

UNAUTHORIZED PRACTICE OF LAW AND ASSISTING WITH UNAUTHORIZED PRACTICE OF LAW

A lawyer is prohibited from assisting another in the unauthorized practice of law. Although a lawyer may delegate tasks to nonlawyer employees, the lawyer must supervise the delegated work carefully and must be ultimately responsible for the results.

Here, Mike engaged in the unauthorized practice of law by giving legal advice, drafting a demand letter to Betty's debtor. Although he believed since it was a simple collections case he could handle it himself, he represented himself as an attorney to Betty's debtor when he sent the demand letter, presumably on AI Attorney letterhead. Mike is an engineer and not an attorney.

Furthermore, Karen could get assistance from Mike or even BratGPT, but she was required to supervise the delegated work carefully. When she went into business with Mike and left Mike alone in the office, she essentially assisted him in the unauthorized practice of law.

PARTNER'S SUPERVISORY DUTY

A partner or managing lawyer in a firm must make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all members of the firm conform to the NRPC.

Here, Karen has failed to provide any training to Mike about what he may or may not do. She let Mike handle client matters alone in the office and did not enact any measures to make sure his conduct conformed to the NRPC.

NONLAWYER INVOLVEMENT IN LAW PRACTICE

A lawyer must not form a partnership or other organization with a nonlawyer if any of the organization's activities consist of the practice of law.

Here, Karen formed a partnership with Mike with the goal of operating a successful law practice using a new artificial intelligence chatbot called BratGPT. They leased an office together and formed a partnership. Therefore, Karen violated the NRPC by creating a partnership that practiced law with a nonlawyer.

SHARING FEES WITH A NON LAWYER

A lawyer or law firm must not share legal fees with a nonlawyer, subject to limited exceptions related to sale of a law practice or deceased lawyer's estate.

Here, Karen and Mike agreed to equally split all fees earned. Therefore, their agreement to split legal fees violated the NRPC.

FIRM NAME

A firm name must not be misleading. Trade names are acceptable as long as it does not imply a connection with a government agency or public or charitable legal services organization.

Here, Karen and Mike formed "AI Attorneys" which does not identify any person, but is a trade name. It would be acceptable except that it advertises an AI attorney, which is not something that exists.

FEES MUST BE REASONABLE

An attorney must not make an arrangement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. Reasonableness is determined by a wide range of factors, including time and labor involved, the novelty and difficulty of the questions involved, whether the lawyer will be precluded from taking other work, the customary fee in the locality, amount at stake and results obtained, time limitations imposed by the client, the nature and length of the relationship with the client, the experience, reputation and ability of the lawyer, whether the fee is fixed or contingent, and any other circumstance bearing on the reasonableness.

Here, Mike charged a 75% contingency fee paid to AI attorney's for all amounts collected. Although a contingency fee is sometimes allowed to be higher due to the risk involved, a 75% fee of all amounts recovered is excessive for even the most skilled an experienced attorney. Considering Mike handled the case successfully with no legal experience, and even considered it a "simple collection case" himself, there are no grounds to believe a 75% fee is reasonable.

CONTINGENCY FEE

A contingent fee is a fee that is dependent on the successful resolution of a client's case and payable from the judgment proceeds. A contingent fee must be in writing and signed by the client. The writing must state in bold face type that is at least as large as the largest type used in the agreement: 1) how the fee is to be calculated; 2) what expense are to be deducted and whether deductions will be made before or after the contingent fee is calculated; 3) what expenses the client must pay, whether or not they win the case; 4) that in the event of a loss, the client may be liable for the opposing party's fees and costs; and 5) that a suit brought solely to harass or coerce a settlement may result in liability for malicious prosecution or abuse of process. At the end, the lawyer must give the client a written statement showing the outcome of the case, the remittance to the client and how the remittance was calculated.

Here, the contingent fee was not reduced to writing. Rather, Mike and Betty agreed and shook hands. By not reducing the agreement to writing with all of the necessary requirements above, the NRPC was violated. Additionally, this rule was

violated by both Karen and Mike despite Karen not being involved with Betty at all because as Mike's partner, Karen will be responsible for his actions as noted above.

SAFEKEEPING AND DELIVERY OF PROPERTY

A lawyer must promptly notify the client when the lawyer receives funds or property in which the client has an interest. The lawyer must also promptly deliver the funds and render an accounting when requested.

Here, Mike received a cashier's check for the full amount of the debt owed to Betty. However, he did not tell Betty and did not promptly distribute her portion of the recovery. Mike's intent to pay Betty with fees from future cases was improper and a violation of the NRPC (and also at least a tort if not a crime). Again, Karen will also be in violation as Mike's partner.

TRUST ACCOUNTS

All money that a lawyer receives in connection with a representation must be promptly placed a client trust account, separate from the lawyer's personal or business accounts.

Here, Mike put the money he received from Betty's case directly into the firm's operating account. He was required to place it in the firm's trust account and then disperse the funds according to the agreement.

CONFLICT OF INTEREST

There are generally two types of conflicts with current clients, direct adversity conflicts and material limitation conflict. Generally, a lawyer must not represent a client if there is a significant risk that the representation will be materially limited by responsibilities to another client or third person. The attorney must reasonably believe she can competently and diligently represent each client despite the conflict and each client must give informed consent, confirmed in writing,

Here, there is at least a potential conflict in Karen's representation of both Larry and Terry in creating a residential lease. Since the interests of Larry and Terry may not fully align, Karen will be limited in her ability to represent each of them effectively. They may have different interests in certain terms such as the duty to repair or limitations on damages for breach of the lease. Depending on how much Larry and Terry have already agreed, she may be able to reasonably represent them both, but should get informed consent confirmed in writing, which she failed to do.

DUTY OF COMPETENCE

A lawyer must act competently, which means acting with the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Karen failed to act competently when she had BratGPT prepare the lease, did not specify it was for Nevada or review the final document. The lease she presented was missing several mandatory provisions such as pet occupancy. Karen failed to act competently

COMMUNICATION WITH REPRESENTED PARTY

An attorney may not communicate with a party that the attorney knows is represented without permission from the attorney.

Here, Karen know Terry was represented because she received an e-mail from Terry's new lawyer. After receiving the email she called Terry directly to discuss the case in violation of the NRPC.

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



**JULY 2024
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QUESTION 2

Question 2 - Selected Answer 1

1. Is the contract governed by common law of UCC?

A contract for the sale of Goods is governed by the UCC. Goods are all things moveable at the time they are identified to the contract. Here the hard drive is a good so there is a portion of the contract grounded in the UCC.

A contract for services is governed by the common law. DSI developed software according to PPI's specifications. The software development is a service governed by the common law.

When a contract contains both goods and services the court can try to apply law a few ways. First the court can look to see what the predominant purpose of the contract was. The contract defines that PPI engaged DSI to develop software that would "make it easier for PPI to keep track of its customers, jobs and invoices." This purpose is hiring DSI's services to make PPI's customer management easier. There is nothing in the description that they are buying a particular hard drive. Rather PPI incidentally needed the hard drive to house the software that DSI was developing. Under the predominant purpose test services prevails and the contract is governed by common law.

The court can also look to see if a contract is divisible. Here there is no specific allocation of payment between the goods and the services, so this is not helpful.

Lastly the court can look to see which element, goods or services, has caused the dispute. Here the dispute arises over PPI's desire to be able to modify the code itself versus paying for modifications. The dispute is further over ambiguities in the contract. This is not entirely helpful, but does lean toward the service side and the common law.

Based on the foregoing, the contract is governed by common law.

2a. PPI introduction of emails to address ambiguity

When a contract provision is ambiguous, the court will follow certain rules of construction to interpret. The words used will be given their ordinary meaning. The words will be considered in the context of the contract as a whole, and the court will consider the customary usage of the words.

Parol Evidence - When the parties to a contract express in writing their intent that the writing embody the full agreement (integration clause), other evidence may not be admitted to vary the terms of the writing. Here the parties' contract is fully integrated. The contract, including Exhibit A, constitutes the entire agreement. At issue, however, is the meaning of "agrees to develop." Does this scope of work equate to a limited license or does it make PPI the full owner. There is nothing in the contract that explains what this means. As a result, the emails are not being offered to vary the terms of the writing. They are not being offered to change a term from license to sale or owner to user. The emails would be offered to help the court understand the scope of the phrase agrees to develop. Based upon the court's desire to end up as close to the parties' intent as possible, it should permit PPI to introduce the emails into evidence.

2b. DSI introduction of industry standard evidence

Building upon the rules set forth in 2a, the court will welcome introduction of industry standard and custom in order to clarify the ambiguous phrase. In fact if they emails are unhelpful the court is very likely to rely on what the industry standard is for the type of ownership which evolves from a contract to develop software.

3. Contract Analysis under the UCC

Merchants - Article 2 has special rules for merchants. A merchant is one who regularly deals in goods of the kind sold or who otherwise by occupation hold themselves out as having knowledge or skill in the goods involved. Here PPI is a plumbing company. DSI is a merchant when it comes to software and computer services.

The parties to the contract may try to argue that the real ambiguity lies in the header "Section 1 Software Development and Sale." Under the language of Section 30, interpretation, however, the headings are only for convenience and are not to be used to determine the meaning of any provision. Under the common law the terms of an agreement must be the mirror image of each other. There is no consideration for dragging in additional terms like there is in the UCC. As a result the common law terms would be to develop software according to the specifications which could run on PPI's company computers, end of story.

Under the UCC the merchants must ascribe to the perfect tender rule. What is delivered by the seller must exactly meet the product which is the subject of the contract. Here DSI delivered software exactly to specifications. PPI was fully satisfied and made the required payment of 1M. PPI then used the product for a full year. PPI was well past their time to object that the product was not perfectly tendered. What PPI is trying to do now is essentially a contract modification. Under the UCC a modification can be made in good faith, but in this case it would have needed to have been done before delivery. Under the UCC the court would not allow the introduction of the emails or the industry custom because the ship has sailed. PPI cannot do an end run to try to modify the contract, avoid paying DSI what would likely be an additional charge to update the software, now that they have used the product for a year. PPI could have known about the modification restrictions well in advance of the year. PPI accepted the product and is stuck.

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

Question 2 - Selected Answer 2

1. UCC or Common Law

This Contract is governed by the UCC

Common Law covers service contracts and the UCC covers sale of good contracts. However, in order for their law to apply, their must be a valid contract. A contract requires an offer, acceptance, consideration, and no defenses. An Offer is a communicaiton to the offeree that creates a reasonable expectation that offeror is willing to enter into a contract. An acceptance is a manifestation to the terms of an offer. Consideration is a bargained for exchange of vegal value for both parties. Generally, a writing is not required under the contract falls under the Statute of Frauds.

Here, it appears there was a valid contract. PPI engaged DSI to create software for its use and the parties reduced the contract to writing. This would be an offer as it manifested PPIs interest to engage in contract with DSI. As there is a writing, this contract would comply with the statute of frauds as long as it included all of the material terms. There appears to have been a valid acceptance as both parties signed the written contract, this manifesting assent to the terms. Consideration is also included. DSI would recieve \$1,000,000 and PPI would recieve the softwaye external harddrive. As a result, a valid contract has been formed.

The contract is for an external harddrive containing the request software. This is a sale of goods and would therefore place the contract within the UCC. However, this contract also has a services requirement to it. The contract is also for DSI to develop the software for PPI. A services contract falls under the common law. When a contract is for both sale and services, the more dominant aspect of the contract will determine which law will apply. Here, the more dominant aspect appears to be the UCC. This is because the goal of the contract is to get software for PPI to make it eaiser to tract customers and jobs. It is only incidental to the contract that the software must be created.

As a result, a valid contract exists between PPI and DSI, and the dominant aspect of the contract is the sale of goods, therefore, the contract falls under the UCC.

2. Emails into Evidence

PPI will likely not be allowed to introduce the emails into evidence.

When a writing with the intent that it embodies the final expression of the bargain, it is a total integration. Any other expressions (oral or written) made prior to or contemporaneous with the writing is inadmissible to vary the terms of it. To determine if it is an itegration, the writing must be 1) intended as a final expression of the agreement and 2) if a total/complete integration, cannot be contradicted or supplemented. This is opposed to a partial integration which would not allow contradiction, but would allow the writng to be supplemented by consistent additional terms. A writing is often seen to be a complete integration if it contains a merger clause. This recites the agreement is the complete between the parties. In large commercial contracts, a merger clause is usually determinitive. However, the modern trend is to consider it as one fact in determining integration. Additionally, the UCC presumes all writing are partial integrations.

Here, the writng would likely be a partial integration. This is becuae the UCC presumes all writing to be a partial integration. Despite the existence of a Merger Clause, as this would only be evidence of complete integration, not a presumption. This means that PPI would not be able to contradict its writing, but it would be allowed to supplement it with consistnt additional terms.

Despite this, PPI does not appear to be trying to introduce evidence of consistent additional terms. PPI appears to want to change the meaning of perviously stated plain meaning terms. As a result, this evidence of emails is being introduced to condract the plain meaning of "sold" and would not be allowed into evidence.

Ambiguity: However, there is an exception to allowing contradiction/supplementation. Ambiguous terms in the writing may allow parol evidence to reach the correct interpretation of the term. However, if the term is not ambiguous and instead has a plain meaning, parol evidence may not be used.

Here, PPI is wants to introduce evidence via emails (parol evidence) to determine the proper definition of the word sold. PPI wants to do this to show the meaning of the word sold as opposed to licensed. However, a court is likley to not allow this parol evidece in. THis is becuae the term "sold" has a plain meaning and is not ambiguous. PPI has not aruged the term is ambiguous but is trying to argue the plain meaning of the term. As a result, , this parol evidence would not come in.

As a result, PPI would not be allowed to introduce the emails into evidence.

3. Industry Standard into Evidence

DSI would likley be allowed to introduce evidence of industry standard.

The rules for parol evidence are discussed above.

DSI is attempting to introduce additional evidence that would be consistent with the writing and would only be used to supplement it. As a result, evidence of industry standard would likley be allowed in.

Additionally, DSI is attempting to introduce evidence of the industry standard into evidence. It is trying to interpret the contract via an ambiguous term. This is unlike above where PPI was trying to interpret a term with a plain meaning. When the term is ambiguous, parol evidence may be introduced. Here, the term is likely to be found to be ambiguous. this is because a reasonable person could differ in determining what is being sold via the hard drive. One person may interpret the term to mean the harddrive physicall is being sold with what is only physicaly contained in the harddrive and the software is licensed. Another may interpret it as meaning the hard drive and everything on it are being sold. Becuae this is the case, the term is ambiguous and DSI would be allowed to introduce parol evidence to interpret the term. Thus, DSI would likley be permitted

to introduce evidence of industry standard to show that the software was only licensed, not sold outright (meaning only the physical harddrive was sold).

4. Whether the answer would change if UCC or Common Law

If this writing was governed by the common law as opposed to the UCC, this would change the analysis.

While the UCC presumes that a writing is a partial integration, the common law does not.

Here, this means that the contract between PPI and DSI would likely be deemed as a complete integration and not a partial integration. This means that because of the merger clause, and no presumption of partial integration, a complete integration has been made and no additional parol evidence will be allowed in to either supplement or contradict. The Emails PPI is attempting to introduce are trying to contract plain meaning terms and would not be allowed into evidence. There would be no ambiguity/interpretation exception because the term "sale" has a plain meaning. Therefore, PPI would still not be allowed to introduce the emails into evidence.

DSI would not be allowed to introduce the industry standard evidence outright as it is attempting to supplement the terms of the contract, which is not allowed in a complete integration. However, the ambiguity exception would likely still apply. Because of this, DSI would still be allowed to introduce evidence of the industry standard to interpret the meaning of the sale of the "harddrive"

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



**JULY 2024
EXAMINATION ANSWERS**

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

QUESTION 3

Question 3 - Selected Answer 1

1. Nevada Law Should Apply Vested Rights

Court normally apply the law of the place of the injury. If P and D are from different states, and law of the place where the accident occurred does not help its citizens, still apply the place of injury unless the other state has grater interest in the claim. Here, the accident occurred in Nevada because the accident occurred soon after Andrew crossed into Nevada.

Most Significant Relationship Approach

A Nevada Court will apply the law of the state which has the most significant relation to the T/O and the parties. Determine by using factors test: 1) the issue presented 2) relevance policies and interest of each state's law, 3) protection of justified expectation 4) certainty, predictability and uniformity of result 5) if not clear then apply vesting rights approach. Here, Nevada has the most significant relation to the parties because the accident occurred in Nevada, Couch Potatoes will argue that they are California Resident but Nevada has a higher interest than California because it is in Nevada's interest that its citizens are protected and that visitor adhere to Nevada.

In conclusion, Nevada Law will apply.

2. Andrew v. Dave (D) & Dave's Defenses Assault

is an intentional act by D creating a reasonable apprehension of an immediate harmful or offensive contact to P. Here, D committed an assault against because he created a reasonable apprehension of immediate offensive contact with Andrew when he started screaming profanities against Andrew while Andrew was sstill int he truck. Thus, Andrew can make a claim of assault.

False Imprisonment

P must show 1) an act or omission by D that confines or restraints 2) to a bounded area 3) D's intent and 4) causation. P must be aware or harmed by confinement. Here, Andrew was confine to his vehicle because Dave started pounding on Andrews door which prevented Andrew from exiting his truck for several minutes. However, this claim will not survive because Andrew was able to exit out of the passenger side of the truck. Thus, Andrew can assert a false imprisonment claim, but it is unlikely to survive.

Battery

P must show 1) harmful or offensive contact 2) to P's person 3) D's intent and 4) causation. Here, Andrew will show that D harmed him when he punched him in the face several times because Andrew's face his still healing six months after D punched him in the face. Since Andrew was punched in his face it was to his person and D had the intent and was the cause of the injury. Thus, Andrew can assert a battery claim against D.

IIED

P must show 1) extreme and outrageous conduct by D; 2) intent or recklessness 3) causation and 4) damages. Here, Andrew will show that Dave's conduct was outrageous because he got out of his car, punched him on the face and screamed profanities at him. Second , there recklessness on D's part and but for Dave's conduct Andrew would not have suffered a punched face and he has damages because his face was still healing and he was institutionalized for six months.

D's Defenses

Self Defense

Invasion is imminent or in progress. May only use proportional force. Here, D may assert self defense because he felt an invasion to his property when Andrew swerved into the lane and hit his car. However, profanities and punches in the face are not proportional to the force of hitting a car. Thus, D's defense will not survive.

3. Barbara v. Dave & Dave's Defenses

Bystander IIED

P must show 1) P present when injury occurred; 2) P is a close relative to V; 3) D knew P was present and a close relative. Here, Barbara can assert that she was present when the injury occurred because she was on the phone with Andrew when he had his hand-free headset on. Barbara is a close relative to Andrew because she is Andrew's wife. Dave did not know that Barbara was present during the call nor did Dave knew that she was Andrew's wife. Thus, Barbara will not be able to bring a successful IIED claim against Dave despite having nightmares from listening to the incident.

4. Dave v. Andrew v. Couch Potato, & Andrew and Couch Potato's Defenses

Dave v. Andrew

Negligence

A claim for negligence can be made when a breach of duty care to another has actually and approximately caused harmed resulting in damages. This requires a duty owed, a breach of that duty, actual and proximate causation and damages.

Duty of Care

A duty is owed to all foreseeable persons who may be foreseeably injured by the d's failure to act as a reasonable person. Here, Dave owed a duty to all the drivers in Nevada to drive carefully in Nevada freeways because there was ice on the road when he was driving which means he needed to be fully concentrated and not distracted on the phone. Thus, Andrew breach to his duty as a driver.

Breach of Duty

D breaches his duty when his conduct falls short of the standard of reasonable care owed under the circumstances. Here, Andrew was talking on the phone while he was driving which caused him to be distracted and to slid over a sheet of black ice and swerved into the other lane hitting Dave's care. Andrew breach his duty to drive safe.

Causation

Causation is established by proving that a breach was both the actual and proximate cause of the plaintiff injury. Actual causation requires that but for the D's breach, the P would not have been injured. *Proximate Causation* asks if it is foreseeable that the D's breach would result in injuries to the P.

Here, Andrew was the actual cause that D's car was hit because Andrew was not driving safely. It was foreseeable that talking on the phone while driving is a distraction especially when you need to focus your eyes on the road when there is black ice. Additionally but for Andrew getting on his car and running over Dave's foot, Dave would not have suffered broken bones on his foot. Thus, causation is established.

Damages

P must prove actual harm, such as personal injury or property damages. Here, Dave suffered property damages when his car was hit and Dave suffered personal injury when Andrew ran over Dave's foot breaking several bones. Thus, Dave can prove actual harm.

Defenses**Modified Comparative Negligence Rule**

Under NV's modified comparative negligence rule, you are entitled to damages following an accident when you were 50% or less responsible for your injury. Here, Andrew will assert that Dave is responsible for his injuries because had Dave not punched him on the face and offended him by screaming profanities Andrew would not have gotten scared and would not have run over his foot breaking D's bones. Thus, Andrew can assert that D was responsible for his injuries.

Dave v. Couch Potato, Inc.**Vicarious liability**

Is a form of strict liability in which a person is liable for the tortious actions of another. It arises when one person has right, ability or duty to control the activities of others. An employer is liable for the tortious conduct of an employee that is within the scope of the employment. Conduct within the scope of employment includes acts that the employee is employed or performed or that are intended to profit or benefit the employee. Here, Dave can sue Couch Potato because Andrew was making deliveries on behalf of Couch Potato as his employee. Couch Potatoes is Andrew's employer and he was driving from California to Nevada to make the special delivery this means that the act occurred because of his employment.

Defenses

Couch Potato will assert that Andrew was not using the company car. However, this claim will not survive because the delivery was made during conduct within Andrew's scope of employment.

Thus, Dave can bring a negligence claim against Andrew and Couch Potato.

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

Question 3 - Selected Answer 2

The Court Should Utilize Nevada Law

The claims involved here are torts, and so, the court in Nevada where the case is venued should use Nevada conflicts of law rules for Torts. Formerly, Nevada used the "vested rights" approach, whereby the court was apposed to apply the law of the place where the wrong occurred. Now, Nevada uses the "significant relationships" test for tort actions.

Under this test, the court should use the law of the state where the injury occurs unless with respect to some issue some other state has a more significant relationship. Courts can consider:

- (1) the needs of the interstate and international legal systems
- (2) the relevant policies of the forum
- (3) the relevant policies of other interested states and relative interests of those states in the determination of the particular issue;
- (4) the protection of justified expectations;
- (5) basic policies underlying the particular field of law;
- (6) certainty, predictability, and uniformity of the result; and
- (7) ease in the determination and application of the law to be applied.

Here, consideration of these factors confirms that the court should apply Nevada law. While Andrew's journey, on behalf of a California company began in California, the injury occurred wholly within Nevada. Andrew and his employer were utilizing Nevada roads when Andrew's car struck a Nevada resident. Further, at least one major part of the transaction of Andrew and his employer (the delivery) was to occur in Reno, Nevada. Nevada generally has more interest in traffic accidents that occur within its borders than do other states, and this is particularly the case here with California. It is a justified expectation of Nevada residents that when injured on Nevada roads by out-of-state drivers, Nevada law will apply. Likewise, out-of-state drivers should expect to be beholden to Nevada law while driving on that state's roads. Finally, a Nevada court will have more ease in applying its own laws than that of another state. Under the totality of these circumstances, the Court should apply Nevada law.

Andrew v. Dave

Assault: For the intentional tort of assault, a plaintiff must prove: (1) an act by the defendant that causes a reasonable apprehension of imminent harmful or offensive contact; (2) intent; and (3) causation. Here, Andrew will argue that by approaching him, screaming at him, and pounding on the truck door, Dave placed him in imminent fear of a harmful/offensive contact. Based on the facts, Dave intended to do so, since he voluntarily walked toward Dave and behaved in the manner described. Further, Andrew should be able to establish actual and proximate causation because Dave's actions were the "but for" cause of his harm and Andrew was foreseeable. Thus it is likely Andrew will be able to establish assault. He would be entitled to any resulting medical costs, pain and suffering, and because this is an intentional tort, possibly punitive damages.

Battery: For the intentional tort of battery, a plaintiff must prove: (1) an act by the defendant that causes harmful or offensive contact; (2) intent; and (3) causation. Here, Andrew would argue the punch by Dave meets the first element, and intent and causation are shown for the same reasons as assault above. Andrew would also be entitled to the same categories of damages, if he were successful in a lawsuit. Note, Andrew might also claim that the pounding on the car was a battery as well. This is because for battery, an object connected to a person that is touched may also be enough to establish a battery. If the fact finder determined Andrew's truck was attached to him, Dave could be liable for this battery as well.

False Imprisonment: For the intentional tort of false imprisonment, a plaintiff must prove: (1) an act by the defendant that confines/restrains the plaintiff; (2) intent; and (3) causation. Confinement/restraint can be shown by physical barriers, physical force, or failure to provide means of escape. Here, Dave's pounding on Andrew's door "prevented" him from exiting the truck for several minutes. If Dean's actions actually caused Andrew to be unable to exit, he might be held liable for false imprisonment. Dean might argue he did not foreclose all means of escape, as Andrew could have exited from another door. If Andrew established this tort, he would be entitled to the same class of damages as assault and battery.

Intentional Infliction of Emotional Distress ("IIED"): For the intentional tort of IIED, a plaintiff must prove: (1) an act amounting to extreme/outrageous conduct; (2) intent to cause severe emotional distress or recklessness as to the effects of such conduct; (3) causation; and (4) severe emotional distress. While Dean might try to justify his behavior and claim it did not rise to the high level of "extreme/outrageous" that this tort requires, Dean's actions, which were violent and unprovoked, likely meet this standard. Further, even if he did not "intend" to cause Andrew severe emotional distress, he was at least reckless in his behavior. Finally, the incident caused Andrew to suffer a mental breakdown (at least in part). For the foregoing reasons, Andrew would likely be able to establish IIED.

Note, on the issue of causation, Dean might try to argue that other stressors (Andrew had "several stressors" in his life). However, as long as the stress caused by Dean caused in part his breakdown and institutionalization, Dean would be liable. Perhaps Andrew was more susceptible to mental injury, but under the eggshell plaintiff doctrine, the defendant takes the plaintiff as he finds him. If this results in greater injuries than would normally be foreseeable, the defendant is still liable for such injuries.

Defenses: Dean might try to claim self-defense as to assault, battery, false imprisonment, and IIED, but this defense would probably fail. To establish this defense, the plaintiff must have a reasonable ground to believe he is being attacked, and if so, he may use reasonable force for protection against injury. Here, while the sliding of Andrew's vehicle caused the initial impact, there are no facts to suggest a reasonable person would believe the accident was Andrew attacking Dean. Furthermore, by the time Dean began approaching Andrew, the accident was over and Andrew was in his truck, and based on the facts, did not appear to be doing anything that would make a reasonable person believe he was being attacked. Finally, the punch occurred when Andrew exited the truck. Dean might try to argue that when Andrew exited, Dean

reasonably believed Andrew was going to attack him. Again, there are no facts to suggest this, and further, by the time Andrew exited the vehicle, Dean had already been screaming at him and pounding on the door. In other words, Dean objectively appeared to be the aggressor, and the self-defense affirmative defense is generally unavailable to the aggressor.

Barbara v. Dave

Negligent Infliction of Emotional Distress ("NIED"): NIED occurs when a person's negligent behavior results in distress which manifests itself in physical symptoms (note, negligence in general is discussed below in the Dave v. Andrew section). While an NIED plaintiff generally needs to be within the "zone of danger," bystanders who witness an event may recover as well if: (1) the bystander plaintiff has a close relationship with an injured party; (2) the plaintiff was at the scene of the injury; and (3) plaintiff perceived/observed the event. Here, Barbara listened to the alleged assault/battery by Dave because Andrew's headset was still on. She suffered physical manifestations of stress (i.e., nightmares). The question of liability turns on whether Barbara could meet the second and third elements. While she was not physically at the altercation, she could perceive it as it occurred through her sense of hearing. If a fact finder determined this tantamount to being physically at the scene of the incident, Barbara could establish NIED.

IED: Barbara would have to establish the same elements above.

Dave v. Andrew and Couch Potato

Negligence: Negligence occurs when a defendant's conduct imposes an unreasonable risk on another person resulting in injury to another person. The elements of negligence are: (1) defendant's duty owed to the plaintiff; (2) D's breach of the duty; (3) actual and proximate causation; and (4) damages by plaintiff. In general, and certainly for drivers on roads, persons must act as a reasonably prudent person under the circumstance. Under the majority view, a duty is owed to all persons within the zone of danger. Breach occurs when the defendant's conduct falls beneath the applicable standard of care.

Here, Andrew owed Dave a general duty of care in operating his truck. Here, Dave would argue Andrew breached this duty by being distracted on the phone which caused him to slip on the black ice. The breach actually and proximately (it was foreseeable that acting beneath the standard of care would injure another driver, like Dave) caused damage to Dave's car and physical injury (as he was limping).

In defense, Andrew would argue the black ice was a supervening force that broke the chain of causation. This argument would likely fail as Andrew was aware of the snow and even used his truck because he was aware of the riskier conditions. Furthermore, his talking on the phone likely contributed to his distraction and subsequent sliding and crash. Dave would likely prevail on his negligence claim.

Negligence per se: Alternatively, if the Court applied California law, and specifically the CA law prohibiting the use of hand-free devices, Dave could establish duty and breach under a negligence per se theory. If a given statute provides for a penalty, the plaintiff can replace a general duty of care with the statute's specific duty. To do so, the plaintiff must be in the class of persons whom the statute is designed to protect, the harm must be the type the statute is to guard against, and the standard must be clearly defined. Here, the CA statute appears to be designed to guard against inattentive drivers causing harm to other persons or property. It would appear, if the court uses CA law, that Dave can establish negligence per se. He would then have to prove causation and damages, which, as shown above, he would likely be able to do.

Respondeat Superior:

In general, an employer is responsible for its employees' torts when the employee is acting within the scope of the employee relationship. This doctrine--respondeat superior--is a form of vicarious liability.

Here, Andrew appears to have been driving for Couch Potato's benefit when the accident occurred. Even though he was using his personal truck (and not a company truck), it was for the benefit and business of Couch Potato. Under these facts, if Andrew is liable to Dean, Couch Potato is vicariously liable under respondeat superior. Andrew and Couch Potato would be jointly and severally liable for Dean's injuries.

Comparative Fault

Nevada is a partial comparative fault state. This means that the trier of fact weighs the negligence of a defendant(s) vs. the negligence of the plaintiff (if any) and reduces the award/judgment by the percentage of the plaintiff's fault. If the plaintiff's fault exceeds the defendant(s) in Nevada, the plaintiff recovers nothing.

As a partial defense, Andrew and/or Couch Potato might argue that Dean was partially negligent and therefore responsible in part for the accident. Here, there are no facts indicating Dean was even partially at fault, but if he were, Andrew and Couch Potato would be able to reduce the judgment by Dean's proportion of fault.

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



**JULY 2024
EXAMINATION ANSWERS**

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

QUESTION 4

Question 4 - Selected Answer 1

1. Steve's statement to paramedic:

Relevance: Relevant evidence proves or disproves a material fact. All admitted evidence must be relevant. Evidence whose probative value is substantially outweighed by prejudice will not be admitted. Here, the statement by Steve to the paramedic is relevant because it was regarding the incident and therefore causation of his injuries.

Hearsay: Hearsay is an out of court statement offered for the truth of the matter asserted. In order to be admissible a statement must be non-hearsay or fall under a hearsay exception. Here, Steve's statement is being offered for its truth and therefore an exception must apply.

Declarant unavailable: A declarant will be deemed unavailable if dead, unavailable, 100 miles from the court house, refuses to testify, absent, or mentally ill. Here, Steve is unavailable because he died therefore declarant unavailable exception might apply.

Dying declaration: In Nevada, the dying declaration exception applies to all criminal and civil cases and can be any statement made during the impending death. Here, Steve got shot and made the statement with his last breath therefore impending death. Since it applies to any statement made during impending death, the statement would come in a dying declaration.

Present sense impression: Statements of present sense impression is a statement describing an event made while the person was perceiving the event or immediately thereafter. Nevada does not have a timing requirement but all facts and circumstances are considered.

Here, the paramedic presumably arrived shortly after the incident had happened however the only part describing the event was "John shot that security guard and I think it shot me" is the only portion that would be applicable.

Statement for medical diagnosis: Statements made of present or past bodily condition is admissible when made to medical personnel. Here, the statement was not for purposes of medical diagnosis but rather placing fault therefore it is not admissible under this exception.

Confrontation clause: A hearsay statement will not be admitted when the statement is offered in a criminal case, the declarant is unavailable, the statement was testimonial in nature, and the accused has not had opportunity to cross examine the declarant testimonial statement. Here, Steve is stating that it was all John's idea and that John shot first. The statement is testimonial in nature and Steve was not able to confront John therefore would not be admissible as this is a criminal trial as well.

In conclusion, the statement is not admissible.

2. Cashier's testimony:

Relevance: See above. This is relevant because the cashier presumably witnessed the robbery and overheard Steve tell John to "get it all, because I need to pay my bills" which shows they conspired to commit this crime and the purpose behind it.

Lay witness: A lay witness can testify if based on their personal knowledge, helpful to the trier of fact, and not based on scientific or specialized knowledge. Here, the cashier can testify about what he heard as he witnessed the event (based on his knowledge, not based on specialized skills, and such statement as mentioned under relevance, would help the trier of fact.

Hearsay exception- Excited utterance: The statement is being offered for its truth and was made out of court thus an exception need to apply. An excited utterance is a statement made under the stress of an event. Here, Steve's statement was made while the robbery was being committed and thus under the event. Therefore it is admissible under this exception.

Party-opponent: A party opponent statement is non-hearsay and it a statement offered by one party against the party that made it. Here, Steve's statement to John is being offered against him as it is being offered by the prosecution and therefore admissible under non-hearsay.

Thus, admissible.

3. Testimony from John's wife:

Relevance: See above. Testimony by John's wife is relevant to show that John planned to rob the store for their rent money. Presumably both Steve and John conspired to rob the store.

Witness-spouse: A witness spouse holds the privilege and it protects the information before and during marriage. Here John's wife can elect to testify if she wants to as she holds the privilege.

Marital communications: Both spouses hold the privilege and it protects confidential communication during marriage. Here John is dead and cannot hold privilege.

Hearsay exception- state of mind: statement that shows present mental, emotional, sensation or to establish intent. Here, this statement by John would be used to establish intent as to why he helped Steve.

statement against interest- declarant unavailable- Statement made against proprietary, penal, pecuniary or social interest. Here, the statement by John was against his penal interest.

Thus, admissible.

4. Testimony from a firearms expert:

Relevance: See above. It is relevant to show that Steve's bullet which was meant for the security guard hit John as Steve is being tried for murder as well.

Expert testimony: Experts will be permitted to testify if their scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue. Here, the testimony sought to be introduced one of a firearms expert and presumably he meets all the requirements for expert testimony. The expert is testifying as to the location of the spent casing and that the first shot was fired in the direction of the security guard. It is unclear as to the qualifications but if the expert's expertise includes that of accident reconstruction i.e. who shot who and from where then the evidence is admissible.

5. The security guard's previous statement that he no longer can remember:

Relevance: See above. The statement is relevant to further substantiate the claims that the shot was fired in the direction of the security guard.

Present recollection revived: A witness may use any writing or thing for the purpose of refreshing recollection on the stand. Statement may not be read into evidence. Here, the security guard's previous statement to the police may be used to refresh his recollection. However, it is unclear whether he was allowed to read his statement first before being introduced.

Recorded Recollection on the other hand is available where a witness does not have sufficient recollection even after consulting writing and thus the statement may be read after proper foundation is made. If proper foundation is laid and the security guard was not able to recollect his memory of it then it may be read into evidence otherwise it will not as potentially shown by these facts.

6. Evidence of prior robbery conviction from 3 years ago:

Relevance: See above. It is relevant to show that this robbery was part of a common scheme.

Character evidence(CE)- mimic: Character evidence is improper to show propensities. However, CE is admissible for motive, common scheme, lack of mistake, intent. This one prior robbery is probably not enough to establish any of the above including common scheme.

Prior conviction- impeachment- Nevada allows a witness to be impeached by prior felony conviction only, no dishonesty requirement, it has discretion to bar impeachment by convictions. This evidence could be potentially used and admissible if Steve were to deny prior robbery.

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

Question 4 - Selected Answer 2

All evidence must be relevant in order to be admissible. Usually, all evidence is relevant unless excluded by specific law or rule

Evidence is relevant if 1.) it is probative because it tends to make a fact more or less probable and 2.) the fact is material because it is of consequence in determining the action. Irrelevant evidence is inadmissible.

Furthermore, evidence could be excluded if its probative value is outweighed by unfair prejudice to a party.

This relevance test will be applied to all pieces of evidence being offered.

1. Issue: Steve's statement to paramedic

Firstly, this evidence is relevant as it is probative of telling if John actually committing the robbery, and it is material to prove the elements of robbery and John's intent, actions, and plans in the robbery.

This probative value is not outweighed by unfair prejudice to John. Thus, it is relevant.

Hearsay is a out of court statement used to prove the truth of the matter asserted. Hearsay is inadmissible in court unless if all within a exception.

While Steve's statement is hearsay, it can be admissible under the dying declaration exemption.

For dying declaration, a declarant needs to be unavailable. This includes the declarant is dead.

In Nevada, a dying declaration statement made by the declarant can be admissible if the declarant made the statement while they believed their death was imminent and the declarant is unavailable. It can be admitted in any case under Nevada rules of evidence.

As such, Steve is the declarant. He is unavailable because he's dead. Therefore, the declarant is unavailable. Steve made this statement after he was shot, in the ambulance, and to the paramedic. As such, it can be argued that Steve made this statement - admitting it was all John - as he reasonably believed his death was imminent.

Therefore, Steve's statement is admissible as a dying declaration hearsay exemption.

2. Issue: Cashier's testimony of what Steve told John

This evidence is relevant as it is probative of who robbed the store, who was in charge, and why they robbed the store. It is material as it can be used to prove John robbed the store and possibly murdered Steve.

Its probative value is not outweighed by unfair prejudice. Thus, this evidence is relevant.

The same rules regarding hearsay listed above apply here.

This would not be admissible as it is hearsay, but it can be admissible as the testimony can fall into one of the exceptions listed below.

2a.) Statement against interest.

For a statement against interest, a declarant has to be unavailable - i.e. dead, or refuses to testify. Furthermore as for the statement itself, the statement needed to be made that was against the declarant's pecuniary, proprietary, civil or penal interest such that no reasonable person would have not made the statement.

As such, Steve is the declarant. Steve is now unavailable as he is dead. Steve, in making this statement, is likely a statement against interest because this would expose him to criminal liability if he were charged, criminal liability to John as communicating to a co-conspirator in ac rime, and it is also against his civil/pecuniary interest as he admits his bills are unpaid.

As such, this can be admitted under the statement against interest exemption.

2b.) Statement by a co-conspirator

For this statement to be admitted as a hearsay exemption, a declarant needs to be unavailable. The rules of unavailability listed above apply here. The statement needs to be made by a co-conspirator during and in furtherance of the conspiracy. It can be used against other co-conspirators.

Steve the declarant is unavailable as he is dead. He made this statement to John to further their robbery conspiracy as to tell John to get the money to further their robbery. He made it to John, a co-conspirator.

As such, this evidence can be admissible under this exception and can be used against John as he was a co-conspirator.

2c.) Present sense impression/ Excited utterance

For both these exemptions, the availability of the declarant does not matter.

Present sense impression is a statement made while the declarant was previewing the event or immediately thereafter.

As such, this could be admitted under present sense impression as Steve the declarant was immediately perceiving and reporting what was in the register.

Excited utterance is a statement relating to a startling event or condition that a declarant made while under stress or excitement of the event or condition.

This is dependent on Steve's excitement/stress, but if he was excited or stressed while committing the robbery and/or seeing what was in the cash register. This could be admitted under excited utterance exception.

2d.) Statement of mind

A statement of a declarant's then existing physical, mental, or emotional condition is admissible; or a statement of intent to prove action in conformity with that intent is admissible.

As such, Steve had stated that he needed to 'get it all' to pay his bills. As such, this can be admissible as a statement of intent to show Steve's intention as to why he stole the money.

3. Issue: Testimony of Joyce, John's wife

This testimony - save any privilege - is probative to prove John planned the robbery and material to the issue at trial to determine if John robbed the store and his intent and reasoning. This is relevant. Its probative value does not outweighed by unfair prejudice to John.

In Nevada, spouses have a spousal immunity privilege. This spousal immunity is that a married person cannot be compelled to testify against their spouse in civil or criminal proceedings. It concerns communications made during the course of marriage between two spouses. The privilege is held by both the witness spouse and the spouse who made the communication.

John and Joyce are married and John verbally communicated his plans to Joyce during their marriage. There is marital communication that took place during the course of these two's marriage. Thus, each party has spousal immunity privilege and can invoke this privilege and refuse to enter this testimony into evidence.

As such, this testimony is not admissible under the spousal immunity privilege at the objection of either Joyce or John.

4. Issue: Testimony of firearms expert

This evidence is relevant. It is probative of who shot which gun, where, and who hit what. It is material in determining the actions of both John and Steve, and to determine the shootings during the robbery. Thus the expert testimony is relevant in this trial.

Its probative value is not outweighed by unfair prejudice to John.

In Nevada, an expert may testify to her opinion on a case. An expert specialized in the relevant field may testify to matters within the scope of their knowledge. A court determines if an expert is credible and their testimony may be admitted if: 1.) expert's opinion is within a recognized field of expertise; 2.) is testable and has been tested; 3.) published and subjected to peer review; 4.) generally accepted in the scientific community; and 5.) based on particularized facts rather than assumption, conjecture, or generalization.

1.) Firearms experts and science is within a recognized field; 2.) this field has been tested and the expert's methodology, etc. can be testable; 3.) it is unknown if any of the expert's testimony has been or is based on anything that is published and subjected to peer review. If it is, then the expert has met this element. If not, then their testimony cannot be admissible; 4.) firearms science is generally accepted in the scientific community; and 5.) it is unknown if the expert actually analyzed where the casings are and when the first shot is fired and what direction based on actual physical inspection and/or scientific studies. If this is based on second hand knowledge and assumption, it cannot be admissible. If it's based on the expert's own studies, then it can be admissible.

Thus, the expert testimony being admissible is dependent on the factors listed above.

5. Issue: Security guard's statement to police

This evidence is relevant. It is relevant because it is probative of who shot first during the robbery, and material as to prove what did John and Steve do during the robbery, and if John killed Steve.

The evidence's probative value is not outweighed by its unfair prejudice to John.

The security guard as a lay witness can testify as the things they actually saw and perceived. Thus the security guard can testify as to these events.

Because the security guard already testified he did not remember who shot first, this is likely admissible to be as a prior inconsistent statement.

A prior inconsistent statement is what it is, a prior statement made by a witness that is inconsistent with their current testimony. Prior inconsistent statements can be used to impeach a witness even if the evidence itself is extrinsic, but it can only be used as substantive evidence if it was made at a trial, hearing, or deposition under oath.

As such, his statement to the police cannot be admitted as substantive evidence, but it can be admitted to impeach the security guard as he is the witness. The security guard will need to be given the opportunity to explain or deny the statement.

6. Issue: John's previous robbery conviction 3 years ago

In Nevada, admissions of felony convictions is allowed if they are within 10 years or lease of sentencing or release from confinement, whichever occurs later.

Considering this is a robbery charge, and this occurred within three years, this can be admitted into evidence.

However, prosecutors cannot use it to prove conduct in conformity. Because this is a specific bad act, prosecutors may use it to prove motive, intent, absence of mistake, identity, or common plan; or to impeach John.

To determine the presumption against inadmissibility of a bad act in a criminal trial, there is a three factor test known as Petrocelli hearing. Prosecutors must show: 1.) the prior act is relevant to the crime being charged (other than proving propensity; 2.) the act is proven by clear and convincing evidence; and 3.) the evidence's probative value is not substantial outweighed by the danger of unfair prejudice.

As such, 1.) prosecutors could use this to prove John's common plan to rob stores, his motive in robbery stores and intent to rob stores, and to possibly identify John as the perpetrator; 2.) this is proven by clear and convincing evidence as John was convicted of robbery; and 3.) John could argue this is irrelevant to his trial the unfair prejudice could substantially outweigh the probative value as a jury could end up convicting John as he acted in propensity. However, still, because this is a substantially outweighed standard, prosecutors could successfully argue its probative value is not substantially outweighed by unfair prejudice as they can use it for reasons as listed in Element 1.

Furthermore, this evidence is relevant as it is probative for the reasons listed in Element 1. It is material to determine if John acted in a common plan and in his current robbery charge. Its probative value is likely not substantially outweighed by its unfair prejudice as listed in element 3. Thus, this evidence is likely admissible.

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



**JULY 2024
EXAMINATION ANSWERS**

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

QUESTION 5

Question 5 - Selected Answer 1

1. Danny's constitutional arguments regarding the admissibility of the narcotics

Danny will raise a fourth amendment argument of unlawful search and seizure.

A.

Fourth Amendment

The Fourth Amendment, which is applicable to the states through the Due Process Clause of the Fourteenth Amendment, provides that people should be free in their persons from unreasonable search and seizures. A violation must include a government actor (here the police officers) and a person with standing.

Standing: Standing exists in a person who was personally seized or stopped and state searched a place where the person had a legitimate expectation of privacy. Here Danny has an expectation of privacy of his person.

Search: A search is defined as a government intrusion into an area where a person has a reasonable and justifiable expectation of privacy. As stated Danny expected his clothes to be private. Danny will argue that there was no reason for the police to search his person.

Search incident to lawful arrest: As a counterpoint the government will assert that it conducted a search incident to lawful arrest of Danny. An officer may conduct a search incident to lawful arrest without a search warrant, or Danny's consent. The scope of the search is limited to the wingspan of the suspect at the time of arrest and must be made contemporaneous in time and place as the arrest. Wingspan is the area the suspect could quickly reach evidence or a weapon.

Danny will argue, however, that the police knew he did not have any weapons. They had been watching him for days and days and days. There was nothing to give them any cause to think that he was armed and dangerous.

To that the police will respond that even if they had not searched him on the street following the arrest, they would have searched him at the jail and so the drugs would have been inevitably discovered and therefore admissible.

B. FOURTH AMENDMENT

Danny will also take issue with the ongoing warrantless audio and video surveillance being done by the police officers over successive days. If the police had probable cause to believe that Danny was the unknown male, he was easily available. There is nothing to indicate that the officers could not have gotten a warrant for the audio and video surveillance. While Danny had a reduced expectation of privacy on the public downtown street, he can make an argument that he had a right to have private conversations with the two other men without being recorded by the police.

C. DUE PROCESS

Danny may also try to argue that the entire "buy program" was a violation of Due process which asks whether the government has followed the proper procedures when it takes away life, liberty, or property and whether the program is justified by a sufficient purpose.

Here the police department has implemented a buy program on the strength of some unknown complaints about an unknown male. They've taken to the streets walking around downtown and approaching people asking to buy meth. This is akin to the DUI checkpoint where the police just stop cars that look like they might be up to something. Programs of this type need more structure, you can't just have Officer Oliver approaching people. This program is likely a violation of Danny's Due Process rights.

2. Danny's defenses

ENTRAPMENT: In addition to the defenses discussed above, Danny will raise the defense of entrapment. Criminal law protects citizens from entrapment by police officers. The rule for entrapment is that if a citizen would not have otherwise conducted the illegal activity "but for" the officer's actions, a conviction will not be upheld. Here the undercover lady officer approached Danny to buy meth on her first day of work. Danny said no. She approached him again the next day. Danny said no. She asked him again and again for successive days, during all of which Danny responded "no." It is unclear what caused Danny to finally give Officer Olive the bag of meth for the \$40, but there is something to his persistent denials of her efforts to get him to commit the crime. Danny will argue that he was entrapped.

LAWFUL PRESCRIPTION: Another defense to the possession of a controlled substance is that it was obtained directly from a medical professional while acting in the course of their professional practice. For days Danny declined to provide the officer any drugs. Then he shows up with some drugs which included fentanyl and methamphetamine. Both of these drugs could be lawfully obtained from a doctor. We don't know that Danny doesn't have a valid medical condition for which he has a prescription. Danny will raise the defense of lawful possession.

3. Danny's motion on disclosure of Officer Olive's identify

SIXTH AMENDMENT: The Sixth Amendment Confrontation Clause requires the defendant have the opportunity to confront any adverse witness who made a testimonial statement at the trial in order to examine the testimony. A testimonial statement is one that was given to assist in an investigation or prosecution. Here Officer Olive will likely offer testimony about her surveillance of Danny, her solicitation of him to sell her the drugs, Danny's responses, and his ultimately approaching her to have her follow him into the alley at which point he handed her the drugs in exchange for \$40. Danny's attorney will file a motion arguing that Danny has a right to know who Officer Olive is in order to build his defense against her testimony.

The court will need to balance Danny's constitutional rights with the police department's need to ensure the safety of its officer. Nonetheless the court will likely require that the officer appear in court to testify. The court may, however, protect her actual identity by allowing her to testify behind a screen. Even this, however, may cause a problem because Danny has a right to "face" his accuser. Danny's request equates to the old probable cause affidavit requirement in which information had to be pretty specific about the informant. The court took the teeth out of that. Similarly the court will hesitate to require the disclosure of Officer Olive's identify but will probably allow it.

4. Danny's Due Process in Sentencing

The Due Process clause, applicable to the states through the Fourteenth Amendment, protects an individual's right to be free from deprivation of life, liberty, or property without due process of law. In criminal sentencing this requires that any all aggravating factors must be tried and decided by the jury, not the judge.

Further under **Double Jeopardy**, the Constitution protects an individual from being tried twice for the same crime. In determining whether it is the same crime, the court looks at the elements of the charge. If both charges require proof of at least one element that the other charge does not require proof of, then they are not the same crime for jeopardy purposes.

Here it looks like Danny has been convicted of multiple charges for the same drug. He is charged with one count of selling a controlled substance. This is the single bag of meth he sold to Officer Olive for \$40. He is charged with one count of possession of a controlled substance for the purpose of sale. This is also the single bag of meth he sold to Officer Olive for \$40. This is allowable to charge twice because the elements are slightly different. However, he is also charged with 4 counts of possession of a controlled substance. This would include the 1 prior bag, plus 2 small bags and 1 fentanyl pill. It is concerning that the state can get so much mileage out of that same initial bag of meth that was sold to Officer Olive. Danny's attorney should argue that at least one of the counts of possession of a controlled substance should be thrown out. He is going to argue that sentencing Danny three ways for the same paltry bag of meth sold to Officer Olive is an Eighth Amendment violation against cruel and unusual punishment.

Danny's attorney will also request that all sentencing be run concurrent, not aggregated or consecutive.

In sum Danny's attorney will argue for jury sentencing, for tossing at least one of the possession convictions, and for concurrent sentencing. The judge should grant these requests.

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

Question 5 - Selected Answer 2

(1) Danny's Constitutional Arguments

Danny can argue that his Fourth Amendment right to be free of unreasonable government search and seizure was violated and the narcotics seized pursuant to his arrest should therefore be thrown out on the basis of the Exclusionary Rule.

The threshold question is whether a search and seizure took place. Since Danny was arrested and the facts tell us he was searched, we can dispense with this step quickly and assume that it did. The Fourth Amendment requires a warrant to conduct a search or a reason to excuse the warrant requirement. In this case, there is no indication the officers possessed a warrant, however they conducted their search of Danny's person pursuant to a lawful arrest. In most (every?) jurisdiction the crimes Danny was arrested for are felonies, so the officers were permitted to arrest him without a warrant based on the probable cause they developed through Officer Olive's undercover activity. A search incident to arrest allowed Officer Olive's colleagues to complete a contemporaneous search of Danny's person including his pockets where they found the contraband. Therefore, the drugs are admissible even though Danny did not consent to the warrantless search. Even if Danny were to argue that the arrest was improper because it was based on mistake, that would not be a defense to the crime charged. It may affect the admissibility of evidence, but because the officers here were apparently operating in good faith in conducting the arrest, its unlikely the evidence would be excluded on this ground.

(2) Danny's Legal Defenses

Danny can raise an entrapment defense. The facts tell us that Officer Olive approached Danny to engage in the illicit transaction originally. Moreover, she went back to the well for "several days" without getting Danny to take the bait, so Danny has an argument that his criminal act was induced by a government agent. Danny's argument fails though because it appears he proactively engaged Officer Olive the following week to finally consummate the deal. The entrapment defense requires not only inducement but also that the defendant not be predisposed to commit the crime. The gap in time between inducements and action, and Danny's affirmative decision to engage the transaction a week later, speak to his predisposition and prevent a successful entrapment defense.

(3) Disclosure of Officer Olive's Identity

Danny's attorney should argue that due process requires a prosecutor to turn over all material, exculpatory evidence to the defense, and to disclose information that would allow defense counsel to impeach its witnesses. Danny's attorney will not have a fair opportunity to consider the range of defenses available to him without the officer's identity and obviously would not have the ability to examine her.

Danny's attorney should also argue that nondisclosure of the undercover officer's identity raises a Confrontation Clause problem. The constitution guarantees criminal defendants the right to confront and cross examine witnesses against them which Danny will not be able to do without the officer's identity. If the government intends to admit any out of court testimonial statements against Danny, he must have an opportunity to cross-examine the defendant.

The court should therefore require the disclosure of Officer Olive's identity.

(4) Post-conviction Arguments Regarding the Court's ability to Sentence Danny

Danny's defense should raise the possibility of merger between one count of selling a controlled substance and one of possession of controlled substance with intent to sell. While the government is permitted to charge a defendant with a crime and a lesser included offense simultaneously, it is impermissible to convict for both on double jeopardy grounds. To determine if jeopardy attaches the court will apply the *Blockberger* test which consider multiple factors: first, it considers the statutory elements of each offense without regard to the actual evidence produced at trial. Second, the government must demonstrate that each offense has at least one different element. If one offense entirely subsumes another, the two offenses are deemed the same for purposes of double jeopardy analysis.

Without knowing the specific elements of the two offenses, it seems likely these two very similar offenses carry overlapping elements and one entirely subsumes the other. As a result, conviction on both charges is prohibited by the Constitution and the court should throw out the redundant conviction as a result.

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



**JULY 2024
EXAMINATION ANSWERS**

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

QUESTION 6

Question 6 - Selected Answer 1

1. Motion to Dismiss for Personal Jurisdiction (PJ)

PJ

PJ is the court's ability to exercise power over the D. NV long arm statute reaches to the limits of the constitution, so the statutory and constitutional analysis are the same. PJ requires contact, relatedness, and fairness for specific jurisdiction.

Contacts: Courts requires sufficient contacts with forum state, ensuring fair play and justice. Requires purposeful availment by the D and foreseeability of being haled into court.

Here, WeDrive (WD) HQ and operation in CA. That is where domiciled. However, they test drove its autonomous cars throughout Nevada under an agreement with Nevada Department of Transportation. (NDOT) Using NV roads is sufficient contacts.

Even though with no offices in NV, WD personally availed themselves to NV because they were test driving autonomous vehicles and made an agreement with NDOT, a NV state organization. They gained benefits from working with NV by testing out there cars and technology. Also, it is foreseeable of being haled into court in NV because using roads in NV for drive tests can lead to accidents, which then leads to litigation.

Therefore, there are sufficient contacts with NV.

Relatedness: claim must related to the D contact with forum. Specific Jurisdiction arises from the D forum related activity. General jurisdiction involves systematic, continuous activity in the state where entities are at home. Humans at home were domiciled. Corporations where incorporated or principal place of business. Tag jurisdiction applies where D is served with process.

Here, there is specific jurisdiction because Paul, NV resident, was in contract with WD. The breach of contract is related to WD contact with NV, specifically with a resident of NV, Paul. The breach of contract occurred in NV. There is no general jurisdiction because WD does not call NV home.

Fairness Factors: fairness factors only apply to specific. Courts weigh burden and convenience on the D and W, but must be at severe disadvantage, state interest, and P's interest.

Here, WD is not severely disadvantaged because CA and NV are right next to each other. It won't take long to get to NV, and depo of witnesses can be done over zoom. There also might be witnesses in NV, since a lot of testing is done there. NV has an interest in making sure companies that are test driving cars in NV comply with contracts, and have a place for residents to litigate. Paul also has interest to litigate in home state.

Therefore, there is PJ.

Motion to Dismiss for PJ must be made in first Rule 12 motion or answer, whichever is first. Or waived

Here, even though WD filed to remove, that is not a Rule 12 motion. WD filed in time to where dismiss for PJ was waived. But, PJ dismiss fails.

Conclusion: Therefore, denying Motion to Dismiss was proper .

2. Removal

Removal issue.

removal transfers a case from state to federal court. Maximum removal time is one year. The Fed court needs subject matter jurisdiction (SMJ). SMJ because of diversity, can't be removed if D is a citizen of the forum state, called state defendant rule. NV requires a motion and statement as to grounds for removal.

SMJ analysis: SMJ is power over the case. Fed courts are courts of limited jurisdictions and can only hear cases involving fed question or diversity of citizenship. SMJ cannot be waived.

Diversity jurisdiction requires (1) complete diversity at filing. Humans domiciled where they live and intend to stay; corporations are where incorporated and principal place of business. (2) amount in controversy claim must exceed \$75K in good faith. Federal question is a claim on the face of the complaint must arise under fed law.

Here, there is no federal question, since claim is for breach of contract and accounting. However, there is diversity jurisdiction. First, Paul just moved from CA to NV. This is his domicile because he currently lives in NV and intends to stay, since he moved in NV. It is rare to move again right after moving. It can be argued he may not intend to stay since his Angel LLC is in CA. However, that is not strong enough argument. Overall, Paul resident of NV. WD is a CA corporation and is therefore resident of CA. There is complete diversity. Also, the amount in controversy is met because Paul is suing for breach of contract for a failure of WD to make first \$100K payment to Paul under the promissory note. This is over \$75K. It can also be argued he is suing for \$5million on the promissory note. Either way, over \$75K.

Therefore, there is SMJ.

Since there is SMJ, the case could have originally been brought in District of NV.

Conclusion: Therefore, removal is proper.

3. WeDrive Counterclaim against Paul and Angel.

Counterclaim issue.

A counterclaim is a claim joinder by D. Counterclaims are against an opposing party. Compulsory counterclaims arise from same Transaction/Occurrence (T/O) as P's claim and must be asserted in this case. Permissive is counter claim that does not arise from same T/O as P's claim and not required to file in same case - sue separately.

Here, the counterclaim for breach of advisor agreement and related torts against Paul is valid because Paul is an opposing party. The advisor agreement counterclaim may be compulsory, as it goes to the same T/O as Paul's claims. But, at the same time it doesn't because it is a different contract than what Paul is arguing was breached, which was the promissory note. Additionally, the tort claims may be permissive, and do not have to be brought at this time. Both claims are permissive.

Now, as to Angel LLC, this is trickier because Angel LLC is not an initial Plaintiff in the case. It appears WD is trying to bring in Angel into the case. This isn't an impleader action, because WD is not bringing in a third party defendant to shift liability. This is a counterclaim. Angel entered into an advisor contract in exchange for an equity stake in WD.

Since Angel is not a party to the action, WD will have to sue Angel separately. However, WD may argue necessary parties, which forces nonparty into case if necessary and feasible. If court dismisses case rather than proceed without absentee, this makes absentee indispensable.

Here, Angel will argue that they are not necessary to case because WD can sue them separately, different from the case against Paul and WD. Angel has a strong argument there. Further, Angel will argue if it gets brought in as Plaintiff, that would destroy SMJ, as Angel is an LLC from CA. However, LLC's domicile is where the members are at, and the one member is Paul, who is domicile in NV. Therefore, if Angel gets brought in, it would not destroy SMJ. However, court will reason that since Paul's claim are about breach of contract and accounting, while WD counter claim against Angel is breach of Advisor agreement and related torts, these are different claims and do not become necessary.

Therefore, counterclaim against Angel is not valid.

Conclusion: counterclaim against Paul valid. Counterclaim against Angel not valid.

4. Discovery Requests

Discovery issues.

Discovery Tools

Discovery is the phase of litigation in which attorneys dig out what other people know. There are a few discovery tools: depositions, interrogatories, request for production, request for admission. These discovery tools cannot be served until after Rule 26(f) conference. The only exception is request to produce, but must be served once 21 days have passed since initial service. In NV, party is allowed 40 interrogatories and admissions each. Rule 26(f) requires that 21 days before scheduling, parties must meet and confer. It sets the tone for discovery.

Here, Paul's attorney served WD the day after motion to dismiss and counterclaim were filed. They sent 50 interrogatories, which is 10 more than what NV allows. They sent 30 requests for admission which is under the 40 limit. However, these requests were made before the Rule 26(f) conference and were not requests for production. These discovery requests should not be allowed.

WD can argue that they do not need to respond because there was no Rule 26(f) conference. This is a strong argument. However, they should be aware that if a party does not give a full response, a party may seek merit sanctions and attorney fees. However, a court would not sanction WD because it was not ripe for discovery tools to be served. WD may want to advise Paul's attorney that it is not time for discovery, and that they need to meet for Rule 26(f) first. They should also tell Paul's attorney in writing, that they are not responding for that reason.

Therefore, the discovery requests by Paul are not proper and WD does not need to respond and will not be sanctioned for not responding.

Discovery Harassment

Discovery should not be used to harass another party for the whole purpose of harassing. A court may limit if cumulative, and burdens party. Sanctions may be given for discovery violations.

Here, Paul's purpose of sending all the discovery requests was because Paul wanted to be "aggressive." An attorney can be a strong advocate, but cannot use discovery tools to harass and be aggressive. Because of the sole purpose to be aggressive, Paul's attorney may be sanctioned for using discovery in a harassing manner.

Conclusion: Discovery Requests were not proper and WD did not need to respond. However, should have responded to Paul's attorney to let them know about 26(f) meeting.

5. Motion to Remand

Motion to remand issue.

Remand brings the case back to state court. P has 30 days after notice of removal to move if reason other than lack of SMJ. Otherwise can move anytime for lack of SMJ. In remand, courts look at factors to determine if remanding is the right decision. Those factors include claims, the parties, facts of the case, etc.

Here, Paul filed a remand because all claims in complaint arose under Nevada State law. He is not arguing SMJ, so he had 30 days after removal notice to file remand. In the facts it says it was filed timely.

Now, looking at factors, the court will agree that the claims are state law claims, as they are contract and accounting claims. However, when it was removed, it had proper SMJ. A big factor is that WD is a CA resident, and are dealing with a promissory contract that is up to \$5million dollars, and about a contract that crosses state lines.

Erie Doctrine

Further, the court wont be concerned about NV state law not applying because of the Erie doctrine. The erie doctrine answers what law applies. If there is a fed law on point that conflicts with state law, apply federal law. If not, the state law will apply if the issue is substantive, which is called the outcome determinative test. Elements of a claim or defense are substantive.

Here, Paul wants to remand because his claims arose under NV state law. This might be true, but since the case was removed to fed district court of NV, that fed court will apply NV law over the elements of contract breach and accounting.

Conclusion: US District Court properly dismissed motion to remand.

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

Question 6 - Selected Answer 2

Question 6(1)

The United States District Court properly ruled on the Motion to Dismiss.

WeDrive filed a Motion to dismiss for lack of personal jurisdiction and brought a counterclaim against Angel, LLC and Paul.

Personal jurisdiction is the court's power over the parties. The question is whether the defendant has sufficient contacts with the forum state so that exercise of personal jurisdiction is fair and reasonable? Determining personal jurisdiction is a two step analysis. The exercise of personal jurisdiction must first fall within a state statute, and the exercise of personal jurisdiction must satisfy the Constitution (due process). Here, the federal court will decide whether it has personal jurisdiction over a defendant in the same as a Nevada court would.

There are two types of personal jurisdiction, specific and general. General personal jurisdiction arises when a defendant is at home in a state. Specific personal jurisdiction arises when the jurisdiction relates to the defendant's contacts with forum. It is elaborated below.

Nevada statutes allow personal jurisdiction over (1) persons domiciled in Nevada, (2) persons served with process in Nevada, and (3) businesses incorporated in Nevada. To sue a nonresident who is not served in Nevada we use the long arm statute. Nevada's long arm statute grants the courts authority to assert PF over defendant on any basis no inconsistent with the constitution.

Here, WeDrive is incorporated in California. We are told WeDrive was properly served, but not where. If it didn't occur in Nevada, then we need to do the constitutional analysis for personal jurisdiction.

For the constitutional analysis we ask: Does the defendant have such minimum contacts with the forum so jurisdiction does not offend traditional notion of fair play and substantial justice? To answer this question we assess a set of factors under the headings of contact, relatedness, and fairness.

Contacts requires minimum contacts. Minimum contacts require purposeful availment and foreseeability. Purposeful availment means that the defendant must reach out to the forum, and the contact must result from targeting of the forum. Foreseeability asks: is it foreseeable that Defendant could be sued in the forum. It is fact based analysis.

Relatedness asks the question of whether plaintiff's claim against Defendant "arising out of or relates to" the Defendant's contact with the forum. it clearly arises out of the contact if Defendant's contract caused the harm to Plaintiff.

Fairness assess whether personal jurisdiction would be (or reasonable) under the circumstances. This is also a fact and policy based analysis and looks at the burden/inconvenience to the parties, the state's interest, and the plaintiff's interest. This is only addressed in specific personal jurisdiction cases only.

Here, WeDrive is a California corporation with its principal place of business in California. They do test cars in Nevada under an agreement with the Nevada Department of Transportation. When in Nevada, Paul entered into a promissory note with WeDrive, which WeDrive has now failed to pay.

Now to analyze the specific personal jurisdiction test (because WeDrive is not home in Nevada so therefore general jurisdiction does not apply). WeDrive has purposefully availed themselves of Nevada by contracting with the Nevada Department of Transportation to test cars in Nevada. Entering into a contract with a state government to conduct business in the state, seems like a pretty straightforward example of purposeful availment. It is foreseeable to be hauled into court in Nevada because of this availment (i.e., the state of NV could sue them for breach of contract).

This analysis fails at the relatedness step. Paul injury (i.e., the failure of WeDrive to pay on the note) does not arise from nor is related to WeTrucks contacts with the state of NV. Paul's status as a resident of Nevada, and execution of the note in Nevada, are merely coincidental and are not related at all to WeTrucks failure to pay Paul on the note.

Because the relatedness element is not met, we need not discuss fairness. However, for completeness the state has no interest in enforce this contract besides protecting its resident, the plaintiff's interest is convenience, and the burden on WeDrive would be large as they would have to travel (those not as much of a burden as it would be on a private individual with less resources to expend).

Therefore, the court does not have specific personal jurisdiction over WeDrive. That is however, until WeDrive filed the counterclaims. All of this analysis is moot because a party may consent to personal jurisdiction, and one way this is done is by filing an action in a court. By filing an action you are consenting to personal jurisdiction. From policy perspective, it wouldn't make sense to dismiss the original claims, then force the plaintiff to refile them after the counterclaims are filed because the Defendant only consent to personal jurisdiction after the motion to dismiss.

If Defendant's want to be dismissed for lack of personal jurisdiction, they shouldn't submit to the court's jurisdiction by bring counter claims.

Question 6(2)

The action was properly removed to federal court.

Removal of a case is the technical name of transferring a case from state court to federal court. Subject matter jurisdiction is necessary for removal. Removal must also take place within 30 days after service. No timeline is given, so we can assume it was within 30 days. This question is testing subject matter jurisdiction.

Removal would have been proper if the federal court has subject matter jurisdiction. Federal courts have subject matter jurisdiction in three cases: (1) federal questions; (2) diversity of citizenship cases; and (3) supplemental jurisdiction in some cases. A federal question is one that arises from federal law. This action is about breach of contract, and therefore there is no federal question at issue (additionally the federal question must be implicated in the complaint, not just as a defense).

Diversity of citizenship subject matter jurisdiction requires that (1) the case is either between citizens of different US states; or (2) between a citizen of a US state and citizen of a foreign country; and (3) the amount in controversy exceeds \$75,000. Complete diversity is required which means that each plaintiff is diverse from each defendant. Two parties are diverse when they are citizens of different states.

Here, Paul is a Nevada citizen. We are told he moved to Nevada. WeDrive, as a business, is a citizen of the state of its incorporation and the state with its principal place of business. Both are in California. Therefore we have complete diversity. Additional, the amount in controversy is \$100,000, which exceeds \$75,000. Therefore removal was proper based on subject matter jurisdiction. We are not given any additional details which would have made the removal improper on procedural grounds.

Question 6(3)

It was permissible for WeDrive to bring a counterclaim against Paul and Angel, LLC.

Angel is a California limited liability company, meaning it was organized in California, is a California citizen, and therefore their presence in the case would destroy complete diversity (WeDrive is a CA entity). However, the general rule is to look at the citizenship of parties when the case is filed, which was satisfied at that time. This question implicates supplemental jurisdiction.

Supplemental jurisdiction is a form of federal subject matter jurisdiction. but it is fundamentally different from diversity and federal question. Diversity and federal question subject matter jurisdiction get cased into federal court. Supplemental jurisdiction does. Instead, it gets claims into a federal case, even though the claims cannot use diversity of citizenship or federal question jurisdiction.

As discussed, the claims against Angel does not satisfy diversity. Also the claims are for breach of contract (the advisory agreement) and related torts, which are state law claims and do not create federal question jurisdiction.

Supplemental jurisdiction has two steps. First we determine the claims share a common nucleus of operative fact with the claim that previously met federal subject matter jurisdiction. This is met when the claim arise from the same transaction or occurrence.

However, the supplemental jurisdiction statute excludes certain claims even though they meet the common nucleus test. But this limitation applies only in cases that got into federal court through diversity jurisdiction. In diversity cases plaintiffs generally cannot use supplemental jurisdiction.

Therefore, the fact that adding Angel, LLC now destroys diversity, is irrelevant to the analysis.

Here, we look to the claims and whether they arise from a common nucleus of operative fact. The claims arise from the breach of an entirely different contract (the advisor agreement) than plaintiff's claim (the promissory note). These are certainly not the same transaction or occurrence. However, the common nucleus test is broader, and if WeDrive can argue that the agreements are related, or were executed in contemplation of each other, then perhaps the claims were properly brought. They were executed contemporaneously, which weighs in WeDrives favor.

Because the agreements were executed simultaneously, it is arguably they fall under the broader common nucleus test even if they aren't considered the same transaction or occurrence. Therefore, the counterclaims were properly brought because the court has supplemental jurisdiction over the claims because they arise from a common nucleus of operative fact.

Question 6(4)

Paul's discovery requests were not proper and WeDrive was not obligated to respond.

Pursuant to FRCP 26 the parties must hold a Rule 26(f) conference and then disclose certain information (without a request). Once initial disclosures have been made, parties may request information from one another. However, assuming that no court order or stipulation provides otherwise, a party cannot send discovery request to another party until after the Rule 26(f) conference. However, request to produce can be served earlier (once 21 days has passed since service of process). Federal court allows for the 25 special interrogatories, however has no limit on requests for admission and requests for production (Nevada allows 40 special interrogatories and 40 requests for admission). These limits can be altered by court order.

Here, the discovery requests were sent prior to the Rule 26(f) conference and initial disclosures. Therefore, the requests are improper and WeDrive did not have to respond. Additionally Paul sent 50 special interrogatories which is 25 more than allowed. If the timing was proper, WeDrive would only have to answer the first 25.

Question 6(5)

The United States district court properly ruled on Paul's Motion to Remand the case to state court in Nevada.

If a plaintiff thinks the case should have been removed, they can move to remand the case back to state court. If the motion to remand is based on a reason other than lack of subject matter jurisdiction, plaintiff must move to remand no later than 30 days after filing of the notice of removal. If plaintiff fails to do so, she waive the right to have the case remanded to state court and the case will stay in federal court.

On the other hand, if removal was improper because the federal court lacked SMJ, there is no time limit on ordering remand. Remember, and objection SMJ is never waived, and a court without SMJ is powerless to act on the case.

Here, Paul filed a Motion to Remand the case to state court in Nevada, arguing that all the claims in his complaint arose under Nevada state law. Thus, Paul is arguing that the cause should be remanded for lack of subject matter jurisdiction due to there being no federal question at issue. However, as analyzed above, all required for diversity of citizenship jurisdiction were met (\$100,000 dispute, more than \$75,000, and complete diversity, Paul is NV citizen and WeDrive is a CA citizen).

We need not worry about procedural timing requirements as we are told "Paul's lawyer timely filed a Motion to Remand."

Therefore, the court properly ruled on Paul's Motion to Remand by denying the motion because the court has subject matter jurisdiction over the case due to diversity of citizenship and supplement jurisdiction.

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



**JULY 2024
EXAMINATION ANSWERS**

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

Nevada Performance Test - 1

NPT 1 - Selected Answer 1

Memorandum

TO: Sharon Hedges, Supervising Attorney
FROM: Applicant
RE: Memo on Legal Issues in Bill Baker Matter
DATE: August 1, 2024

Issue present

Is Mr. Baker considered an employee rather than an independent contractor under Nevada's minimum Wage Amendment (MWA)

Analysis

Employer vs. independent

The MWA defines an employee as "any person who is employed by an employer **Does v. La Fluente, Inc. Supreme Court of Nevada (2021)**. The federal Fair Labor Standard Act (FLSA) gives carries greater persuasive weight, given the broad language of the MWA and applies the "economic realities test" to determine what counts as an employee and not an independent contractor. Id. To apply this test we look at the totality of the circumstances. Id. In Does, the Supreme Court of Nevada has stated that, if a federal law is analogous to a Nevada law counterpart, Nevada courts look to the statutory language of the federal law. Id.

Since our case with Mr. Baker is most likely to be resolved in the state of Nevada we apply the economic realities test using to totality of the circumstances presented by the facts given to use by Mr. Baker.

economic realities test

The economic realities test is based on the base on totality of circumstances. Does (2021). The factors include: 1. degree of alleged employer's right to control the manner in which the work is to be performed; 2. the alleged employee's opportunity for profit or loss depending upon his managing skill; 3. the alleged employee's investment in the equipment or materials required for his task, or his employment of helpers.; 4. Whether the service rendered requires a special skill; and 5. the degree of permanence of the working relationship. Does (2021)

In the case Thibault v. Bellsouth, a worker worked as a splicer during hurrican Katrina and tried to recover pay from their employer under the FLSA. Thibault v. Bellsouth 5th circuit 2010. Thibault is not controlling authority under Nevada law but rather persuasive, but illustrates how the economic realities tests are tested under the totality of the circumstances. Below we compare the economic realities factors as they related to the facts in Thibault to the facts of our client Mr. Bakers.

1. Degree Control

Similarly to the Thaibault case where the employer told the worker to go and what he needed to fix, in our case Mr. Banker was told by PBN what time he needed to be on the job, where to go, and what jobs he needed to be performed.

2. Worker's Opportunity for Profit and loss

Unlike in the Thibault case where the workers pay depended on their ability to consistently find splicing work with other companies, MR. Baker was paid by PBN for the time he was on the job.

3. Relative investment

Similarly to Thaibault case, where the worker provided their own tools, even up to 100 different tools, in our case, Mr. Baker did have to buy some tools with his own money.

4. skill an initiative

Similarly to Thaibault case where the employer had never worked as a splicer before but had some training in other handyman work and recieved training from his friend and other splicers, Mr. Baker did have some technical training to prepare to be a handyman.

5. Permanency of relationship Factor

Unlike in the Thibault case where the plaintiff did not work exclusively for the employer, in our case Mr. Baker did in fact only work for PBN exclusively during the 22 weeks that he was working.

Economic Realities Test Conclusion

In the Thaibault case, the court held that the worker was not an employee because he had a side business while working as a splicer, not satisfying the permanency relationship factor. Moreover the worker was paid contingent to the work that he found and not paid by the employer for being on the job, therefore not satisfying the worker's opportunity for profit and loss. Thaibault. However, in our case, Mr. Baker did work exclusively for PBN during those 22 weeks that he did work, differentiating the circumstances in Thaibault and in our case. Moreover, Mr. Baker was paid by PBN for being on the job instead of being reliant on finding work in order to be paid. Therefore Mr. Baker may be able to satisfy all the factors of the economic realities test.

Moreover, In CromWell v. Driftwood Electronical Contractors, the court references factors that had weighed heavily for a worker being an employee rather than an independent contract. CromWell v. Driftwood Electronical Contractors, fifth circuit (2009) citing Carrel v Sunland Const., Inc. (5th cir. 1993). The factors included if defendant's dictates the worker's schedule, paid them in fixed hourly wage, and assigned them to specific crew. Cromwell. Similarly to the Thaibault case, the Cromwell case is not controlling law because it is a 5th circuit case, however like Thaibault, it was be used as persuasive authority.

Here Mr. Baker was assigned specific times to work by PBN, paid Mr. Baker in fixed increments, and was either assigned to his friend Cornish or with other Splicers to work on jobs assigned to them.

The Contract

In Myer's the court cites Terry v. Sapphire, a 2014 Nevada Supreme Court case, that states that an independent contract is not conclusive evidence that the person is an independent contract and therefore the economic reality test is inapplicable. The differentiation between an employee and an independent contractor is "guaranteed to them by law, not by the contract". Myers. The determination between what is an employee and what is an independent contract is 'determined only by the economic realities test. Myers.

Here even though Mr. Baker signed a contract with PBN, that alone does not make it conclusive that Mr. Banker is an independent contract. Instead we look to the economic realities test to determine who is a independent contractor and who is an employee.

Conclusion

Using the economic realities test under the totalities of circumstances and by the interpretation of independent contractor contracts by the Nevada Supreme court, Mr. Baker would be considered an employee.

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

NPT 1 - Selected Answer 2

To: Sharon Hedges, Supervising Attorney
From: Applicant
Subject: Baker, Bill - Employee/Independent Contractor Memo
Date: August 1, 2024

Issue

Is Mr. Baker an employee or a independent contractor under the MWA.

Short Answer

Determining employee/independent contractor status is a fact based analysis that looks at the totality of the circumstances. Based on the currently available facts, it is likely Mr. Baker will be held to have been an employee.

Analysis

Nevada Courts Use the Economic Realities Test to Determine Employment Status

The MWA provides for minimum compensation for employees, not independent contractors. Determining whether an individual is an employee or an independent contractor is a fact based analysis. In *Myers* the Nevada Supreme Court clarified "that the employee status for purposes of the Minimum Wage Amendment to the Nevada Constitution (MWA) is determined only by the 'economic realities' test." The court further stated that the language of an employment contract is not controlling as to the status of the employee/independent contractor.

In *Does*, the Nevada Supreme Court noted that the language of the MWA "closely mirrors" the language of the FLSA (e.g., the definition of employee is near identical). The Court stated that "[w]hen interpreting provisions that have analogous federal counterparts, Nevada courts look to federal law unless the state statutory language is 'materially' different from or inconsistent with federal law." As the language in the MWA "closely mirrors" FLSA, the court looked to federal case law and found five factors "that courts nearly universally consider:"

- 1) the degree of the alleged employer's right to control the manner in which the work is to be performed;
- 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;
- 3) the alleged employee's investment in equipment or materials required for this task, or his employment of helpers;
- 4) whether the service rendered requires a special skill; and
- 5) the degree of permanence of the working relationship.

However, while the Court identified these five factors as relevant, it did state that "the economic reality rest is based on [the] totality of the circumstances" and that the above list is not exclusive.

Employment Contract is Not Controlling

As briefly addressed above, the Court in *Myers* "reaffirm[ed] that a worker is not necessarily an independent contractor solely because a contract says so." Here, the "Power Back Nevada Independent Contracting Agreement" entered into by Mr. Baker and Power Back Nevada classifies Mr. Baker as an independent contractor. However, as determined in *Myers*, this is not controlling, and Mr. Baker's status can only be determined by the economic realities test ("ERT").

ERT - The Degree Of The Alleged Employer's Right to Control the Manner in Which the Work is to be Performed

The more that an employer has a right to control the manner in which the work is to be performed, the more likely the worker is to be classified as a employee.

In the 5th Circuit Case, *Thibault*, a man temporarily worked as a splicer in the aftermath of Hurricane Katrina. While the court ultimately held that Thibault was an independent contractor based on the totality of the circumstances, the analysis of the degree of control included facts that could have supported both a finding that Thibault was an employee or an independent contractor. The relevant facts evidencing employee status were that Thibault was assigned to work and had a schedule created by his employer (the schedule mirrored those of other employees). The facts evidencing independent contractor status are that Thibault only performed splicing work, the employer never specified how to do the job, and it was up to Thibault to figure out how to fix the problem and then report back after it was completed.

In another 5th Circuit case, *Carrell*, the court "noted that several facts weighed in factor of employee status, including that the defendant dictated the welders' schedule, paid them a fixed hourly rate, and assigned them to specific work crews."

In yet another 5th Circuit case, *Cromwell*, the court further stated that an employer providing work assignments which limit the need of the worker to demonstrate initiative in performing the job was indicative of employee status.

Here, as is typical, "there are facts pointing in both directions." *Carrell*. The following facts evidence an employee relationship. Mr. Baker was assigned a task every day at 7:00 AM and required to report back at 8:00 PM. Mr. Baker was required to work a 12 hour day. His work was project based, but once a project was completed he was required to get another project from his employer if his 12-hour work day had not completed. Additionally, while Mr. Baker only performed splicing jobs, he did perform other tasks such as operating the bucket truck and carrying necessary materials to and from the job site.

On the other hand, Mr. Baker was given the freedom to resolve the problem as he saw fit once on the job site. He "controlled the details of how [he] performed the work and [was] not closely supervised." *Cromwell*.

The amount of control exercised by Mr. Baker's employer would tend to weigh equally in favor of employee status or independent contractor status.

ERT - The Alleged Employee's Opportunity For Profit Or Loss Depending Upon His Managerial Skill

The more opportunity a worker has for profit or loss the more likely he is to be determined an independent contractor.

In *Thibault*, the workers were required to fill out time sheets and invoices of the work performed. However, it was determined that year end profits or losses depended on the ability to find work with other companies, and that splicing requires traveling and associated expenses which can increase loss. This weighed in favor of independent contractor status.

In *Cromwell*, the court found that the employers "complete control over [Plaintiffs'] schedule[s] and pay, had the effect of severely limiting an opportunity for profit or loss by [Plaintiffs]." While the Plaintiffs could have taken other jobs, from a practical perspective, their busy schedules with the employer prohibited that. This weighed in favor of employee status.

Here, Mr. Baker had a set salary and had to work 12 hours a day. It was unlikely he would be able to seek out other work due to that schedule so his opportunity for profit was quite limited. However, he was required to travel and supply some equipment so his opportunity for loss did exist, although it was not great because he often slept in his car and borrowed equipment.

On the whole, this arrangement would favor the status of employee.

ERT - The Alleged Employee's Investment In Equipment or Materials Required for His Task, or His Employment of Helpers

The more a worker must individually invest his equipment or materials, the more likely he is to be found an independent contractor.

In *Thibault*, he owned his own bucket truck, and basically all the equipment necessary for the job. This supported independent contractor status.

In *Cromwell*, the plaintiff's invested a significant amount into trucks and equipment. This too evidenced independent contractor status.

Here, the Contract provides that Mr. Baker will supply his own equipment. In reality, Mr. Baker would use the trucks and tools of other workers. He did invest some money into tools, but it was significantly less than the workers in both *Thibault* and *Cromwell*. He did sometimes use his own truck, but he did not buy one specifically for the work.

Mr. Baker's minimal investment in equipment and materials would favor a finding of employee status.

Additionally, Mr. Baker hired employed no helpers, that we are aware of, although he referenced assistants and other people on the crew in the field. This would weigh in favor of employee status.

ERT - Whether the Service Rendered Requires a Special Skill; and

The more a service requires a special skill, the more likely the worker will be classified as an independent contractor.

While *Thibault* and *Cromwell* concede that splicing requires a high degree of skill, similar to Mr. Baker, *Thibault* did not have experience or training in splicing except for informal training from a friend immediately prior to the job.

Here, Mr. Baker explicitly had no training or skills in splicing when he started the job. The Contract specifically described Mr. Baker's work as akin to an apprenticeship. Additionally, even though Mr. Baker did acquire some skill during his time, he only did very simple splicing work and usually just hauled materials and controlled the bucket truck (which admittedly required some skill).

However, on balance, due to Mr. Baker's lack of a special skill when starting the job, and despite Mr. Baker's insistence that he learned enough to earn a splicing job in the future tend to favor an employee status.

ERT - The Degree of Permanence of the Working Relationship

The more permanent the relationship, the more likely an employee/employer relationship will be found.

In *Thibault*, the plaintiff did not solely work for the defendant. He had his own company, and only worked for defendant for 7 or 8 months. This weighed in favor of independent contractor status.

In the 5th Circuit case, *Robicheaux*, welder were found to be employees when they "worked on a steady and reliable basis over a substantial period of time exclusively with the defendant, ranging from ten months to three years." The *Cromwell* court directly compared *Robicheaux* when it found that the plaintiffs "worked on a steady and reliable basis over a substantial period of time- approximately eleven months- exclusive for their purported employers. This weighed in favor of employee status.

Here, Mr. Baker worked with PBN exclusively for 13 weeks between Dec 2022 and Mar 2023, and then again for 9 weeks between Nov 2023 and January 2024. While Mr. Baker was working for PBN he worked on a steady reliable basis and exclusively for PBN. However, his intermittent work which never lasted for more than 4 months a time likely does not qualify as a substantial period of time as discussed in the 5th circuit cases.

Therefore, this fact weighs in favor of independent contractor status.

Necessary Follow Up re: Additional Facts

Follow up questions to Mr. Baker and/or necessary investigation:

- Did you employ any of the assistants or other crew that were on the job-site?
- How money did you spend on equipment, materials, travel expenses, etc. (all expenses related to the work)?
- Did you receive training or direction from PBN on how to complete the work? I understand they were not present when you did the work, but they direct how it was to be done?
- Did you work anywhere else during the time you were employed with PBN?
- What skills were necessary to complete your job?
- Why did you work the two stints? And not work consecutively? Your choice? PBN? The contract does not include employment dates, why?

Conclusion

Mr. Baker is likely to be classified as an employee. Employee/Independent Contractor analysis often comes with facts pointing in both directions, as we have here. Mr. Baker worked on a project basis, although was required to log 12 hour days ande. He was paid daily, and not on a project basis. He did not have much opportunity for profit (though a little bit for loss). He appears to have invested only a nominal amount in materials and equipment. The work requires a special skill, but he was hired without any skills. When Mr. Baker worked with PBN it was exclusive, but it was never for more than a few months. And while on jobs, Mr. Baker had the freedom to complete the task as her saw fit because there was no oversight at the job-site.

The last two points, freedom to complete the job and only working for a few months at a time, lean towards a finding of independent contractor. However, considering the totality of the circumstances including Mr. Baker's minimal investment, daily wage, lack of skill, lack of opportunity for profit, and the fact that PBN controlled Mr. Baker's schedule outweigh the independent contractor factors. Absent additional contradictory information, I believe Mr. Baker is likely to be found to be an employee of PBN.

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



**JULY 2024
EXAMINATION ANSWERS**

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

Nevada Performance Test - 2

NPT 2 - Selected Answer 1

To: Jack Doe, Partner
From: Applicant
RE: Smith Trial Statement Draft

Below is a draft of the Smith Trial Statement.

Sincerely,

Applicant

Smith Trial Statement (Draft)

This trial statement has been drafted in accordance with the rules set forth in the Rules of Practice for the Second Judicial District Court of the State of Nevada. (Rule 5).

(a) Claimed Facts:

(1) The Plaintiff claims there are compelling circumstances to divide the community estate unequally in the plaintiff's favor due to the defendants financial misconduct during the marriage.

Mr. Smith has been conducting an affair with Ms. Hart for years, and purposefully hiding his relationship and spending from Ms. Smith. Mr. Smith has knowingly wastes community assets for personal gain to the sum of \$95,088 of community funds in connection with his affair. According to an expert retained by Ms. Smith who has specialized inf forensic accounting since 2005, Mr. Smith spent the following sums in connection with his affair: 1) \$75,745 on airfare, hotels, dining, and other activities associated with travel, (2) \$10,422 for restaurants in Reno when they were not traveling and (3) \$8,921 for jewelry and other gifts for Ms. Hart.

Further he used approximately 700,000 airline reward points and 175,000 hotel points in connection with travel with Ms. Hart.

(2) The Defendant claims there are compelling circumstances to divide the community estate unequally in the defendants favor, due to Ms. Smiths spending during the marriage, and on a European vacations.

(b) Undisputed Facts:

The parties have been married since July of 2007 and have resided in the state of Nevada for the entirety of their marriage. The parties are incompatible in the marriage and there is no possibility of reconciliation. There are no minor children and the plaintiff is not pregnant.

Mr. Smith admits to contributing more money to the community assets.

Mr. Smith admits he was aware of Ms. Smiths vacations in Europe, as well as her spending habits.

Mr. Smith admits to having an affair with Linda Hart, who now lives with Mr. Smith. (John, Depo).

In March of 2019, Mr. Smith took Ms. Hart on a trip to Lake Tahoe where Ms. Hart spent the night in his hotel room, and Mr. Smith covered the entirety of their costs. (Id.).

Mr. Smith admits to taking Ms. Hart to dinners. (Id.).

Ms. Smith has traveled to Europe on annual vacations with her sister throughout the marriage, sometimes utilizing reward points from prior work travel and sometimes using community funds. (Alice, Depo).

Ms. Smith admits to spending more money on the trips than her sister.

On her last trip to Europe, Ms. Smith covered costs between \$2,500 and \$3,000, part of which was spent on her sister. (Id.).

(c) Issues of Law:

The issues of law are as follows:

(1) The community estate is subject to unequal division due Mr. Smiths spending connection with his extramarital affair.

In the State of Nevada, the court may make an unequal division of community property where the court finds a *compelling* reason to do so and sets fourth, in writing the reason for making an unequal division. NRS, 125.150(a) (emphasis original). The Nevada Supreme Court has gone on to explain one compelling reason to justify unequal division of the community property is financial misconduct. (Putterman citing to Lofgren). Moreover, the court denotes other situations that would constitute compelling reasons such as the "hiding or wasting of community assets or misappropriating community assets for personal gain." (Putterman).

Under the Nevada Supreme Court holding in *Kogod*, spending community funds on extramarital affairs is a type of financial misconduct that would call for an unequal division of property. (Kogod). In *Kogod*, the court found that funds were "dissipated" when spent on extramarital affairs. (Id.) Funds are dissipated when they are used for "inequitable pruose[s], such as a spouse's use of the community property for personal benefit when a divorce is imminent." (Blacks Law Dictionary.).

Here, Mr. Smith admits to having an affair with Ms. Hart. As such, any money he spent on Ms. Hart in connection with that affair has been dissipated, and entitles Ms. Smith to a higher proportion of the community funds. Mr. Smith misappropriated the community assets for personal gain by spending assets outside the knowledge and awareness of Ms. Smith. Notably, Ms. Smith was aware of some of Mr. Smiths spending as she knew he went on hunting trips with his friends. This shows that he purposefully and intentionally hid his spending in regards to the affair from Ms. Smith.

According to an expert retained by Ms. Smith who specializes in forensic accounting since 2005. Mr. Smith spent in sum \$95,088 of community funds in connection with his affair, including: 1) \$75,745 on airfare, hotels, dining, and other activities associated with travel, (2) \$10,422 for restaurants in Reno when they were not traveling and (3) \$8,921 for jewelry and other gifts for Ms. Hart.

Therefore, these funds should be divided disproportionately in favor of the plaintiff.

(2) The division of the community estate is not subject to unequal division in connection with Ms. Smiths spending during the marriage, and on a European vacations.

The Supreme Court notes that the simply because one party contributes less to the marriage than another party, the higher contributor is not then entitled to more than an equal share of community property. Even if there is some disproportionate consumption of community assets. (Putterman). Moreover the Court is conscious to note that such disproportionate contribution or consumption by one spouse does not entitled the other to a "retroactive accounting" of the overcoming spouses spending. (Id.) Most importantly, such over consumption not a compelling reason for unequal division and is distinctively and entirely different from "the wasting of community assets or misappropriating community assets for personal gain" which is indeed a compelling reason for unequal division of community property. (Id.).

Here, while Mr. Smith contributed more money to the community assets than Ms. Smith, such contribution does not entitle him to a retroactive accounting of all the funds that Ms. Smith used throughout the marriage. Further, Mr. Smith was aware of Ms. Smiths spending on her vacations, as well as her spending habits. As such, Ms. Smith was not secreting aware or wasting community assets outside the knowledge of her spouse.

Therefore, Mr. Smith is not entitled to either an accounting of Ms. Smiths spending or to an unequal division of the community assets.

Under the Nevada Supreme Court ruling in *Kogod*, post-separation pre-divorce gifts will not be constitute "dissipation" absent a specific injunction, when there is an "established pattern of history giving such gifts to family members during the marriage. (Kogod citing to Robinette).

Here, Ms. Smith admits that she took her sister on a European vacation after the divorce proceedings began and spending approximately \$2,500 to \$3,000. However, there was no specific injunction in place, and Ms. Smith can demonstrate an established patter of history for such gifts to her sister. For instance, she admits to taking her sister to Europe nearly every year and further admits to paying part of her sisters expenses on those trips. Moreover, even Mr. Smith acknowledged a pattern of Ms. Smith taking her sister on these vacations nearly every year and paying for portions of the trip.

Therefore, because there was no injunction in place and Ms. Smith can establish a pattern of history for such gifts, she has not dissipated the community funds and Mr. Smith is not entitled to an unequal division of the funds.

Finally, the Nevada Supreme Court made clear in *Kogod*, that wasteful spending in relative to the community assets of the parties. (Kogod). For instance, if the parties spending appears typical of their general over consumption throughout the marriage, then such spending alone will not justify an unequal division. (Id.).

Mr. Smith is not entitled to an unequal division of funds due to Ms. Smiths spending habits throughout the marriage. Ms. Smith spending throughout the marriage was consistent, and Mr. Smith acknowledged her spending habits.

Therefore, even if Ms. Smith was over consuming community assets in comparison to Mr. Smiths spending, such consumption will not entitle him to an unequal division of assets because her spending remained consistent throughout the marriage and Mr. Smith was aware of it.

(d) Summaries of Schedules: [xxx]

(e) Names and addresses of witnesses:

John Smith
400 East Virginia Ave.,
Apt 303
Reno, NV

Linda Hart
400 East Virginia Ave.,
Apt 303
Reno, NV

Alice Smith
777 Partridge Lane,
Reno, NV

Gina Green (Forensic CPA)
999 South Meadows Rd.
Suite 200
Reno, NV

(f) Comments, suggestions, or information for the assistance of the court:

This is a family law case regarding the divorce of Mr. and Ms. Smith. The parties have stipulated to the following: (1) all discovery has been completed (2) there is no separate property (3) community property will be divided equally with the exception of disputes noted below (4) neither party will be entitled to receive or obligation to pay alimony.

(g) A list of special questions to be propounded to prospective jurors:

This is inapplicable as no jury trial has been requested.

(h) Certification by counsel that discovery has been completed:

Counsel certifies that discovery has been completed.

(i) Certification by counsel that the parties have met and conferred in good faith:

Counsel certifies that the parties met and conferred in good faith and were not able to settle the case, but have stipulated to the terms included in this trial statement.

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

NPT 2 - Selected Answer 2

TRIAL STATEMENT

A. Claimed Facts

Mr. and Ms. Smith were married on July 7, 2007, in Washoe County. In the course of the marriage, Mr. Smith had an extra-marital affair. During his marriage to Ms. Smith, Mr. Smith has lived with his extra-marital partner, Ms. Hart. His affair began in January of 2019 and has continued until present.

Ms. Smith did not make as much money as Mr. Smith, and Mr. Smith claims that this entitled him to spend more money on his extra-marital affair. He regularly spent money going out to dinner with Ms. Hart, and at one point on a hotel room. He also spent money taking Ms. Hart on trips.

Gina Green, an expert obtained by Ms. Smith, reviewed the parties' bank statements, credit card statement, rewards points, and Mr. Smith's deposition and determined the amount that Mr. Smith had spent on his affair. Based on the expert and Ms. Smith's review of the finances, Mr. Smith spent (1) \$75,745 on airfare, hotels, dining, and other activities associated with travel with Ms. Hart, (2) \$10,422 on restaurants when they were not traveling, (3) \$8,921 on jewelry and other gifts for Ms. Hart. This is a total of \$95,088 of community funds spent on his affair. Additionally, Mr. Smith used approximately 700,000 airline rewards points and 175,000 hotel reward points in connection with his travel with Ms. Hart.

During the marriage, Ms. Smith would regularly purchase clothes, get her nails and hair done, and go to lunch with her friends. She also regularly went to Europe with her sister, going almost every year. The most recent trip was after filing for divorce. Ms. Smith would regularly pay for part of her sister's travel expenses, including using her travel rewards points. Recently she spent about \$2500 to \$3000 on her sister's expenses. Mr. Smith was always aware of these expenses because he reviewed credit card statements carefully each month. At the time, he did not express any concern about the vacations because he also liked to spend money on hunting trips with his friends. There has been no injunction prohibiting spending any of the community property.

B. Admitted or Undisputed Facts

It is undisputed that the parties were married on July 7, 2007, in Washoe County, and are still married. Mr. and Mrs. Smith and incompatible and are seeking a divorce from the bonds of matrimony. The parties have agreed that there is no separate property, community property except that discussed below will be divided equally, and neither party is entitled to alimony. There are no minor children to the issue of this marriage, and plaintiff is not now pregnant.

C. Issue of Law and Memorandum of Authorities

The issue of law for trial is whether there are compelling reasons to divide the community property unequally either in favor of Ms. Smith or in favor of Mr. Smith.

Ms. Smith seeks to be awarded an unequal distribution in her favor due to Mr. Smith's misconduct in spending community funds on his extra-marital affair. Mr. Smith has alleged that he is entitled to unequal distribution due to Ms. Smith spending through the marriage, and her European vacations with her sister.

Memorandum of Authorities

Nevada is an equal division state. *Putterman*. The court no longer looks to the equitable factors that were formerly applied due to the change from equitable to equal property division. *Lofgren*. A court generally must make an equal disposition of community property in a divorce unless there is a compelling reason to make an unequal disposition. NRS 125.150(1)(b); see also *Kogod*. However, the legislature did not define what it meant when it permitted an unequal division for compelling reasons.

The Nevada Supreme Court has determined that dissipation (or waste) provides a compelling reason for the unequal disposition of community property. *Kogod* (citing *Lofgren*). Therefore, if community property is expended through the intentional misconduct of one spouse, the court may consider that misconduct as a compelling reason for an unequal disposition of community property, and may augment the other spouse's share. *Lofgren*.

1. Ms. Smith is entitled to an unequal distribution based on Mr. Smith's dissipation of community funds due to his extramarital affair.

The dissipation that the court may consider refers to one spouse's use of the community property for selfish purposes unrelated to the marriage, in contemplation of divorce or at the time when the marriage is in serious jeopardy. See *Kogod* (citing 24 Am.Jur.2d Divorce and Separation). There are many other compelling reasons for unequal disposition such as negligent loss or destruction of community property, unauthorized gifts, or compensation for losses occasioned by marriage and its breakup. See *Putterman* (citing *Lofgren*).

In *Kogod*, the district court unequally distributed the parties' community property due to one spouse's extramarital affairs, gifts to family, and excess spending. The Supreme Court of Nevada explicitly held that "community funds spent on extramarital affairs are dissipated such that the district court has a compelling reason to make an unequal disposition of community property." Funds spent on paramours are almost automatically dissipated. See *Kogod* (citing Brett Turner).

The court in *Kogod* found that one spouse dissipated funds and a large portion of the funds dissipated were related to extramarital affairs. Around \$1,853,212 were diverted from community funds for extramarital affairs, and the Supreme Court of Nevada found this to be a compelling reason for the unequal disposition. The argument that because the overall value of the estate grew during the marital misconduct, spending on the affair had no adverse economic impact on the marital estate was rejected.

Here, Mr. Smith spent community funds on his extramarital affair. The court was clear in *Kogod* that this is a compelling reason for unequal distribution.

These funds spent by Mr. Smith were dissipated from the community and therefore, should result in an unequal award to Ms. Smith. A total of \$95,088 of community funds were spent on his affair. This includes: \$75,745 on airfare, hotels, dining, and other activities associated with travel with Ms. Hart; \$10,422 on restaurants when they were not traveling; \$8,921 on jewelry and other gifts for Ms. Hart. Additionally, Mr. Smith used approximately 700,000 airline rewards points and 175,000 hotel reward points in connection with his travel with Ms. Hart.

Any argument by Mr. Smith that he was entitled to spend these funds because of his contribution to the community estate or because the estate grew during this time should be rejected by this court like it was in *Kogod*. Any argument that he should be entitled to spend this money because it would have been the same amount he spent on Ms. Smith had he taken her should also be rejected because he spent community funds, not on Ms. Smith, but on Ms. Hart.

Therefore, due to Mr. Smith's misconduct and this compelling reason for unequal distribution, Ms. Smith requests that she be awarded an additional distribution of \$95,088 and the comparative dollar amount of the rewards points that Mr. Smith spent on his affair.

2. Mr. Smith is not entitled to an unequal distribution in his favor because Ms. Smith's vacation with her sister was a regular gift.

Absent a specific injunction, a gift to a family member is not dissipation if there is an established pattern or history of giving such gifts to family members during the marriage. *Kogod* (citing *Robinette*). Therefore, while giving gifts to family members could constitute dissipation, the evidence must show that it was not a marital enterprise. *Id.*

In *Kogod*, the district court appropriately found that regular expenditures on family members were not dissipation, while non-regular gifts and ones made after an injunction were. Therefore, a unequal distribution was only appropriate for the non-regular gifts or ones made after an injunction prohibiting such expenditures.

Here, it is clear that the European vacations by Ms. Smith and her sister were regular occurrences during the marriage. Ms. Smith regularly assisted her sister in paying for such trips. It has been acknowledged by both Mr. Smith and Ms. Smith that these were yearly trips. Additionally, Mr. Smith was always aware of these trips and reviewed the finances related to these trips. He regularly reviewed their credit card statements and was aware of, and in fact encouraged, such trips.

Mr. Smith has no grounds to ask for an unequal distribution for the trips taken during the marriage. Any argument by Mr. Smith that he should receive an unequal distribution for the trip taken after Ms. Smith filed for divorce is without merit because it falls within the regular trips taken, and there was no court order or injunction prohibiting Ms. Smith's regular spending.

Therefore, Mr. Smith is not entitled to an unequal distribution for Ms. Smith's gift to her sister because it was regular and not in violation of any court order.

3. Mr. Smith is not entitled to an unequal distribution in his favor because over consumption of one spouse is not a compelling reason for unequal distributions in Nevada.

General over consumption throughout the marriage does not provide a compelling reason for an unequal disposition of community property. *Kogod*; *See also Putterman*. The court in *Putterman* was clear, that secreting or wasting of community assets while divorce proceedings are pending is distinguished from under contributing and over consuming of community assets during marriage. In an equal division state, lower contribution and over consumption does not entitle the other party to more than an equal share of property. *Putterman*.

As stated by the court in *Putterman*, almost all marriages involve some disproportion in contribution or consumption of community property. Retrospective considerations of spending during the marriage are not and should not be relevant to community property distribution. *Putterman*.

This court would therefore, need to find specific and meticulous findings of fact to conclude that there was hiding or wasting of community assets not merely over consumption and under contribution to find an compelling reason for an unequal distribution in favor of Mr. Smith. *See Putterman*. The court must differentiate between ordinary consumption and the redirecting of assets needed for basic community support. *Kogod*.

Here, Mr. Smith alleges that Ms. Smith spent more money during the course of the marriage, and did not make as much money as him. Ms. Smith's expenditures included regularly purchasing clothes, getting her nails and hair done, going to lunch with her friends, and the European trips which was discussed above. This is all regular consumption. There is no indication that Ms. Smith redirected assets needed for basic community support. Instead, it appears that the Smiths were high earners and spent as such.

Additionally, even if it was over consumption, the Nevada Supreme Court has been clear in *Kogod* and *Putterman* that over consumption is not a compelling reason for unequal disposition. Mr. Smith would need to show that Ms. Smith had wasted or secreted community assets, which he simply cannot show. As previously stated, Mr. Smith was well aware of Ms. Smith's spending during the marriage as he regularly reviewed credit card statements and finances.

Therefore, because over consumption is not a compelling reason for unequal distribution, and because Mr. Smith cannot show a waste of assets, there is no basis for an unequal distribution to Mr. Smith.

4. Conclusion

Mr. Smith's misconduct in wasting community funds on his extramarital affair is a compelling reason for this court to award an unequal distribution of community funds in favor of Ms. Smith, in the amount of \$95,088 plus the comparative dollar amount of the rewards points that Mr. Smith spent on his affair.

Additionally, Mr. Smith is not entitled to any distribution due to Ms. Smith's spending because over consumption is not a compelling reason for such a distribution or for Ms. Smith's gift to her sister because it is a regular occurrence.

D. Summaries of Schedules [to be added by paralegal]

E. Witnesses

1. Alice Smith
Represented by Jack Doe
1234 Neil Road, suite 500
Reno, NV 89511
2. Gina Green, Forensic CPA
999 South Meadows Rd., Suite 200
Reno, NV
3. John Smith
Represented by Jill Jones
111 California Avenue
Reno, Nevada 89501

F. Other Information for the Court

Not applicable, all applicable information for the court is included above.

G. Special Questions for Prospective Jurors

Not applicable as this is a bench trial.

H. Certification of Discovery

Counsel certifies that discovery has been completed.

I. Certification of Conferral

Counsel certifies that prior to filing the trial statement, counsel have personally met and conferred in good faith to resolve the case by settlement and have been unable to reach a settlement.

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