



JULY 2007 EXAMINATION

**APPLICANTS' ANSWERS TO QUESTIONS
OF NEVADA BOARD OF BAR EXAMINERS**



**STATE BAR OF NEVADA
JULY 2007 EXAMINATION
APPLICANTS' ANSWERS TO QUESTIONS
OF NEVADA BOARD OF BAR EXAMINERS**

- EXAM 1, QUESTION 1 -

JULY 2007

EXAMINATION NO. 1;

QUESTION NO. 1: ANSWER IN LIGHT BLUE BOOKLET

Doctor ("D") performed a surgery on Plaintiff ("P"). During the course of the surgery, P died on the operating table. P's family and estate filed a lawsuit alleging medical malpractice against D.

During discovery, P's attorneys gathered the following information and documentation regarding the prosecution of their case against D: (1) D's publicly accessible disciplinary records from several other states' medical licensing boards indicating that D had been disciplined, including license revocation and suspension, for submitting insurance claims for services that were never performed; (2) P's daughter overheard an unidentified nurse exclaim that she would never work with D again as she exited the operating room immediately after P's surgery; (3) D admitted in his deposition that he failed his first attempt to become a Board Certified Surgeon; (4) during her deposition, P's wife, a school teacher, testified that D's lack of competence as a surgeon caused her husband's death; and (5) following the surgery, D told P's family that he was "sorry" that P died, and D offered to pay for P's medical expenses and funeral expenses.

Also during discovery, D's attorneys obtained the following information and documentation in defense of the allegations made by P against D: (1) P had filed several previous lawsuits against other doctors alleging medical malpractice; (2) P had two previous felony convictions, one for robbing a store twenty years ago, and the second for forgery three years before the surgery; (3) in his report, D's retained expert, a retired professor of heart medicine at the local medical school, opined that P's death was caused by the weakened condition of his heart due to long-term cocaine use, and not D's conduct during surgery; (4) several months before the surgery, P's wife obtained a restraining order against P for domestic violence; and (5) a copy of an informed consent form from the hospital, which was purportedly signed by P indicating that he understood "death" was one of the possibilities from surgery.

Several weeks before trial, the attorneys for P and D each filed their motions to preclude all of the above-referenced potentially damaging information concerning their respective clients from being introduced at the time of trial. You are the law clerk for the Judge that has been

assigned to try the case, and decide the motions to preclude the information and documentation set forth above.

Please prepare a bench memorandum to the Judge setting forth in detail the reasons why the information and documentation discussed above should, or should not, be admitted at the time of trial.

1)

To: Judge

From Applicant

Re: Bench Memorandum regarding admissibility of evidence at impending trial

Introduction:

This Bench Memorandum is intended to assist this court in determining the admissibility of information and documentation set forth by way of counsels' respective Motions in limine. The determination will be based upon the rules of evidence regarding the admission of testimonial and documentary evidence.

Documentary Evidentiary Requirements

In order for a document to be admissible, it must satisfy a series of admissibility standards. Said standards include (1) Relevance; (2) Foundation; (3) Authentication; (4) not violative of Best Evidence Rule (secondary evidence rule); (5) not Hearsay; and (6) Not privileged.

Relevance

Logical Relevance

In order to be logically relevant, evidence must have some tendency to make a fact at issue in the case more or less likely than without the evidence. The burden for logical relevance is not lofty and rarely bars the admission of evidence.

Legal Relevance

Notwithstanding logical relevance, evidence may be precluded on the grounds that it is legally irrelevant if the admission of the probative value is substantially outweighed by the likelihood of prejudice to the defendant in the eyes of the fact finder.

Foundation

Documentary evidence must also have a foundational basis. Foundation is laid by the attorney seeking to introduce the evidence and generally must demonstrate that the witness, through whom the documentary evidence is to be introduced, has personal knowledge of the document. Absent a proper foundation, evidence will not be admitted.

Authentication

The requirement for authentication requires a showing that the document is what it purports to be. Some documents, such as periodicals, are self authenticating while others must be authenticated by the witness through whom the evidence will be introduced.

Best Evidence Rule

The Best Evidence Rule (or sometimes known as the secondary evidence rule) requires that if the "best" or primary evidence of a fact is contained in a writing, that writing must be produced or be shown to be unavailable through no fault of the party seeking its introduction. A carbon copy of a document has the same evidentiary effect of an original unless the authenticity is challenged or there is some other reason why its introduction would be unfair.

Hearsay

The legal definition of Hearsay is an out of court statement offered to prove the truth thereof. Hearsay, absent an exception, exemption, or exclusion, is not admissible. However, evidence is not hearsay if it is used for purposes other than to prove the truth of the statement.

Privilege

Finally, documents may not be privileged. Privilege arises from numerous relations including, but not limited to, (1) man/wife, (2) attorney/client, (3) clergy/member. Privileged documents may not be introduced as evidence.

Testimonial Requirements

Similarly, in order for witness testimony to be admissible, the witness must have (1) personal knowledge and must also be (2) competent. Furthermore, the testimony must be (3) Relevant, (4) not Hearsay (or must be able to avail itself to an exclusion, exception, exemption) and (5) must not be privileged.

Personal Knowledge

Personal knowledge requires that a witness have some familiarity with the facts or documents about which they purport to testify.

Competent

Additionally, witness must be competent. Competency requires that a witness have the ability to observe, remember and relate.

Relevant, Hearsay, Privilege

The requirements of relevance, hearsay, and privilege are the same as those set forth above.

P's Evidence in Support of claim:

1. Admissibility of D's publicly accessible disciplinary records:

Character for truth or veracity: The credibility of a witness is always at issue. Accordingly, evidence that goes to the truth or veracity of a witness is normally admissible if that witness takes the stand. Here, the documents, subject to an exception for hearsay, should be admitted as they

go to the truth and veracity of the doctor should the doctor take the stand. In that the doctor will likely need to take the stand in order to mount a defense (and P can call the same in its case in chief), **evidence of the license revocation may come in.**

Hearsay

Public Records exception

One exception to the hearsay rule is the public records exception. Public records, those kept in the ordinary course of business, created and maintained by a public agency, will be admitted despite their inherent nature as documentary hearsay. Accordingly, this will not bar the admission of the records.

2. Admissibility of Statements of nurse working with Doctor

Personal Knowledge

Clearly P's daughter, should she purport to testify has personal knowledge of the statements of the unidentified nurse. The evidence is not inadmissible based upon an absence of personal knowledge.

Competent

There is further no reason to believe that P's daughter would not be competent to testify to the matters.

Relevant

Clearly the negative statements that a nurse said to the doctor accused of malpractice would tend to show that the doctor was negligent. However, the testimony must also be legally relevant. If the court determines that the probative value is substantially outweighed by the prejudicial impact, the testimony should not be admitted. Since the witness is not identified as a nurse of this specific doctor, and there is not evidence as to what she was referring to with the statement, the statements are probably prejudicial as they would tend to persuade a

fact finder that the doctor was negligent without sufficient evidence to prove the same.

Hearsay

Despite being hearsay, out of court statements may be admitted if they are not offered to show the proof of the matter asserted or if they may avail themselves to an exception, exclusion, or exemption. One such exclusion to the hearsay rule is an EXCITED UTTERANCE. A statement, which does not rely upon unavailability, may be admitted so long as it has a particular indicia of reliability because it was made at or near the time of an occurrence regarding the particular occurrence. Here, the statement is an Excited Utterance.

Accordingly, there is an exclusion to the hearsay rule since it is not offered to prove the truth of the matter. However, based upon the prejudice that would result to the Defendant (since the W is not identified and there is not evidence to what she was referring) **the evidence should likely be prohibited as unduly prejudicial.**

Privilege

There are not privilege issues involved in the admission of this evidence.

3. Admissibility of D's admission that he failed to pass Board Certified Surgeon exam on first try:

Character evidence is generally inadmissible to the extent that it purports to confer character in conformity on a particular occasion. Exceptions include when the evidence is offered to show motive, intent, plan, absence of mistake, or to show identity. To the extent that P hopes to use the surgeon's prior failure of the exam to show negligence, this is likely impermissible character evidence as it will purport to persuade a fact finder that the doctor was negligent without any actual evidence of negligence.

Moreover, the courts have specifically ruled that a professional's prior failure to pass an exam, though he/she ultimately was certified to conduct the activity, is inadmissible as unduly

prejudicial for the same reason as character evidence is generally precluded. **According, the evidence is inadmissible.**

4. Admissibility of P's wife's testimony that D's lack of competence as a surgeon caused her husband's death:

In addition to the requirements set forth above with regard to admission of testimonial evidence, OPINION EVIDENCE has its own prohibitions

Lay Opinions

Witnesses may give opinions if they relate to matters of common knowledge or are generally known in the community. They may not, however, offer expert opinions.

Expert Opinions

An expert opinion is admissible if (1) it will assist the fact finder (2) Is not commonly known in the community, (3) the expert qualifies on the subject matter of testimony and (4) and is based upon things normally relied upon by experts (experts may rely upon hearsay and may testify to ultimate issues in a case).

Here, P's wife proposes to testify that her husband's death was caused by the doctor's "lack of competence". This requires an expert opinion. In that P's wife is a school teacher and the facts do not indicate that she may be qualified to testify on the matter, **the evidence is inadmissible expert testimony and should be precluded.**

5. Admissibility of D's statement that he was sorry P died and offer to pay medical and funeral expenses:

Additionally, there are a series of events which courts refuse to offer into evidence based

on the likelihood that they will confer guilt or culpability upon a party even in the absence of direct evidence in contravention of public policy. Such events include (1) subsequent remedial measures, (2) offers to compromise, (3) offer to pay medical expenses, etc.

Here, the doctor has both apologized and offered to pay the medical expenses of the family. An offer to pay medical expenses, unlike offers to compromise, is severable meaning that the offer may be severed from any other contemporaneous statements. Accordingly, **the statement that the doctor was "sorry" should be admitted and severed from the offer to pay expenses which must be excluded from entrance into evidence.**

D's Evidence in Defense of claim:

1. **Admissibility of evidence of other lawsuits of P alleging malpractice:**

Evidence of prior lawsuits may not normally come in in order to demonstrate to a fact finder that a party has a propensity to bring lawsuits thus suggesting that this lawsuit is likely unmeritorious. However, if the prior suits are so pervasive as to make the showing permissible, it may be authorized as permissible CHARACTER EVIDENCE. Character evidence will not be precluded if it tends to show motive, intent, identity, etc. (as set forth above). Here, to the extent that prior lawsuits may show intent or common plan or scheme, they may be admitted.

Notwithstanding, it appears that the introduction of such evidence, unless pervasive, may significantly prejudice a fact finder rendering the evidence legally irrelevant (i.e. unduly prejudicial). Accordingly, **the evidence should not be admitted in that it may suggest that P's claim is unmeritorious without regard to the fact of this particular case.**

2. Admissibility of prior felony convictions:

Robbing a store 20 years ago

Felonies of a testifying witness of less than 10 years prior to the time of trial must be admitted. Felonies of more than 10 years may be admitted, at the discretion of the court, if they bear particularly on the matters before the court. Here, however, a 20 year old conviction for robbery would likely be unduly prejudicial to the trier of fact as to the P and thus should be precluded.

Moreover, the creditability of P (who is dead) is irrelevant to the finding of the court since he will not take the stand and thus his truth or veracity is not at issue. **This must be excluded**

Forgery 3 years before the surgery

Again, while issues going to truth or veracity may be properly admitted against a witness, this conviction goes to the character of the deceased. **Thus it is logically irrelevant and must be excluded.**

3. Admissibility of opinion of expert:

Expert Opinions

An expert opinion is admissible if (1) it will assist the fact finder (2) Is not commonly known in the community, (3) the expert qualifies on the subject matter of testimony and (4) and is based upon things normally relied upon by experts (experts may rely upon hearsay and may testify to ultimate issues in a case). There is no reason to believe that professor would not qualify as such and thus his testimony should likely be admitted.

Moreover, the testimony goes to the cause of the death; a crucial determination in an action for malpractice. **Accordingly, the testimony must be admitted.**

4. Admissibility of evidence that P's wife previously obtained restraining order against P:

Character conformity

As set forth above, there are some instances in which character to show conformity may be admitted. Here, however, evidence of the prior restraining order would be logically irrelevant to a determination of malpractice. It would also be legally irrelevant as tending to be unduly prejudicial to P. **Accordingly, the evidence must be excluded.**

P's wife takes stand

Even if P's wife took the stand, the existence of a prior restraining order has no impact on her truth or veracity. The fact that there were other issues between the two is largely irrelevant. **However, should P's estate be claiming loss of consortium, the evidence may be admissible to suggest that no consortium was lost. However, this is not likely enough to overcome the prior prohibition.**

5. Admissibility of evidence of informed written consent to surgery:

Assumption of the Risk

Parties may assume the risk of a particular occurrence so long as (1) they are fully informed and (2) within the scope of the risk assumed. **A person never assumes the risk of negligence and never consents to actions exceeding the consent.** Accordingly, if negligence (i.e., medical malpractice can be shown), P will not be said to have assumed the risk of malpractice and P will not be found to have consented to D's negligence. Notwithstanding, the evidence of the consent should be permitted for introduction by the Defense to show the scope of

the risk assumed (or consent given). However, it will not absolve D of the obligation not to be negligent and the jury should be given a jury instruction stating the same.



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- EXAM 1, QUESTION 2 -

JULY 2007

EXAMINATION NO. 1;

QUESTION NO. 2: ANSWER IN RED BOOKLET

John owned Blackacre on which sat a large house. John agreed to sell Blackacre to Kerri for \$250,000. Kerri and John signed a contract stating who was the buyer and seller, the address of Blackacre, the purchase price and that escrow would close within 90 days of the contract date. Risk of loss was not addressed in the agreement.

Blackacre backed up to a canyon. The grass in the canyon caught fire. The fire raced up the canyon and burned the house to the ground before the 90 day escrow period. The property was not insured and is now worth only \$150,000. John wants to close escrow. Kerri objects contending she did not agree to buy land and ashes.

On the other side of the canyon, Linda owed Whiteacre, on which sat a partially finished home. Linda orally agreed to sell Whiteacre to Mike for \$150,000. The property appraised for \$250,000 if the home was finished. Linda agreed that Mike could move into Whiteacre before close of escrow. Mike moved in and began work on the property. At the time of the fire in the canyon, he had spent \$50,000 and had just finished the home. When Linda heard of the fire, she raced to the property to see if Whiteacre was okay. She loved what Mike had done to the home and now refuses to close escrow. Mike has tendered the purchase price.

Next door to Whiteacre is Redacre, a vacant lot owned by Nick. Nick accepted \$10,000 from Ollie and agreed that Ollie could have an option for 90 days to buy Redacre for \$150,000. Ollie recorded the option. The day after the fire but within the 90 days, Ollie told Nick he wanted to exercise his option and tendered the purchase price. Nick refused as Redacre is now worth more in light of the beautiful house that has been finished on the adjacent Whiteacre.

Fully discuss John and Kerri's rights and remedies regarding Blackacre.

Fully discuss Linda and Mike's rights and remedies regarding Whiteacre.

Fully discuss Nick and Ollie's rights and remedies regarding Redacre.

If more than one remedy is available in each instance, discuss all available remedies, which are most suitable and why.

2)

Question 2

Blackacre

SOF

A land sale contract falls within the statute of frauds. It must be in writing, signed by the party charged, have the name of both parties, the purchase price, and must describe the property. Here, the description of the property is merely an address of Blackacre. Although a legal description such as metes & bounds is preferable, this is an adequate way to describe Blackacre as long as it could be identified & parol evidence is available. Here, there is no question regarding the identification of Blackacre, so the contract satisfies the statute of frauds.

Contract

A contract requires offer, acceptance, and consideration. Here, the facts say they had a contract, so this is assumed.

Equitable Conversion

At the moment a land sale contract is signed, equitable title passes from seller to buyer, and the contract can be specifically enforced. At this time, the buyer has real property, and the seller has personal property proceeds. Here, the land sale contract was signed, meaning that title to Blackacre was with Kerri the buyer, and John is entitled to only proceeds.

Risk of Loss

If risk of loss is not addressed in a land sale contract, and the destruction of the property is not by the fault of either party, then the principles of equitable conversion apply. Here, there is no evidence that either party was at fault. Per equitable conversion, risk of loss transfers to the buyer upon signing the contract, because the contract is specifically enforceable. This is the majority rule. A minority rule is that if the Uniform Vendor Purchaser's Act applies, then risk of loss does not switch until legal title passes at closing. Since this was not mentioned, we will assume the majority rule applies, and buyer Kerri bore the risk of loss.

John's Rights & Remedies

As described above, John did not bear the risk of loss. Therefore, he is entitled to close

escrow. He has a few options.

Damages

Expectation/Actual damages - If Kerry refuses to close escrow, then John can sue for breach of the land sale contract. John would be entitled to expectation damages - the full value he would have received if Kerri fulfilled her contractual obligations. Here, Kerry agreed to sell the property for \$250,000. Therefore, he is entitled to recover this from Kerri.

Incidental Damages - These are damages that are incurred due to the dealing with the breach of contract. Here, if John has to sue Kerry, he can recover incidental damages caused by his dealing with her breach.

Consequential Damages - these are special damages to the plaintiff caused by defendant's breach that were foreseeable because either a reasonable person would foresee such consequences or because the plaintiff made the defendant aware of them. Here, there is no evidence of John's consequential damages, but he may be able to collect them if he satisfies these requirements.

Liquidated damages - although the facts do not state, if the parties made a liquidated damages provision limiting damages for breach to a certain amount, then John can collect this instead of actual damages. The provision would have to not be a penalty - would have to be difficult to forecast & a reasonable prediction.

Punitive damages are not available for breach of contract generally.

Restitution

This would be that John could recover the benefit conferred onto Kerri, but there is no evidence here that Kerri got any benefit, so John is not entitled to restitution.

Specific Performance

When a person breaches a contract the nonbreaching party is entitled to specific performance if the legal remedies are inadequate & other facts as described below apply.

Inadequate - the remedies at law must be inadequate. When a sale of land is involved, damages are always inadequate because land is unique. Even though the seller is only getting money instead of the land, damages would be inadequate here because John would be left with a pile of ashes, and the property was not insured. He would have to incur much time & cost getting the property back to the way it was prior to the fire.

Definite - specific performance is only available if the terms of the contract were clear & definite, so that the court can know the parties' intentions. Here, the contract specified the price & exactly what the parties intended, so this element is satisfied.

Feasibility - it must be feasible to grant specific performance. Here, it would be possible to do so because the court would not have to be involved. Kerri would have to pay, which is feasible, since she agreed to in the first place. The old law was that land had to be in the jurisdiction where the suit is brought, but now there just needs to be personal jurisdiction over the parties, so a suit for specific performance will be possible as long as this is satisfied.

Mutuality - the old law was that specific performance had to be available to both parties. But now the law is the security of performance test. The court must be secure that if the defendant does her part, the plaintiff will perform. Here, this is satisfied because John doesn't have anything left to do - he already performed.

Defenses - finally, to grant specific performance, the defendant must not have any defenses, such as estoppel, laches, first amendment claims or hardship. Here, Kerri does not have any of these claims. The only one could be hardship because now she has to buy land & ashes instead of Blackacre, but the risk of loss was on her & otherwise, John would be stuck with this but he didn't bear the risk of loss.

Conclusion - John is entitled to either damages or specific performance. Here, specific performance is the most suitable remedy for John because he did not bear the risk & loss, and won't have to be stuck rebuilding Blackacre.

Kerri's Rights & Remedies

As discussed above, Kerri bore the risk of loss because of equitable conversion. Therefore, she is not entitled to rescind the land sale contract.

Damages

Assuming Kerri didn't have the risk of loss, she would be entitled to actual damages - the difference in value of the property now & in the contract price. Therefore, she would get \$100K because she was supposed to pay \$250K & now the property is worth \$150K.

Restitution

She didn't already pay any of the purchase price, so she doesn't appear to have conferred any benefit on John that she is entitled to recoup.

Specific Performance

Kerri is trying to get out of the contract, rather than trying to enforce it, so specific performance is not relevant.

Kerri has no rights or remedies - she must pay John for Blackacre because she had the risk of loss. If she didn't for some reason (such as the UVRPA applies), then Kerri would be entitled to the difference in fair market value & the purchase price.

Whiteacre

Contract Formation

A contract requires offer, acceptance & consideration to be enforceable.

Offer - an offer is a manifestation of commitment communicated to an identified offeree with definite terms. Here, Linda agreed to sell Whiteacre to Mike for \$150K - an offer for land must include the price, which this did. She communicated this to Mike, and thus had an offer.

Acceptance - acceptance can be by part performance (bilateral contract), by promise to perform, or by full performance. Here, it appears that Mike performed because he tendered the purchase price at the close of escrow.

Consideration - this is a bargained for legal detriment. Linda agreed to relinquish the rights to Whiteacre & Mike agreed to pay - therefore, there was consideration.

The parties had a binding contract unless there's a defense to enforcement.

Statute of Frauds

A land sale contract falls within the statute of frauds. It must be in writing, identify the parties & property, signed by the party to be charged & have the purchase price. Here, Linda orally agreed to sell Whiteacre to Mike. Therefore, the statute of frauds was not satisfied. However, there is an exception for oral land sale contracts. If the oral terms are clear and there is evidence that unequivocally indicates that a land sale contract has been in fact made, then a writing is not required. This must be an oral agreement plus the buyer must have done 2 out of the following 3 things: 1) pay full price 2) take possession of the land 3) make improvements on the land. Here, there was an oral agreement, Mike took possession with permission & he made improvements to the property. Therefore, there was a land sale contract even though it was not in

writing.

Mike's Rights & Remedies

Since they had a contract & Linda refuses to close escrow, Mike is entitled to the following remedies:

Actual/expectation damages

Mike is entitled to get the benefit of his bargain. He should get the full fair market value of the property, which here is probably \$250K since the home is finished. He can also collect the \$50K that he spent to finish the home as part of getting the benefit of the bargain if he doesn't keep the property.

Consequential Damages - Mike is also entitled to special damages that Linda could foresee either because a reasonable person would or because he made her aware of them. It is foreseeable that if Linda refuses to close escrow, that Mike will incur damages from having to move out & find another home. He can collect these damages.

Legal restitution

Restitution allows the plaintiff to recover any benefit that has been conferred upon the defendant. Here, the property was only worth \$150K when Mike moved in. He spent \$50K on improvements, and now the property is probably worth \$250K with a finished house. Therefore, Linda will have to disgorge the \$50K he spent on improvements, as well as the extra \$100K in increase in fair market value.

Specific performance

As described above regarding Blackacre, Mike can get specific performance if the legal remedy is inadequate, if the terms were definite, if it is feasible, if there is mutuality, and if Linda has no defenses. Here, the legal remedy of damages is inadequate because land is unique. Mike worked hard to make the property more beneficial & damages won't be able to compensate him adequately. The terms were definite - Linda agreed to sell Whiteacre to him for \$150K. It is feasible if there is personal jurisdiction over Linda, there is mutuality because the court can probably be sure that Mike will pay the \$150K to close, and Linda does not appear to have any defenses against Mike. Her only defense would be the statute of frauds, but as described above, this was satisfied.

Sum - the most suitable remedy for Mike is specific performance because property is unique &

the legal remedies won't adequately compensate him.

Linda's Rights & Remedies

If the court found that the statute of frauds was not satisfied by Mike's moving in & making improvements, then Linda would not be bound to the land sale contract & would be entitled to the following remedies:

Actual/Expectation Damages - if Mike moves out & Linda keeps the property, then she will not have incurred any damages.

Incidental Damages - the only damages are possibly those in dealing with the suit against Mike.

Restitution - If Mike stays on the property, then Linda is entitled to recover the benefit conferred on Mike. When she sold the property to Mike it was worth \$150K. So she would get the difference in fair market value minus the \$150K as restitution because this would be the benefit conferred on Mike. She'd have to subtract the \$50K he spent on improvements though.

Ejectment - if Linda is found to be the owner & have not entered into a contract with Mike, then she can have Mike ejected from the land. If she tells him to move out & he refuses, he may be considered a trespasser, so she can get ejectment + rental value, and possibly punitive damages.

Sum - Linda does not have any rights or remedies for Whiteacre because she entered a binding contract with Mike & must convey the land to him for the purchase price. If the court found there was no valid contract, her best remedy would be to eject Mike from the land so she can recover possession, along with the reasonable rental value & punitive damages.

Redacre

Option Contract

An option contract is a promise to keep an offer open for a specified time in exchange for payment. Here, Nick promised to keep the offer to sell Redacre open to Ollie for 90 days & accepted 10K in consideration for this. They had a binding option contract.

Nick & Ollie's Rights

Unless Nick is excused from performance, he is bound to let Ollie buy Redacre for \$150K. Here, Ollie tried to exercise the option but Nick refused because the land is worth more now. Nick may try to argue frustration of purpose - that something unforeseen & unexpected occurred that frustrated his reason to sell Redacre. However, this would fail because an increase in value to property for any reason is foreseeable.

Anticipatory repudiation

This is when a party unambiguously indicates that he is unwilling to fulfill the contract before the due date. Here, Nick has refused to sell Redacre before the 90 days was up. Therefore, this was a complete breach of contract, & Ollie is entitled to sue

Ollie's Remedies

Since Nick breached the contract, Ollie can sue for damages or specific performance.

Actual Damages - as described above, Ollie would get the benefit of the bargain. This would be the fair market value of Redacre as it now stands, minus the \$150K purchase price he promised to pay.

Consequential & Incidental - defined above. There is no evidence of these, but Ollie will be entitled to them if there was.

Restitution - Ollie can choose instead of damages to get restitution which is the value conferred upon Nick that would be unjust for Nick to keep. Here, he paid Nick \$10K for an option. Since Nick breached, it would be unjust for him to keep this money & Ollie can collect the \$10K.

Specific Performance - as defined above, Ollie can have the contract specifically enforced if the 5 conditions are met. 1) damages are inadequate because land is unique. 2) the terms were definite - Ollie could purchase Redacre for \$150K. 3) Feasible - as long as there is personal jurisdiction over Nick, it is feasible to enforce the option contract. 4) Mutuality - the court can be certain Ollie will perform since he tendered the purchase price. 5) Defenses - Nick does not appear to have any defenses against Ollie. Ollie didn't engage in laches, there's no estoppel, 1st amendment issues, and there is no hardship because the contract terms were not oppressive.

SUM - Ollie's most suitable remedy is specific performance because the land is unique & is now worth even more.

Nick's Remedies

Nick has no rights here because there was a valid option contract, and Ollie has tendered performance. Nick has breached the contract, so he has no rights & no remedies.



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- EXAM 1, QUESTION 3 -

JULY 2007

EXAMINATION NO. 1;

QUESTION NO. 3: ANSWER IN DARK GREEN BOOKLET

Harold and Wendy began living with one another in Las Vegas in 1993. Harold, a lounge singer, had a net worth of about \$200,000 when they started living together, including \$100,000 equity in a home. The couple pooled their income and paid joint bills and the monthly mortgage payments on his home. Wendy used Harold's last name and they filed joint tax returns even though they were not legally married.

In late 1999, Wendy gave birth to a baby named Barbara. Harold questioned whether he was Barbara's father because he was away from home working in Reno when he believed the child was conceived. Wendy assured him he was the father and they decided to marry. On March 1, 2000, the morning of the planned wedding and as out of town guests were arriving, Harold insisted that Wendy sign a prenuptial agreement and stated that he wouldn't marry her if she didn't. Wendy read and signed the agreement and they were married.

The prenuptial agreement stated that all of Harold's wealth, including the home and his future income would be his separate property and required Wendy to waive alimony. The prenuptial agreement also stated that in the event of divorce, Wendy would have custody of Barbara, that Harold would voluntarily terminate his parental rights and would not be responsible for payment of child support.

Harold and Wendy continued to pool their income and pay expenses, including the mortgage, during the marriage although title remained in his name alone. Barbara lived in the home with them. Harold referred to Barbara as his daughter and helped with her care, such as dropping her off and picking her up from the child care center even though he thought Barbara looked like Wendy's friend and co-worker, Larry. However, at times during arguments with Wendy, Harold would insist that he was not Barbara's father.

In July of 2006, as the marriage deteriorated, Harold signed a \$5 million contract to perform at a casino for the next four years. In January of 2007, Harold filed a complaint for annulment, claiming that Wendy had defrauded him into marrying her by falsely claiming that he was Barbara's father. He also sought to enforce the prenuptial agreement. The parties then signed a stipulation terminating Harold's parental rights and waiving child support. The stipulation has not yet been filed with the court.

Wendy seeks your advice. Among other things, she thinks she had a common law marriage and believes she is entitled to half of everything, including the equity in the house (which is now \$300,000) and the \$5 million contract. She wants alimony and child support.

Evaluate her rights.

3)

EXAM 1 QUESTION 3

Wendy seeks your advice. Among other things, she thinks she had a common law marriage and believes she is entitled to half of everything, including the equity in the house (which is now \$300,000) and the \$5 million contract. She wants alimony and child support. Evaluate her rights.

Jurisdiction in Nevada for Annulment Proceedings

A state has jurisdiction for annulment proceedings where the marriage took place or where there is personal jurisdiction.

Here, the marriage location is not explicitly stated but as H and W lived in Las Vegas and W worked in Reno, Applicant assumes the marriage took place in either Las Vegas or Reno and therefore in Nevada.

Therefore, the Nevada Court has valid jurisdiction over these proceedings and Nevada law will govern. As to the divorce counterclaim suggested below, there is jurisdiction because W has been in NV as her intended domicile for more than 6 weeks before the action, there is also personal jurisdiction of H as a resident of NV.

Whether W had a common law marriage beginning in 1993

Though Nevada will recognize a common law marriage that was valid in another state through the full faith and credit clause of the constitution, Nevada does not have common law marriage. Attempted common law marriage in Nevada is governed by contract law principles and therefore a party is not without remedies if the parties cohabitated, pooled resources and expenses, and lived as if they were married (such as holding out one another as husband and wife) as such facts would be supportive of allegations that there was a contract between the parties. To evidence such contract, there must be a showing by the plaintiff that there was a present intent between the

parties to mutually assent through some objective manifestation that they would carry on as husband and wife as to the sharing of assets and responsibilities and subsequent reliance on such agreement. Courts in Nevada will allow for quasi community property under a theory of unjust enrichment to protect the parties' rights in their bargain. Because there is no common law marriage in Nevada, however, alimony (which is peculiar to the ending of a marital relationship) is not a part of the remedy under this theory.

Here, W will have to show that when she and H had the present intent and agreed to share responsibilities and obligations as if they were husband and wife. Facts in W's favor include the fact that they pooled their income (mention is made of H's profession as a lounge singer but no mention of W's profession), paid joint bills and the mortgage on H's home. W's use of H's last name (likely without his objection) would go to a showing of the existence of a contract between the two. Additionally, they filed joint tax returns which is supportive of their quasi-marital relationship. If W can show these facts without adequate rebuttal by H, who would perhaps argue that no such contract existed and the parties knew that fact because they did actually get married in 2000 (this would not be a good argument for H because it is not essential that W have any belief that they were in fact married as the analysis is under contract principles), then W's rights include a disposition of the property as *quasi-community property*. W cannot claim alimony under this theory but she can recover her share of community property.

Therefore, W cannot get alimony under the theory of contract liability associated with unjust enrichment but she is entitled to her share of community property. As to alimony, W will have to show that the marriage of March 2000 was valid and cannot be annulled.

Whether H has grounds to annul the marriage of 2000

An annulment of marriage is possible where the marriage has some defect that was in place at the time the marital relationship began. Fraud in the inducement is a claim that can be waived if, upon discovery of the fraud, the party does not act on it.

Here, H could have taken reasonable steps to determine whether B was his child. Additionally,

he believed that it was not his child for a long time before he filed for annulment and could have arguably waived his right to void the marriage. If an annulment is granted, the property in question is disposed of as quasi marital property because an annulment makes it as if the marriage did not occur.

H does not likely have grounds for annulment on these facts and W should counterclaim for divorce as well as answer his complaint.

Pre-marital Agreements -- Unconscionability

A pre-marital agreement is a valid and enforceable contract as to the division of property but cannot control alimony if the result of the provision would put a party on welfare and certainly cannot determine child custody or support. A pre-marital agreement is judged by its voluntariness and disclosure under the umbrella of an unconscionability analysis which is determined at the time the contract was signed.

Here, though H disclosed H's property and provided the home and income would remain separate. This provision alone may be enforceable but the court looks to the totality of the circumstances and would find that W could not have possibly made a knowing voluntary waiver of her statutory rights when presented with the agreement as the out of town guests were arriving and *on the morning of the wedding*. The courts have held that a marriage that could easily be called off for more time because it was spontaneous may not give rise to unconscionability but the fact here of out of town guests suggests an involved affair and that the pressure on W was probably great as H would not marry her if she did not sign then and there. Additionally, W did not have the opportunity or the advisement to consult outside counsel, nor was there time.

Therefore, the court will hold the pre-marital agreement void as unconscionable and therefore its provisions will not control. Even if it were valid, the provision of child custody and support could not stand and there are also the quasi community property rights that would not have been waived by the agreement because they exist under separate considerations.

Distribution of Community (or Quasi-Community) Property

The analysis of community or quasi community property is the same because both have the same qualities. There is a presumption that all property that is not separate property by clear and convincing evidence is community property. Separate property is property that is received by parties to a marriage as a gift, property that was separate between the parties before marriage, and other things such as tort claims for personal injury. Community property includes income from community labor and appreciation on property attributable to community assets.

Here, W wishes to claim interests in the home equity and H's contract to perform at the casino as a lounge singer for four years starting July, 2006.

Home Equity as Community Property

In Nevada, where parties to a marriage or parties to a relationship giving rise to quasi community property disposition pay the mortgage on a property that was separate property before the relationship began, a pro-ration approach is taken. Under the pro-ration approach, which is modified from the California approach after which it is patterned, the court looks to the payments made with separate property and the payments made with community property during the relationship to determine the proportion of the property appreciation that is to be distributed as separate or community property. Title can indicate intent to gift property but there is still an interest though title is separate.

Here, W has \$100,000 equity in his home to start and at the time of this action the home has \$300,000 in equity, representing a \$200,000 increase over the years of the relationship through payments made with pooled incomes. Of the \$300,000 in equity, 1/3 is separate property (\$100,000) and 2/3 would be community property and divisible between H and W equally. W therefore has a right to 1/2 of 2/3 of the \$200,000 increase in equity. Separate title does not have a bearing on this.

Therefore, W can claim a community interest in the increase in equity of the home owned by H.

H's income under the 4 year contract to perform at the casino

Though there is provision for division of business assets as far as ownership of a business or asset is concerned, the marital interest in income, even under a contract that extends beyond the termination of the marriage is such that the community interest is only in those entitlements that arise during the marriage. If the interest was an asset or business which involved separate property as the initial interest the court would employ the Perira and/or Van Camp tests though Nevada Courts favor Perira which favors the community estate. Separation or the filing of a complaint is not sufficient to terminate a relationship for community property purposes, the court looks to the actual date of decree.

Here, though H's income under the 4 year contract to perform at the casino is for \$5 million, he cannot be paid unless he performs for the 4 years and therefore even with the lump sum amount, W's share will only extend to those H earns until the termination of the relationship. W can attempt to argue that the contract is an incentive plan and therefore the \$5 million is entirely community property because, like a stock option, it may not be exerciseable until a later date but there is a present interest in it. If W can successfully argue this, then she will be entitled to a pro rata share of the money as determined by the amount of time from the arising of the interest to the end of the relationship divided by the amount of time from the end of the relationship to the exercising of the option/interest. It is unlikely that the courts would view the contract as an incentive plan as opposed to a compensation plan to be paid in proportion with performance over 4 years. If W can succeed in her argument (say, the \$5 million was paid to H up front), she would be entitled to a pro rata share that arises from community labor.

Therefore, W is certain to get a community property interest in the contract from the date it was effective, July 2006, to the date of the decree arising from this case.

H's \$100,000 assets counted as part of his \$200,000 net worth (the \$200,000 includes the \$100,000 equity in the home that he started with as separate property)

Where a party spends separate property without express reservation on community expenses, that is presumed to be a gift to the community and cannot be recovered as they have transmuted into

community property as a result. Commingling of funds creates a difficulty as far as one spouse will wish to claim that they can trace the remaining separate property.

W has no claim on H's assets as far as they were kept separate but on these facts they may have had a joint account though there is no indication one way or another. If they had a joint account, H cannot claim reimbursement for expenditures for community expenses but he may wish to claim that he has a separate property interest in things purchased with separate property that were not for the community but there are no facts to use in this analysis.

Therefore, W should be advised that through further discovery such as examination of affidavits of financial condition, an argument as to her interests may arise.

Alimony for W

As discussed above, alimony is not valid for a quasi-community property analysis. Additionally, as discussed above, a party cannot waive alimony in a prenuptial agreement where the result would essentially put that party on welfare (in need of state support). If parties were married, however, the courts can award a spouse alimony for their support. Factors involved in determining alimony include the disproportionate earning power of the parties, whether rehabilitative alimony is necessary to allow one party to obtain an education, and things like fault to the extent that the fault has a bearing on the economic interests of the parties. Another factor would be the length of the marriage.

Here, W is entitled to alimony as it seems that H was the main earner of the family even though the premarital agreement purported to be a waiver of her rights. W can argue facts such as the amount of time she stayed home or supported H through the marriage, her level of education or length of time out of the workforce. . . the facts indicate B was put into day care and W has a co-worker and therefore W did have a job though her income is not indicated. It likely pales in comparison to the income of H as indicated by his new \$5 million lounge singer contract. The relationship began in 1993 though the wedding only happened in 2000 so the factor of marriage length is calculated from 2000 to 2007. A court would consider 7 years a considerable amount of

time in which the parties would have become accustomed to a certain standard of living.

Therefore, W is likely to be entitled to alimony though the amount is unclear on these facts.

Custody of B

As discussed above, a premarital agreement cannot determine child custody or support. The courts in Nevada employ what is known as the child's best interest standard for determining custody -- the court looks to factors such as the likelihood of the custodial parent to allow the child visitation with the noncustodial parent and what the child's emotional and physical needs are. There is no presumption any longer under the former tender years doctrine that a young child be with their mother and there is no gender based parental preference, the only standard is the child's best interest standard. A stipulation as to custody will not be binding on the court as the child's best interest standard is paramount.

Here, the facts indicate that B was cared for by both parents though H may be emotionally hard on her because of his dislike for W and his belief that she is not his child. W is likely to allow visitation of B by H and with child support and her job will be able to provide for her financially.

W should be advised that regardless of the stipulation the court must still make a determination of what is in the child's best interests and all that can be done is present evidence to show W's custody would be in the best interests and leave it to the judge's discretion otherwise.

Termination of Parental Rights in H - Putative Father

A child born in wedlock is presumed to be the child of the woman's husband, however, a child born out of wedlock can be legitimized if the alleged father held that child out as their own. This is an objective standard.

Here, B was born out of wedlock but H behaved as if he were her father by calling her his daughter and helping with her care. Though H will claim that he did not ever believe B was his daughter, that was his subjective secret intent and does not comport with objective manifestations

of his behavior. He is her father on these facts and cannot waive his parental rights simply by signing a stipulation.

Therefore, H is B's father on these facts and a consideration as to custody (discussed above) and support (below).

Child Support for B

In Nevada a determination of child support is made so that the non custodial parent has a monetary obligation to the care and support of a child. If there is one child in question the percentage is 18% of gross income except where the income of the noncustodial parent is over a statutory amount (around \$200,000) then the court abandons the percentage and uses discretion and balancing.

Here, the amount of B's support will likely not include the % because \$5 million over 4 years is far and above the statutory amounts and caps. The court will look to the circumstances such as any special needs B has and the costs of maintaining her.

W, if she gets custody of B, will be entitled to receive child support in an amount determined by the court.

Additional Advice to W

W should not only take the above into consideration but she should answer the complaint for annulment and counterclaim for divorce. W should be disabused of the notion that she gets "half of everything" because she is only entitled to half of community property, which is not "everything" because of separate property implications.

END OF EXAM



**STATE BAR OF NEVADA
JULY 2007 EXAMINATION
APPLICANTS' ANSWERS TO QUESTIONS
OF NEVADA BOARD OF BAR EXAMINERS**

- EXAM 1, QUESTION 4 -

JULY 2007

EXAMINATION NO. 1;

QUESTION NO. 4: ANSWER IN ORANGE BOOKLET

Pete is a Utah resident. His former college roommate, Dennis, lives in Nevada. In June of 2005, Pete flew from Salt Lake City to Las Vegas for a weekend of partying. Dennis picked Pete up at the airport in his new sportscar and the two went out on the town, ending up in Ben's Bar in Primm, Nevada, which is located near the California state line. They drank 10 rounds of Tequila shooters at Ben's Bar before they staggered out, planning to drive back to Las Vegas. Disoriented, Dennis got on I-15 heading toward California. Just after crossing from Nevada into California, Dennis lost control of his car and crossed into the path of a van driven by Tom. Tom was a citizen of Mexico, where his family still lives, but Tom was legally residing in California at the time of the accident.

Tom was killed instantly. Pete suffered head and neck injuries which were exacerbated by Sam, who was driving from his home in St. George, Utah, to Los Angeles on business, saw the accident, and stopped to render aid, pulling Pete from the sportscar in case the car caught fire. Dennis suffered no injuries.

Assume for purposes of this question the following law exists:

1. Mexico limits recoveries for wrongful deaths to \$25,000, while neither Nevada nor California imposes any limits;
2. Nevada, California and Utah have statutes making it a crime for bars to serve liquor to intoxicated patrons but only California has a true so-called "dram shop" act, imposing civil liability for doing so;
3. Utah and Nevada have automobile guest statutes that require "willful misconduct" before a passenger can recover from the driver of the car in which the passenger was riding when injured, whereas California does not; and
4. Nevada has a two year tort statute of limitations, whereas California and Utah have shorter one year limitation periods.

On November 1, 2006, Tom's family sues Dennis and Ben's Bar in the Nevada District Court for Clark County, Nevada.

On May 31, 2007, Pete sues Dennis, Ben's Bar, and Sam in the United States District Court for the District of Nevada, properly invoking diversity jurisdiction under 28 U.S.C. § 1332.

Identify and discuss each party's claims and defenses, and which jurisdiction's law should apply to each party's claims and defenses.

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Tom v. Dennis and Ben's Bar in NV District Court

Jurisdiction

The NV district court is a court of general jurisdictions. It has subject matter jurisdiction over any civil case if the damages are \$10K or more (this must be specifically pleaded as "damages in excess of \$10K").

Nevada can exercise personal jurisdiction over any person who is domiciled in Nevada, is present in Nevada, consents to personal jurisdiction in NV, or can be reached under the state's long arm statute. The state's long arm statute reaches to the full extent permitted by the US Constitution. Personal jurisdiction is constitutional if the defendant has minimum contacts with the state, purposefully availed himself of the benefits of the laws of NV, where an exercise of jurisdiction would comport with fair play and substantial justice, where jurisdiction would be fair, where the claim is related to the defendant's contacts with NV, and where the state has an interest in providing a forum for its domiciliaries.

Here, Tom has chosen to sue in NV District Court. This action will be brought by Tom's survivor, citizens and residents of Mexico. The domicile of the plaintiff usually does not matter. Further, in a wrongful death action you consider only the domicile of the decedent, not the decedent's representative, and even then it would only matter if the decedent was a defendant. Here, Tom's heirs have consented to personal jurisdiction in NV as evidenced by their bringing suit there,

The court has personal jurisdiction over Dennis because Dennis is a Nevada domiciliary and apparently a resident of Nevada. Jurisdiction is proper over Ben's because Ben's is a business located in Primm, NV. If Ben's is a corporation then they will have appointed an agent for service of process. The court does not need to exercise its long arm statute to get jurisdiction over these parties

Venue - venue is proper in the county where the defendant resides.

Here, Ben's is in Primm, if this is in Clark county (facts do not say, but it is likely since it is so close to Vegas, which is in Clark County) then venue is proper in Clark County. It is not clear in what county Dennies lives.

Choice of law

1st restatement - vesting rights approach

Under the 1st restatement the choice of law is based on the place of injury for a tort case since the place of injury is the place where the right "vests". The court will apply its own law if the issue is procedural rather than substantive. Although statute of limitations periods was traditionally thought to be procedural it is now considered substantive.

Here, the likely causes of actions are all tort claims: wrongful death, battery, dram shop civil liability (tort-esque more than contract), guest statute, negligence. The injury at issue for Tom occurred in California. Thus, under the 1st restatement California's tort law will apply to his case.

If CA law does apply then Tom will likely be able to recover on his dram shop claim. The major difficulty here is that Ben's is located in NV. Even though its conduct would constitute a tort in CA, it seems unfair to apply CA law to conduct that Ben's engaged in in NV, especially since Ben's had no control over whether the patrons remained in NV after they left Ben's. However, the better argument is likely that it is completely foreseeable that patrons who consume 10 rounds (!!!) of tequila shooters will be so disoriented that they might drive into CA (nearby) and hurt someone.

However, application of the California statute of limitations will prevent Tom from bringing his case. CA has a one year statute of limitations. By contrast, NV has a 2 yr period. Because statute of limitations period are now considered substantive, NV will have to apply CA law on this. If NV does so, the 1 yr period will apply and Tom's action will be blocked because the

injury occurred in June of 2005 and he brought his lawsuit in November of 2006. One year had already passed. The statute of limitations had run.

2nd restatement - significant relationship approach

Nevada favors the 2nd restatement choice of law approach (significant/substantial relationship). Under the 2nd restatement the court looks to public policy factors such as where the injury occurred, which state has the most substantial relationship to the injuries, where are the parties domiciled, whether a plaintiff would be deprived of any relief if the other state's law were used, what relationship NV has to the issues, what public policy factor weighs in favor of applying NV law, etc.

Here, the injury itself occurred in California, not NV. However, both Defendants are NV residents and the intoxication that led to the accident (both the consumption of tequila and the provision of) occurred in NV. If NV applies its own law then there will be no dram shop liability, which supports NV public policy (NV public policy does not endorse dram shop liability). NV has an interest in making sure its own rules re: dram shop liability are used for cases brought in NV court. Further, using NV will ease application of law, since the court is likely already familiar with NV law on these topics.

Thus, under the substantial relationship NV could conceivably conclude that NV has a significant enough relationship to apply its own law.

If NV law is applied there will be no dram shop liability because NV does not provide such a statute. Although Ben's could be criminally prosecuted for serving intoxicated patrons in NV, they will not have any civil liability. This is a more equitable result (see discussion in above discussion re: problems with applying CA dram shop to NV tavern).

If NV law is applied then the NV statute of limitations period will also apply. In NV the statute of limitations for most tort actions is two years. Here, Tom brought his case within two years of the injuries so the statute will not have run. Although he will not be able to recover from Ben he

will be able to recover from Dennis, the intoxicated driver in this action. He can bring his wrongful death, negligence, and possibly even battery actions against Dennis, whose tortious actions caused Tom's death.

Government interest test

Under the govt interest test the court considers which state has a stronger interest in applying its own law. Under this approach the forum state almost always applies their own law. Here, Tom will have a strong argument that NV should apply NV law. The defendants are NV residents, the drinking at issue occurred in NV, the driver is likely licensed in NV.

Under the govt interest test NV will apply its own law. The result will be identical to the 2nd restatement (above).

Claims

wrongful death - under survival statutes the survivors of a decedent tort victim may bring the decedent's claims on his behalf. The recovery goes to the estate.

Tom's survivors from Mexico can bring the below claims on his behalf.

dram shop tort claim - under dram shop acts the plaintiff must show that the defendant knowingly provided alcohol to an overly intoxicated person.

Here, the facts state that Dennis and Pete consumed 10 shots of tequila at the bar. If the same bartender was working the entire time (or if the previous bartender told the new one coming on shift) how much the two had been drinking then liability could be imposed on Ben's in a jurisdiction that has a dram shop act. More facts are needed regarding how much time elapsed during their drinking in the bar (liability for 10 shots in one hour more likely than for 10 shots in 5 hours).

negligence - a prima facie case of negligence requires a showing of duty, breach of duty,

causation (actual and proximate), and damages.

Here, the most likely defendant for negligence would be Dennis. Dennis as a driver was negligent per se by driving while intoxicated. Both CA and NV make the legal limit .08BAC. Thus, he was breaking the law in both jurisdictions and protecting victims like Tom (fellow motorists) from injury is one of the harms that the DUI laws aim to protect against. Thus, T will easily be able to show duty and breach. Further, causation in the present since but for Dennis' driving negligently while intoxicated he could not have crossed into the path of oncoming traffic.

battery - a prima facie case of battery requires a showing of a harmful or offensive contact with plaintiff's person. Intoxication, even voluntary is a defense to intentional torts.

Here, Dennis' intoxication, even though voluntary, will be a successful defense to the intentional tort of battery, which requires a specific intent. However, Tom can argue that it was foreseeable when he started drinking, before he was intoxicated, that he would have to drive home since they were way out in Primm, far from where D likely lived in Vegas. Still, this goes more to negligence than the intentional tort of battery, since killing someone, while a risk, is not substantially certain to occur if you drive drunk.

Pete v. Dennis, Ben's Bar and Sam in US District Court in Nevada

Jurisdiction

Diversity jurisdiction

Diversity jurisdiction in federal court requires that no plaintiff be a resident of the same state as any defendant and that the plaintiff allege an amount in controversy of more than \$75K. Here, Pete was a resident of UT, Dennis was a resident of NV and Ben's is a resident of NV. It is not clear if the amount in controversy is more than \$75K. More info would be needed. This is immaterial though since diversity is destroyed here by the plaintiff (Pete) and one of the defendants (Sam) both being Utah residents.

Although Sam was driving from St. George to CA, he had not changed his residency or domicile. Changing your domicile requires presence in the place with the intent to remain. Sam was going on a temporary trip for business. Even though Pete was visiting Dennis in Nevada, he was still a UT resident and had not abandoned Utah.

This action should be remanded to state court. A notice of removal is only proper if it is filed within 30 days of the first removable document. The time limit is likely the same for remand. But since the court lacks SMJ it can dismiss at any time since without subject matter jurisdiction.

The same choice of law analysis as above applies. Here, NV will apply substantial relationship (2nd restatement again). Under that test the NV Stat of lim will apply and Pete will just barely make it under the gun before the statute runs because his May 31 filing is still within the 2 years.

As for causes of action, Pete will have a cause of action against Dennis and Ben only if CA law is applied, thus only under the 1st restatement, since CA does allow recovery for dram shop and for guest statute. Pete will argue that Dennis' drunk driving was willful misconduct. If NV law applies his recovery could be reduced by his contributory negligence in drinking and riding with a drunk driver.

Under NV Sam will not be liable as a rescuer. NV does not impose liability on good samaritans who stop to rescue in the absence of gross negligence or an intentional tort. Here, no arguments to satisfy that can be made against Sam, who stopped to help.

For both cases the Mexico tort limits are immaterial.



**STATE BAR OF NEVADA
JULY 2007 EXAMINATION
APPLICANTS' ANSWERS TO QUESTIONS
OF NEVADA BOARD OF BAR EXAMINERS**

- EXAM 2, QUESTION 1 -

JULY 2007

EXAMINATION NO. 2;

QUESTION NO. 1: ANSWER IN PURPLE BOOKLET

Art is a struggling artist without a checking account. One night, Art designed and printed a personal check as a gag gift for his wife's birthday. The check was drawn on "First One Bank" in the amount of \$10,000.00. Art signed the check as drawer, but left its "pay to the order of" line blank. After finishing the check, Art drank seven shots of vodka, and headed for an upscale clothing boutique owned by and attached to the home of a man named Taylor.

Art went to the boutique to pick up a tuxedo for which he had previously paid Taylor \$150.00 to rent for his wife's birthday party. On the way to the boutique, Art decided to take something home as a birthday gift for his wife even though he had no means to pay for it.

Art stumbled through the open front door of the boutique. Inside, Art retrieved his rental tuxedo and grabbed a skirt for his wife. As Art started for the door, Taylor appeared and ordered him to "drop the stuff." Instead, Art punched Taylor, and ran out the door with both the tuxedo and skirt.

Deciding that he needed money, Art offered to sell the tuxedo to a man named Kevin, the owner of a formalwear store. Kevin instantly assessed the tuxedo's retail value to be \$2,000.00, and eagerly paid \$50.00 for it. At Art's insistence, Kevin promised that he would keep quiet about their bargain.

Eventually, Art was charged with a felony crime as a result of his actions at Taylor's store. Art demanded to represent himself at trial even though he admitted in open court that he had no legal training. The trial judge refused the demand without canvassing Art, ruling that "attorneys must represent all defendants in my court."

Over defense objection, the judge instructed the jury at trial that "a defendant can be found guilty only if the evidence proves guilt by a preponderance of the evidence." At the conclusion of the trial, Art was found guilty.

Between his trial and sentencing hearing, Art learned that the prosecutor knew, but did not tell his defense attorney, that before trial Taylor identified someone other than Art as "the guy who ripped me off." Very little evidence other than Taylor's testimony supported the determination that Art committed the crime with which he was charged.

Upset about the guilty verdict, Art decided to leave town, took the check he designed and printed for his wife, and gave it to a car dealer named Cal in exchange for a used pickup.

Just as he was about to give Art the title to the pickup, Cal said, "The deal's off." Art neither took possession of nor title to the pickup, although he had negotiated for both.

Fully discuss and identify the elements of any common law crime which may reasonably be prosecuted on these facts, together with any defense or defenses to each crime discussed.

Identify and fully discuss any constitutional error which occurred during Art's trial.

Question No. 1

CRIMES

In order to be found guilty of a criminal act, one must both perform a prohibited act and have the prohibited mental state. Specific intent is where the actor specifically intends to accomplish the prohibited act. General intent is where the actor is aware of the nature and circumstances comprising the crime. Malice, lies between general and specific intent, and is the mental state for common law murder and arson. Strict liability requires no guilty mind whatever, only a prohibited act. The model Penal Code uses the mental states of intentionally, knowingly, recklessly, negligently, or strict liability.

Forgery

Forgery consists of: 1. Making or altering, 2. A writing, 3. Making it false, 4. With fraudulent intent. Art made a writing that was false, but he did not do so with fraudulent intent, thus, he would not be guilty of forgery at the time he made the gag check. Later when he attempted to use the check to purchase the used pickup, he

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had altered the writing with the requisite intent and could be successfully prosecuted for forgery.

7-26-07-Question 1

Art may claim the defense of insanity because he was so upset about his guilty verdict. Nevada uses the M'Naughtin test for insanity, which requires one not know the difference between right and wrong or appreciate the criminality of her acts. Here it would seem Art's mental confusion resulting from his upset about his guilty verdict would likely not rise to the level of insanity.

Larceny of the skirt

Larceny consists of: 1. Taking, 2. Carrying away, 3. Personal property, 4. Of another, 5. Through trespass, 6. With the intent to permanently deprive. Here Art took the skirt with the intent to permanently deprive meeting all the requirement of larceny. Larceny is a felony at common law and a specific intent crime. If the item is worth more than \$250, the crime is grand larceny in Nevada.

Art will raise the defense of intoxication. Involuntary intoxication is an absolute defense because it negates all volition. Voluntary intoxication is a defense only to specific intent crimes because the state of intoxication prevents the individual from forming the

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requisite mental state of specific intent with which to commit a crime. Here Art was voluntarily intoxicated and thus has a valid defense to a specific intent crime of larceny.

Burglary

7-26-07-Question 1

Burglary consists of: 1. Breaking, 2. Entering, 3. The dwelling, 4. Of another, 5. At nighttime, 6. With the intent to commit a felony. Here Art made entry through the front door by opening it, thus constituting breaking. He then entered the dwelling of another at nighttime. The boutique was part of Taylor's dwelling. Art had formed the intent to "take something home" prior to entering and thus entered with the intent to commit a felony.

Burglary is a specific intent felony, and Art's voluntary intoxication may be successfully interposed as a defense.

Battery

Battery is the unlawful application of force on the person of another (In Nevada, it is the willful and unlawful application of force). When Art punched Taylor, he unlawfully applied force to the person of Taylor

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committing a battery. Battery is a general intent crime and Art's voluntary intoxication will not be a successful defense. Art could attempt to interpose the defense of self-defense. One is permitted to defend one's self against a credible threat of battery. Here Taylor "appeared and ordered him to 'drop the stuff'" which Art would argue put him in reasonable apprehension of an imminent of physical altercation. This would be an unreasonable argument based on the circumstances because a shopkeeper has a privilege to detain suspected thieves and Art knew that he was stealing.

Robbery

Robbery consists of: 1. Taking, 2. Carrying away, 3. Personal property, 4. Of another, 5. Through the use of force or threats, 6. From the person or his presence, 7. With the intent to permanently deprive. Here when Art was confronted with the skirt, he reacted by striking Taylor and thus converting the larceny of the skirt into a robbery of the skirt. At common law, robbery is a specific intent crime, and Art's voluntary intoxication would serve as a successful defense. In Nevada, robbery is not a specific intent crime and thus the defense would not succeed.

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The tuxedo

When Art initially took the tuxedo, he had paid for it and was entitled to possession. Art may be charged with larceny of the tux through the continuing trespass doctrine because while initially he intended to return the tuxedo, later he changed his mind and sold it for profit. The continuing trespass doctrine satisfies the element of "intent to permanently deprive" with the defendant's later disposal or destruction of the property.

Alternatively, Art may be charged with embezzlement. Embezzlement consists of: 1. The fraudulent, 2. Conversion, 3. Of personal property, 4. Of another, 5. While in lawful possession. Here Art was in lawful

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possession of the tuxedo when he then converted it to his own use, fraudulently, by selling it for profit. The tuxedo was the personal property of another.

False pretenses

Art could be charged with false pretenses in attempting to purchase the car with the gag check. False pretenses consists of: 1. Obtaining title, 2. To the personal

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property, 3. Of another, 4. By misrepresentation of past or existing fact, 5. With fraudulent intent. Where one attempts to obtain only possession, the crime is larceny by trick. Here Art was unsuccessful in obtaining title to the used car thus could not be successfully charged with false pretenses. Art could be charged with attempted false pretenses. Attempt consists of: 1. Specific intent, 2. To commit the target crime. In Nevada, one must act in a way that specifically tends to accomplish the crime. Here Art specifically intended to obtain title to the personal property of another by misrepresenting the nature of the commercial paper with an intent to defraud the salesman. Art could be successfully charged with attempt on this count.

Kevin

Kevin could be charged with receiving stolen property. Receiving stolen property consists of: 1. Receiving property, 2. Known to be stolen, 3. For

personal advantage. Here Kevin purchased the tuxedo from Art but only paid \$50 for it. The difference in market value versus what he paid should have put Kevin on notice that this property was stolen. A reasonable person would have recognized that no one sells a \$2,000 tuxedo for \$50.

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Additionally, the deal was premised on Kevin's promise that he would keep quiet. Kevin would likely be prosecuted for receiving stolen property.

Kevin and Art could be charged with conspiracy to commit larceny. Conspiracy consists of: 1. An agreement between two or more people, 2. An intent to agree, 3. An intent to accomplish the target crime. A majority of states also require an overt act, however, not the common law nor Nevada. Here it seems unlikely that the two could be successfully prosecuted for conspiracy because the facts do not show that Kevin had any prior knowledge, much less entered into any agreement with Art.

PROCEDURE

The 6th Amendment guarantees criminal defendants the right to assistance of counsel. Since Art was charged with a felony, which is generally defined as a crime punishable by death or more than one year in prison, he is entitled under the 6th Amendment to an attorney at state expense if he is unable to afford his own. Where there is the potential for incarceration, the state must provide an attorney to indigents at no cost.

An individual has a right under the 6th Amendment to represent himself. The waiver of the 6th Amendment right

to counsel must be knowing, voluntary, and intelligent. Here the facts do not indicate whether the waiver would meet this criteria because the judge summarily dismissed Art's request. This violated Art's 6 Amendment right to counsel, which includes the right to represent one's self.

The 6th Amendment right to counsel has been incorporated to the states through the 14th Amendment. Art's criminal case would be heard in state court because there is no federal criminal common law.

The judge's jury instruction violated Art's right to due process by changing the burden of proof required in a criminal case. In a criminal case, a defendant must be proven guilty by the state by the standard of beyond a reasonable doubt. The jury instruction in Art's case ran afoul of this constitutional guarantee by lowering it to the level used in civil cases.

A prosecutor has the duty to disclose all exculpatory evidence to the defendant that may be material. Here the prosecutor failed to produce evidence of the victim's identification of another individual. This evidence is exculpatory and the prosecutor had a duty to disclose it to Art. Art's sentence could be reversed on appeal unless lack of disclosure was deemed harmless beyond a reasonable doubt. In this circumstance, that appears to be an impossible conclusion to draw and Art's sentence would be

reversed.

Since it is likely Art's conviction will be reversed

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based on the Brady violation, the prosecution may not be able to retry Art if the appeal's court reverses also for an insufficiency of the evidence. Where a conviction is reversed for insufficiency of the evidence, the defendant may not be tried again because this violates double jeopardy. Double jeopardy demands that a defendant be held in jeopardy of life or limb only once for a specific charge. Jeopardy attaches in a bench trial when the judge swears in the first witness, in a jury trial, when the jury is sworn.



**STATE BAR OF NEVADA
JULY 2007 EXAMINATION
APPLICANTS' ANSWERS TO QUESTIONS
OF NEVADA BOARD OF BAR EXAMINERS**

- EXAM 2, QUESTION 2 -

JULY 2007

EXAMINATION NO. 2;

QUESTION NO. 2: ANSWER IN YELLOW BOOKLET

In 1967, Jack was nineteen and was drafted into the U.S. Army to fight in Vietnam. Before reporting for duty, Jack attended a musical performance in Incline Village, Nevada. At the show, he drank an alcoholic beverage that was handed to him by a stranger. After he drank the beverage, Jack began to hallucinate and saw flashing colors and flying pigs.

After the show, Jack walked in Incline Village, Nevada for hours. He saw a lawyer's office, walked into the office, and asked if he could have a will executed because he was going off to war. A lawyer prepared a will for him, and had Jack sign the will with two people in the room who signed the will. Jack read the will and it indicated he would leave all his property to his sister, Mary. The will stated Jack was an unmarried man.

Jack fought in the war and returned with no recollection of his life before the war. Jack married Kelly in 1975 and subsequently they had two children, Larry and Nikki.

On June 1, 2007, Jack made an offer on a home in Las Vegas that was accepted. Escrow was scheduled to close on the Las Vegas house on July 1, 2007.

On June 15, 2007, while in Las Vegas, Nevada, Jack executed a form, typed, will and had it signed by Larry and a stranger as witnesses. The stranger watched Jack sign a document the stranger thought was a marriage license. The stranger then signed a separate piece of paper and indicated he had witnessed Jack signing the other document.

In the 2007 will, Jack gave: (1) Las Vegas house to my wife, (2) my vintage Porsche automobile to my children, (3) my 1000 shares in ABC Corp. to my oldest child, Larry, and (4) any remaining property to the American Legion.

On July 1, 2007, Jack closed escrow on the Las Vegas house. On the same day, July 1, 2007, Jack made an offer to purchase a house in Incline Village, Nevada. The offer was accepted and on July 15, 2007, escrow closed on the Incline Village house. The title to the Las Vegas and Incline Village houses listed Jack and Kelly as tenants in common, each owning a fifty (50) percent interest.

Jack died on July 17, 2007. At his death, Jack owned the vintage Porsche automobile, 1000 shares of stock in ABC Corp., a retirement fund, the house in Las Vegas and the house in Incline Village. Jack owned the car and stock as separate property. The retirement fund lists Kelly as the beneficiary.

On July 20, 2007, Jack's will is read. Mary is alive when Jack dies. At the will reading, Peggy and her son Ron appear, and Peggy states that she is Jack's wife. Peggy states that she and Jack were married in 1966. Peggy states that she lost touch with Jack when he went to the war and believed he had died in the war. Peggy has a valid marriage certificate to substantiate her marriage to Jack. Peggy states that Ron is Jack's son and a subsequent DNA test matches Ron and Jack's DNA.

When the will is read, Kelly can present no evidence that she and Jack were actually married. In fact, even though Jack and Kelly had a marriage ceremony, they never obtained a marriage license.

Analyze how Jack's interest in the above-mentioned property will be distributed. Include analysis of all claims that can be made to that property.

2)

1967 Will

To have a valid will, the testator must have a present testamentary intent, have capacity, sign, and have two witnesses sign who acknowledge the signature or will. When Jack made the 1967 will, he was 19, so he was of valid age, he signed the will in front of two witnesses, and the two witnesses signed. However, it is unlikely that Jack had the mental capacity at the time to make the will.

Lack of capacity

To have capacity to make a will, the testator must understand the nature of his acts, understand the nature and extent of his property, and know the natural objects of his bounty.

When Jack made the will, he had just drank an alcoholic beverage that made him hallucinate and see flashing colors and flying pigs, so the drink was likely drugged by the stranger who handed it to him or Jack was allergic to something in the drink. However, he walked around the village for hours after the drink, so the effects might have worn off before he executed his will. If Jack was still under the influence of the drug when he made his will, then he might not have been able to understand the nature of his acts, extent of his property, or objects of his bounty, which might explain why he left nothing to his alleged wife and child. Without knowledge of what drugs were in the drink or why Jack was hallucinating, the only way to know if Jack had capacity at the time of the execution would be by the testimony of the two witnesses.

Proving of Will

When a will is being challenged, both witnesses must testify at the probate hearing regarding the will, unless there is a self-proving affidavit. A self-proving affidavit is a sworn affidavit signed in front of a notary public, by the testator and the witnesses, attesting that the will was validly executed. The facts do not indicate that a self proving affidavit was signed.

Further, the facts are silent as to whether the 1967 will is even in existence.

Lost wills statute

Under the lost wills statute, the proponent of the will has the burden of proving by the contents of the will through the testimony of two credible witnesses, and must also prove that the will was in existence at the testator's death or that the will had been fraudulently destroyed. As the beneficiary of the first will, Mary would have this burden if she wanted to receive the gift from the will.

Revocation of 1967 will

A will can be revoked by a subsequent will if the subsequent will shows an intent to revoke the prior will. The 2007 will that Jack made does not state whether it revokes all prior wills. When two valid wills are in existence, they are to be read together to the extent possible, but as to any inconsistencies, the later in time will will prevail. Since the 1967 will states that it leaves all property to Mary, and the 2007 will states that the property should be divided to different named beneficiaries, the two wills are inconsistent, and the 2007 will will control, if it is valid.

2007 Will

Requirements

Testamentary capacity

Peggy could challenge the validity of the 2007 will by showing that when Jack made the will he did not know the natural objects of his bounty. Since Jack apparently had no memory after he came back from the war, he would not have known that he had been married and had a child. Given the dates, Jack might not have even known that Peggy was pregnant with his child

before he left for war.

The heirs in the will could counterargue that Jack had left his pre-war life behind, and had started a new life after the war, and therefore even if he did have any memory of his prior wife or child, he would not have provided for them in the will.

Attesting Witnesses

To have a valid will, there must be two witnesses who sign with the knowledge of what they are signing and who acknowledge that what they are attesting to is in fact the testator's will. The stranger who witnesses Jack's 2007 will did not even know what he was signing; he thought that he was watching Jack sign a marriage license. Further, the witnesses must sign the will itself, and the stranger apparently signed a separate piece of paper. The separate paper was probably a self-proving affidavit, but signing such a document without attesting that he had acknowledged the testator sign the will is not an effective acknowledgment. Since Nevada requires 2 valid witnesses, and the stranger is an insufficient witness, this will cannot be valid unless it is a valid holographic will.

Larry: Interested Witness

A gift to an interested witness will be void unless the witness is supernumerary. Larry received a share in Jack's porsche and shares of stock in Jack's will. Because he was one of the witnesses, and he was not supernumerary, as there was only one other witness, this gift will be void unless Jack's will is a valid holographic will.

Holographic will

Holographic wills are valid in Nevada if the will is signed, dated, and all material provisions are in the testator's own handwriting. Such a will does not require witnesses. Material provisions are those identifying the property and who is to receive it. A form will can be a holographic will if the material portions are filled in with the testator's handwriting. The

facts state that Jack filled out a typed form will, but it does not state whether he filled in the blanks with typewriting or his own handwriting. If the property and beneficiary portions of the will are in Jack's own handwriting, this will be a valid holographic will, and will be given effect despite the lack of 2 witnesses, and the gift to Larry will be given effect because under these conditions, he would be considered a supernumerary witness.

Gifts if 2007 will is given effect as Holographic will:

House to Wife

The gift of the Las Vegas house to "my wife" is a specific devise. Jack made the will on June 15, before he had closed on the Las Vegas house. However, the closing took place as planned, so the gift will be given effect. The issue is whether it goes to Kelly or Peggy. Nevada does not recognize common law marriages, so Kelly cannot claim to be Jack's wife unless she actually engaged in a valid marriage.

However, she can claim she is a putative spouse if she in good faith believed she had married Jack, and there was a ceremony. A putative spouse may receive the benefits of the marriage even though the marriage is not in fact valid. The facts indicate that there was in fact a marriage ceremony; however, because Jack was already legally married to Peggy, the marriage would have been void. However, if Kelly can show that there is a valid reason for the fact that they did not obtain a marriage license, and she in good faith thought she was married to Jack, then the house should pass to her as a putative spouse. If not, Jack's share in the house will go to Peggy, because she does have a valid marriage certificate. Because Kelly and Jack owned the houses as tenants in common, Kelly will keep her half interest.

Porsche to children

The gift of the porsche to "my children" was a class gift, because Jack did not specifically name his two known children, Larry and Niki. A class gift is a gift to a group of persons generically described as a class. Jack's son Ron has a right to share in the gift, even though Jack

did not know about him, because he is Jack's biological son, and the gift is made to Jack's children. Therefore, Larry, Ron, and Niki will equally share the porsche.

1000 shares of ABC stock

The gift of "my shares in ABC stock" is a specific devise. If Jack's will is a valid holographic will, as discussed above, the shares will pass to Larry.

Remaining Property to American Legion

The remainder of Jack's property is the residue, which Jack states should go to the American Legion. The residue consists of the Incline Village house. Because Jack and Kelly own that house as tenants in common, Kelly will keep her share, and the other undivided one-half will pass to the American Legion.

Ron: Pretermitted Child

If a child is left out of a will, it is assumed that the omission was intentional. However, Ron will argue that when Jack made his 2007 will, he did not know about Ron's existence. However, since Ron received a share in the porsche, which is exactly the same gift as Niki received, who Jack did know about, Ron has been accounted for in the will, and will not receive any additional share.

Retirement Fund

The retirement fund is provided for separately, and will not pass under Jack's will. Because it lists Kelly as beneficiary, then regardless of Kelly's status as wife or not of Jack, she will receive the proceeds of Jack's retirement fund.

Property Distribution if 1967 and 2007 wills are found invalid

If the two executed wills are found invalid, as discussed above, Jack's property will pass under intestate succession. In Nevada, if the decedent leaves 2 or more lines of issue, 1/3 of his separate property will pass to those issue, and the other 1/3 will go to the spouse. The spouse also receives the decedent's share of the community property.

Therefore, (2/3) of the following property will be left to Larry, Nikki, and Ron: the porsche, the 1/2 shares that Jack owns in the 2 homes, the stock in ABC corp, and the residue. The other 1/3 will go either to Peggy, if it is found that her marriage certificate to Jack should be given effect, or Kelly, if she is recognized as a putative spouse. The retirement fund will still pass to Kelly as the named beneficiary.



**STATE BAR OF NEVADA
JULY 2007 EXAMINATION
APPLICANTS' ANSWERS TO QUESTIONS
OF NEVADA BOARD OF BAR EXAMINERS**

- EXAM 2, QUESTION 3 -

JULY 2007

EXAMINATION NO. 2;

QUESTION NO. 3: ANSWER IN DARK BLUE BOOKLET

Attorney Able has represented Pete as his legal counsel since 2000. In July 2003, Pete married Jill. After the marriage, Jill used her cash accumulated prior to marriage to purchase a bar. Pete and Jill were co-owners. Able subsequently became the attorney for the bar. On one occasion, Pete drank excessively at the bar, became violent, and intentionally struck Jill, who was seriously injured.

Pete retained Able to defend him on the domestic violence criminal charges. Able persuaded Jill to recant her statement to the police by telling her that she would lose the bar if Pete went to jail. Able put Jill on the stand and, based on Jill's false testimony, Pete was acquitted.

Because of the stress of the trial, Jill developed a drug habit fostered by her friends at the bar. Unfortunately for Jill, she was set up in an undercover sting operation and was arrested for methamphetamine possession. Jill retained Able to represent her on the charges. Prior to the drug bust, without Jill's knowledge, Pete had consulted with Able about Pete's legal rights in a possible divorce.

Without reviewing any discovery in Jill's case, Able advised Jill to take a plea agreement which, among other obligations, prohibited Jill from going to the bar. While Jill was on probation, Able prepared a quitclaim deed at Pete's request whereby Jill conveyed her interest in the bar to Pete.

Unable to pay mounting legal fees to Able, Pete transferred a 50% ownership in the bar, valued at \$200,000.00, to Able who then took control of bar operations.

After discovering that she had lost her interest in the bar, a distraught Jill called the State Bar of Nevada to file a complaint against Able.

What ethics violations are presented by the facts? Discuss fully.

3)

Duty of Confidentiality

An attorney must not disclose confidential information regarding representation without client consent.

While it does not appear that Able actually disclosed any information from Pete to Jill or Jill to Pete or disclosed information or communications to a third party. Able most certainly did use confidential information gained through representation and client confidences against both clients to his own advantage as discussed further under loyalty.

Duty of Loyalty

An attorney owes an undivided duty of loyalty to his client. An attorney has a duty to avoid transactions adverse to the client and favorable to the attorney or a third party and has a duty to avoid conflicts of interest.

Conflict of Interest

An attorney must avoid creating conflicts of interest at anytime during the relationship and has a duty to withdrawal if a conflict arises or get consent to continue representation after adequately informing the clients of the potential risks presented by the conflict and get informed written consent to proceed.

A conflict of interest exists if representation would be materially adverse to a client's interests or if the attorney would be materially limited in the representation UNLESS an attorney reasonably believes that the representation would not have a materially adverse effect on the client and receives informed written consent by the clients affected after explaining the issues of common representation, specifically, the fact that there may be a loss of confidentiality or need to withdrawal in the future.

Breach #1

Here, Able breached the duty to avoid a conflict of interest when he accepted representation of both Jill and Pete as co-owners of the bar because there is a potential that this common representation may lead to breach of confidentiality or further divided loyalty between either Pete and Jill. If Able reasonably believed that he could adequately and loyally represent both parties, he had a duty to explain the potential of conflict to both and get their informed written consent, but he failed to do so in this case and will be subject to discipline for accepting this representation.

Breach #2

When Pete committed domestic violence against Jill and Able represented Pete in that action an actual, not possible conflict arose. Here, Pete should not have taken the representation even with informed consent of the parties and by so doing, he violated other duties. For one, his loyalty to his client Jill was breached as he was no longer looking out for her best interests. In fact, he advised her specifically to lie to the court by using the threat that she would lose her bar if she did not. This is a major breach of loyalty to Jill and a complete breach of the duty of honesty to the court as well as a breach of dignity to the profession.

Breach #3 & #4

Abe again breached his duty of loyalty and conflict of interest between the parties when Jill developed her drug problem and with knowledge that Pete wanted to seek a divorce and his interests obviously being adverse to Jill's, Abe advised Jill to sign a plea agreement that kept her off the premises of the bar and subsequently prepared a quitclaim deed and advised Jill to quitclaim her interest in the bar to Pete. These actions are completely materially adverse to Jill's position and as such a breach of the duty of loyalty and conflict of interest and thus, Abe will be subject to discipline.

Adverse Business Interest - Breach #5

As part of the duty of loyalty owed to clients, an attorney may not use confidential information about the client to his advantage. Additionally, attorneys may not enter into business transactions that are adverse to their clients. If an attorney does enter into a business transaction with a client,

the terms must be fair and in writing and reasonably easy to understand by the client, the client must also have time to review the terms of the agreement with independent counsel and give consent.

Here, Abe had Pete quitclaim or transfer over 50% of his ownership in the bar, which was valued at \$200,000.00 to satisfy Abe's legal fees that had mounted over the years. In order for this transaction to be valid, it must not be materially adverse to Pete and further should have been fair, explained in reasonably understood terms in writing to Pete and Pete should have had the time to give adequate informed consent by having the opportunity to consult with outside counsel to determine if he should consent to such a transfer. It does not appear this occurred, nor does this transaction seem at all fair as explained in the attorney fee violation section. Thus, Abe is in breach of the duty of loyalty to Pete in this transaction and will be subject to discipline.

Reasonable Fees

An attorney's fees must be reasonable and explained promptly to the client who should give their consent to the fees in writing.

It does not appear that Able ever explained his fees to either Pete or Jill as required by the rule. Furthermore, it does not appear that Able's fees are "reasonable". Reasonable fees are based on the lawyer's time and experience with the given subject and need to be somewhat consistent with what other lawyers' with similar experience and expertise. It appears the only "legal fees" Abe earned in connection to Pete is defending him on DV charges and being the bar attorney, as well as consulting with him regarding potential divorce from Jill, which the facts do not indicate amounted to much work, which do not appear to substantiate \$200,000.00 in fees, the value of the portion of the bar transferred to Able to satisfy Pete's legal fee debt.

Additionally, even if Pete was planning to pay for Jill's legal fees owed to Abe, it does not appear that \$200,000 is reasonable. All Able did for Jill is advise her to take a plea agreement in a criminal matter that he never bothered to review and have her sign over her interest in the bar to Pete.

Thus, Able will be subject to discipline for failure to adequately and promptly disclose fees and to charge reasonable fees to his clients in this case.

Duty of Competence

An attorney must be or become competent or associate with a lawyer who is competent. Competency requires that the lawyer act with the legal skill, knowledge and preparation necessary to representation.

Here, the facts do not indicate the normal area of practice for Able. Attorneys may take any take different types of cases, but are under the duty to become competent by learning about the applicable law and procedure in the case they undertake or by association with a competent lawyer in the area. It is possible that Able is competent in the area of criminal law, although the facts are not clear, however he breached his duty of competence to Jill by advising her to take a plea agreement in relation to a first time drug offense to which there was possibly an entrapment defense that he HAD NEVER EVEN READ!

Duty of Communication

A lawyer has a duty to communicate promptly with a client to advise the client of the status of their case and answer inquiries. Additionally, a lawyer has a duty to communicate settlement offers and also communicate adequately evidence that would be used in the client's decision making process about the substantive issues in the case and how to proceed.

Able breached his duty to communicate to Jill regarding the plea agreement. While he did talk to her about the agreement, a plea agreement is similar to a settlement agreement and definitely requires adequate review by the attorney and explanation and review by the client in order to make an informed decision regarding whether or not to take the deal. Not only did Able breach the duty here, Jill has a claim for ineffective assistance of counsel that she may pursue to invalidate this plea agreement and hire competent counsel.

Scope of Representation

The attorney makes procedural and strategic decisions while the client makes substantive decisions.

Here, although it appears that both Jill and Pete end up agreeing to the final decisions, they are not adequately informed to make decisions regarding transfers of interests in property and waivers of privileges and taking plea agreements etc. Able is basically controlling the substantive decisions which the client owns the right to make, thus again Able will be subject to discipline as he exceeds the scope of representation by so doing.

Duty of Honesty to the Court

An attorney has a duty of honesty to the court to present evidence truthfully and to refuse to present untruthful testimony or evidence.

Here, Able put Jill on the stand and had her testify to information that Able knew to be false and untruthful, thus Able violated his duty of honesty to the court.

Duty to Witnesses

An attorney must not advise witnesses to disappear so they will not have to testify or to give false testimony.

Here, Able advised Jill to give false testimony in court and to recant her honest testimony to the police in clear violation of his duty not to do so under the rule regarding duty to witnesses, thus Able will be subject to disciplinary action.

Duty of Dignity

An attorney must act to promote public confidence in the profession.

Able has taken every possible step to shake confidence in the profession by misadvising his clients, lying to the court, obstructing justice, acting completely against the interests of his clients, etc. Shakespear was clearly referring to him and his kind!

Remedies

Jill's complaint and the Bar's subsequent investigation should result in the loss of Able's license.

He has committed so many violations that he is really unfit to practice law.

Constructive Trust

A constructive trust is an equitable remedy whereby property that has been obtained by improper means to which the defendant has title that is traceable to the harm is conveyed from the defendant to the victim.

Here, it appears that a constructive trust would be an appropriate remedy for the property, 50% interest in the bar, that was conveyed to Able in this case. Jill or Pete may be able to impose a constructive trust on that 50% interest, but is most likely will be imposed for Jill's benefit as Pete still owns his 1/2 interest in the bar.

Malpractice Insurance and Suit

Jill and Pete should both sue for Malpractice and particularly Jill.



**STATE BAR OF NEVADA
JULY 2007 EXAMINATION
APPLICANTS' ANSWERS TO QUESTIONS
OF NEVADA BOARD OF BAR EXAMINERS**

- EXAM 2, QUESTION 4 -

JULY 2007

EXAMINATION NO. 2;

QUESTION NO. 4: ANSWER IN LIGHT GREEN BOOKLET

The summer months for Amy's Catering Company were always a very busy time. As a result, Amy hired an office assistant, Emily, before the busy season began. Emily's duties included placing and receiving orders, retrieving and opening Amy's office mail and light bookkeeping. Amy gave Emily a key to the post office box where the company received its mail, as well as a key to the desk where the company checkbook was located.

On April 15, Emily placed an order with Matt's Gourmet Mushroom Company for 1,000 exotic mushrooms at a price of \$1.00 per mushroom. The valid and fully executed agreement between Amy's Catering and Matt's Mushrooms specified that the mushrooms were to be between three and four inches in diameter and imported from a certain region in France. The agreement contained language that "in the event the goods fail in any way to conform to the specifications of the contract, Matt's Mushrooms' sole obligation will be to substitute conforming goods within ten days of the date of delivery of the goods."

The contract specified that delivery was to occur on May 1. Past practice between Amy's and Matt's companies was that deliveries within ten days of the date specified in the contract were considered to be in compliance with the contract. However, Matt was aware that Amy needed the mushrooms for a large reception she was catering on May 5.

One of Matt's employees delivered the mushrooms to Amy's company on May 2. Matt had instructed his employee that before he turned over the mushrooms, Matt wanted somebody from Amy's company to sign a receipt acknowledging delivery of the goods. Matt's employee presented Emily with a receipt, which contained a provision in bold letters above the signature line indicating that "Buyer accepts the goods in their present condition." Before she had time to review the receipt or the boxes of mushrooms, Emily signed the receipt.

The day after delivery, Amy opened the boxes and determined that the mushrooms were one to two inches in diameter and the boxes that contained them indicated they were from California, not France. Amy called Matt, who assured her that new mushrooms would be delivered immediately.

When the mushrooms had not arrived by May 4, Amy called another supplier who was able to provide 1,000 exotic mushrooms from France as specified in the original agreement between Amy and Matt, at a price of \$2.00 per mushroom. Amy did not tell Matt about this. When Matt's delivery of new mushrooms was made on May 6, Amy instructed Emily to tell Matt's employee that she did not want them, even though Amy had many other catering jobs at the time where she could use the mushrooms.

In the meantime, Emily, realizing her apartment rent was overdue, wrote a check payable to "cash" from Amy's company checkbook, making it out for \$1,000.00. Emily forged Amy's signature on the face of the check and gave it to her landlord in payment of her monthly apartment rent. That same day, Emily picked up the mail, which contained a \$2,000.00 check from a catering customer made payable to Amy's company. Emily forged Amy's signature on the back of the check.

Emily deposited the \$2,000.00 check into her account and her landlord deposited the \$1,000.00 check into his account the next day. Amy did not discover any problems with her account until ten days later, when a representative of National Bank, where her company account is held, called to inform her that her account was overdrawn. Amy went to National Bank demanding re-credit for each of the checks deposited by Emily and her landlord.

Provide full answers and analysis to the following questions:

1. Is Amy's Catering Company obligated to accept the first delivery of mushrooms from Matt's Mushrooms?
2. Is Amy's Catering Company obligated to accept the second shipment of mushrooms provided by Matt's Mushrooms?
3. Does Amy have a claim for damages against Matt's Mushrooms?
4. Is National Bank obligated to re-credit Amy's account?
5. Does National Bank have any recourse against Emily or her landlord?

4)

1. Is Amy obligated to accept the first delivery of mushrooms?

The sale of the mushrooms is a sale of goods and so Article 2 of the UCC applies. The issue is whether Amy was obligated to accept the first delivery of mushrooms. The rule is the perfect tender rule of the UCC which requires that all goods conform to the contract in every respect, or the buyer is not obligated to accept. The contract specified the mushrooms were to be delivered on May 1. The mushrooms did not arrive until May 2. Therefore, Amy could argue that she had the right to reject the delivery. However, Matt could argue that, based on past performance of the parties (their course of dealing), he had reason to believe that the goods would be accepted within 10 days of the contract date, and that he relied on this and his awareness that she needed the goods by May 5, and therefore Amy should be estopped from insisting on strict compliance with the delivery term now. Since Amy had not found a substitute on May 1 and still needed the mushrooms, any rejection of the delivery based on the one-day delay would have been in bad faith and unreasonable. Amy did not have the right to reject on the basis of the one-day delay because the UCC imports a duty to act in good faith and a commercially reasonable manner.

The sale of the mushrooms was not perfect tender because they did not conform to the contract as they were not the right size and the origin. A buyer is given reasonable time to inspect the goods before accepting them. Here, Amy's assistance Emily signed the receipt without inspecting the goods. Although signing the receipt was acknowledgement of delivery, it probably will not constitute an acceptance as Emily had not had reasonable time to inspect. Matt, of course, will argue that a reasonable person would have immediately opened the boxes for inspection, and if her delay in inspection was unreasonable, then the signing for the goods constituted acceptance.

Matt will also argue that Amy accepted the goods in the present non-conforming

condition because her agent (Emily) signed under the very obvious disclaimer reading "Buyer accepts in present condition." This disclaimer is a variation in the contract requirement of perfect tender, and only someone in Amy's company with the authority to modify contracts could modify the contract. Amy will argue that she never gave Emily express authority to modify the contract. Matt will argue Emily placed and received orders, and therefore had the implied power to contract on behalf of Amy and thus modify the contract. At the very least, Matt will argue Emily had apparent authority to accept the goods and modify the contract as she placed the initial order. She was "cloaked in authority" even if it was beyond her scope of duty.

However, Matt probably knew the mushrooms were non-conforming and inserted the disclaimer to force Amy to take them. This breaches Matt's obligation to act in good faith. Also, it is most likely true that Amy needed reasonable time to inspect the goods before she could accept them, and so she was not required to accept the goods. Emily would not be able to tell the origin of the mushrooms, but Amy as a chef would be. So Amy (not Emily) needed reasonable time to inspect before acceptance would be effective. Once Amy discovered the non-conformity, she promptly notified the seller (telephoning Matt) that she would not be accepting the goods and told him exactly why, as required by the UCC.

2. The second shipment.

Amy was required, under the UCC, to give Matt time to cure the non-conforming goods delivered on May 1. A seller has time to cure up to the date performance was due, and if no date, within a reasonable time. Performance was due under the contract on May 1. However, if the seller does not have reason to know that the goods are likely to be rejected as non-conforming, he may receive a reasonable time past the performance date in which to cure. Even if Matt had no reason to know the shipment would be rejected, Matt did know that Amy needed the mushrooms by May 5 for a reception. Therefore, Matt had to deliver conforming goods before May 5th (and in time for her to prepare the food) Amy asked for and received reasonable assurances from Matt that he would cure immediately. Matt failed to do so, so Amy properly mitigated her damages by seeking cover (substitute goods). Therefore, she was not required to accept the second shipment.

Matt may argue that because Amy could still use the mushrooms, her rejection of the shipment was not in good faith or commercially reasonable as required by the UCC

3. Amy's Damages

Amy may receive the difference between the cost of cover (\$2000) and the contract price (\$1000) for a total of \$1000 and any incidental damages that flow from Matt's breach (including storage of the nonconforming mushrooms) and any foreseeable consequential damages (such as having staff stay overtime to fix the food for the reception). This is based on the fact that Amy's cover was reasonable, as it was for the same mushrooms specified in the same contract. Matt will argue Amy should have called more suppliers to get the lowest price.

4. Is National Bank required to recredit Amy's Account

Checks are negotiable instruments cover UCC article 3. Normally, drawee -banks are liable to depositors for wrongfully paying checks with the drawer's signature forged. Therefore, the bank must recredit Emily's account. Had Emily signed her own name to the check, the drawee-bank could argue that Emily's signature was authorized because the checks were drawn on the company account for which Emily was an agent. The bank may argue that the forgery was authorized, given the fact that Emily had apparent authority /authorization to sign for Amy based on the apparent authority Amy cloaked her with by giving her access to a company check book.

5. National Bank v. Landlord

The check from the checkbook was bearer paper because it was made out to cash. Therefore, the landlord was a holder because he had possession and good title. (Good title means that there are no forged signatures of payees and special indorsees, which there weren't here because bearer paper does not require indorsees). The landlord is a holder in due course - he

accepted the check for value (the rent owed) without knowledge of its overdueness, defenses, irregularity or insolvency of the drawer. He did not sign the check and so he is not subject to transfer liability or contract liability. His presentment of the check to the bank shows that he has given presentment warranty, but he has not breached the presentment warranty because he did have a right to payment as a holder in due course.

The bank has recourse against Emily on a theory of breach of contract liability because the forged signature on the check operates as Amy's own signature, and Amy is primarily liable. The bank has no recourse on the theories of presentment liability or transferor liability because Amy never presented the check to bank or signed as an indorsee.

END OF EXAM