JULY 2008 EXAMINATION

APPLICANTS' ANSWERS TO QUESTIONS OF NEVADA BOARD OF BAR EXAMINERS

STATE BAR OF NEVADA
JULY 2008 EXAMINATION
APPLICANTS' ANSWERS TO QUESTIONS OF NEVADA BOARD OF BAR EXAMINERS

- EXAM 1, QUESTION 1 -

JULY 2008

EXAMINATION NO. 1;

QUESTION NO. 1: ANSWER IN LIGHT BLUE BOOKLET

Just after midnight, in an otherwise quiet residential neighborhood in Sparks, Nevada, Police Officer Smith stopped a car driven by Ryan Jones for a misdemeanor loud music violation. Jones was cooperative and provided Officer Smith with his driver's license, the vehicle registration and proof of insurance. Smith arrested Jones when a computer background check revealed that Jones had previously failed to appear in court and/or pay fines. After the arrest, a search uncovered a bag of marijuana, a cell phone and $116 in cash. Officer Smith handcuffed Jones and placed him in the patrol car. Meanwhile, Officer Kelly Long arrived to assist and began to search the interior of Jones' car. When Officer Long discovered a .38 caliber revolver under the front seat, she showed it to Smith. Officer Smith removed Jones from the patrol car and asked, "Is there anything else in your car that we need to know about? That could hurt us?" Jones said that although he knew the gun was in the car, it wasn't his. Officer Long completed her search of the car, finding a box of .38 caliber ammunition in the glove box. In the trunk she found a plastic baggie which contained 5 grams of cocaine.

Jones was charged with unlawful possession of a firearm, two counts of unlawful possession of a controlled substance (marijuana and cocaine) and one count of trafficking in a controlled substance for possessing over 4 grams of cocaine.

During a pretrial hearing, where the district judge denied his court-appointed counsel's motion to suppress evidence, Jones told the judge that he wanted to represent himself at trial. Jones assured the judge that he would be ready even though trial was scheduled to start the next day but, he added, he might need standby counsel to assist him. The district judge, after asking Jones some questions concerning his education, lack of criminal history and his familiarity with court procedures, denied the request stating that granting it would result in delaying the trial, that Jones' self representation would cause disruption in the orderly presentation of the evidence and that, in any event, the trafficking charge alone was "too serious to allow the matter to proceed to trial without the assistance of counsel." The judge also noted that it appeared from Jones' answers to his questions, that Jones' knowledge of court procedure "was derived primarily, if not exclusively, from television shows."

The next day during jury selection, two of the potential jurors, one of whom was African American and the other, Caucasian, expressed concern that if the trial lasted more than a week it would be difficult for them to serve because of previously made plans and other obligations. However, both acknowledged that they would not suffer any hardship if kept on the jury. The prosecutor utilized a peremptory challenge to remove the African American juror on the basis that the juror's concern over his previous commitments would interfere with his ability to serve attentively, and that his nonverbal communication – body language – suggested to him that the juror had not taken the earlier *voir dire* questioning seriously. The court excused this juror but kept the other juror. The trial lasted a total of two days. The jury convicted Jones of all four counts.

Assume that Jones is an African American. Assume further that Jones' trial counsel raised every possible issue in her pretrial motion to suppress and properly made contemporaneous objections during all of the proceedings in this case, including jury selection.

1. Before trial, Jones' court-appointed counsel filed a motion to suppress evidence. Please identify and discuss each of the issues you believe counsel should have raised in her motion to suppress. Do not be influenced by the fact that the trial court denied the motion.

2. Did the trial court err in denying Jones' request to represent himself at trial? Please explain your answer fully.

3. Did the trial court err in granting the prosecution's peremptory challenge? Please explain your answer fully.

1)

1. Motion to Suppress

Fourth Amendment - Seizure of Person

The Fourth Amendment, applied to the states through the Due Process clause of the Fourteenth Amendment, protects an individual's right to be free from an unlawful seizure of his person by the government. There must be state action for this right to apply. An arrest warrant is generally not required for an arrest made in a public place.

State Action

Here, there was state action because Jones ("J") was pulled over by a state police officer.

Arrest

A warrant is not required when an individual is arrested in a public place and the police officer had probable cause to arrest. Probable cause is present where the officer has trustworthy information sufficient to make a reasonable person think the defendant had committed or was committing a crime. Here, J's commission of a loud music offense is not sufficient to justify arresting J because it was only a misdemeanor. However, the officer had probable cause to arrest J because a computer background check revealed that J had previously failed to appear in court, and thus likely had a warrant out for his arrest. This constituted trustworthy information indicating J had previously committed a crim, and thus J's arrest was valid despite the lack of an arrest warrant.

Fourth Amendment - Searches

The Fourth Amendment also protects an individual's right to be free from unreasonable searches by the government. This right applies where there is state action and the person had a

reasonable expectation of privacy. A warrant is generally required before conducting a search, however, there are several exceptions to this requirement.

State Action

As discussed above, there was state action because J was pulled over by a state police officer.

Reasonable Expectation of Privacy

A person has a reasonable expectation of privacy when he is in his home or on property he owns. An individual has a lessened expectation of privacy where he is in his vehicle or in public. Here, J was arrested in his vehicle while on a public road, and thus did not have a reasonable expectation of privacy.

Search Warrant

Generally, a search warrant must be obtained before conducting a search. Here, the police officer did not obtain a search warrant prior to searching J's vehicle. However, there are exceptions to the search warrant requirement which are applicable and are discussed below.

Search Incident to a Lawful Arrest

An officer may conduct a search incident to a lawful arrest where he has probable cause to arrest the suspect and was lawfully present in the place where the arrest took place. Such a search may include any area within the suspect's reach, and is justified by an officer's need to discover whether there are any weapons, or contraband that could possibly be destroyed in the area. This exception allows an officer to search the main compartment of the vehicle, but not the trunk, because that is not an area where the defendant could reach.

Here, Officer Smith had probable cause to arrest J because J the arrest was valid, as

discussed above. Thus, the officer was justified in searching areas within J's reach to protect himself from any weapons that could be in J's possession and to discover any contraband. However, the cocaine discovered in the trunk is inadmissible under this exception.

Automobile Exception

When a suspect is arrested in his vehicle, the police may conduct a search of the entire vehicle, including the trunk, if they have probable cause to believe there are weapons or evidence in the vehicle. If they have probable cause to search for a particular item, they may only search containers or areas of the vehicle that could contain the item. Nevada also requires the existence of exigent circumstances to justify a search of an automobile.

Here, as discussed above, the officers had probable cause to search J's vehicle. Because Officer Smith found marijuana, the officers had probable cause to search the rest of J's car to determine whether the vehicle contained more drugs. However, there do not appear to be any exigent circumstances existing to justify a search before obtaining a warrant. There was no one else in the car with J, so it is unlikely that someone would have driven the car away before the police could obtain a warrant. Because there are no exigent circumstances to justify the officers search of the vehicle before obtaining a warrant, the evidence will not be admissible under this exception.

Stop and Frisk

A police officer may frisk a suspect if he has reasonable suspicion that the suspect may have weapons or contraband on his person. Any evidence discovered on the suspect or within his clothing must be discovered based on plain feel, meaning the officer may not manipulate the object within the clothing to ascertain whether it is a weapons or contraband, but rather, must be able to ascertain the object's identity based on plain feel.

Here, the facts do not indicate whether the money, cell phone, and marijuana were found on J's person or in the vehicle. Because J was being arrested for not showing up to court or paying fines, the officer had no reason to suspect that he might have weapons or drugs on his

person. Thus, he could not have had a reasonable suspicion justifying a search of J, and the search cannot be validly justified under this exception.

Inventory Search

Police may search a vehicle after arresting a suspect in order to compile an inventory of the vehicle's contents. Here, it does not appear that Officer Long's search of the vehicle was done for inventory purposes, but rather, to discover weapons or contraband. Thus, the search is not justifiable as an inventory search.

Fifth Amendment - Miranda Warnings

Before conducting a custodial interrogation, the police must read a defendant his Miranda warnings, which includes the right to remain silent and the right to counsel. A defendant is in custody if a reasonable person under the circumstances would believe he was not free to leave. An interrogiation occurs where police conduct makes it likely the suspect is likely to give an incriminating statement. Any waiver of Miranda rights must be knowing, voluntary, and intelligent.

Here, J was in custody because he was handcuffed and placed in the back of a squad car, and a reasonable person would not feel free to leave under those circumstances. He was being interrogated because Officer Smith removed J from the car and asked him whether there was anything else in J's vehicle they should know about that could hurt them. Because Officer Smith was asking J a direct question about the contents of his vehicle, he knew that it was likely to elicit an incriminating statement from J. Because J was never given his Miranda warnings, he could not have waived them. Thus, J's statement that he knew the gun was in the car, but that it was not his, may not be admitted at trial because under the exclusionary rule, evidence obtained from an unlawful search or interrogation is inadmissible.

Fruit of the Poisonous Tree

The fruit of the poisonous tree doctrine prevents the admission of any evidence the discovery of which is made possible through an illegal search or confession. Here, it does not appear any of the evidence discovered was fruit of the poisonous tree because, as discussed above, the officers had the right to search J's vehicle. Thus, this doctrine is inapplicable and will not bar the introduction of any evidence.

2. Request to Represent Self at Trial

Sixth Amendment

The Sixth Amendment, applied to the states through the Due Process clause of the Fourteenth Amendment, guarantees a defendant the right to counsel at all critical stages of criminal proceedings. This right also includes the defendant's right to represent himself. A judge generally may not deny a defendant's request to represent himself at trial unless the defendant lacks capacity.

Here, J told the judge he wished to represent himself at trial the day before trial was about to start. Although this may have resulted in a delay of trial, this is not a sufficient ground to justify denying J his constitutionally protected right to represent himself. Neither the judge's concern that the orderly presentation of evidence would be disrupted, that J's knowledge of legal proceedings was derived from TV, nor that the trafficking charge was too serious were sufficient justifications to deny J his right to represent himself at trial. There are no facts indicating that J lacked capacity. Thus, the judge erred in denying J the right to represent himself at trial.

3. Peremptory Challenge

Sixth Amendment

The Sixth Amendment, applied to the states through the Due Process clause of the Fourteenth Amendment, guarantees a defendant the right to a trial by a jury of his peers. He is entitled to have his jury selected from a fair cross-section of the community, although he is not

guaranteed a fair cross-section of the community in the particular members of his jury. In a criminal case, each side is allowing three peremptory challenges and unlimited challenges for cause. A party need not explain the reasons behind his use of a peremptory challenge, but such challenges may not be based on the race of the juror.

Here, because both the Caucasian and the African-American juror expressed concerns that it would be difficult for them to serve because of previous obligations, but only the African-American juror was excluded, it appears that the prosecutor exercised his peremptory challenge of the African-American juror based on race. Because J is also African-American, the prosecutor may have believed that this juror would be more sympathetic towards J, and thus a conviction would be more difficult to obtain. The prosecutor will argue he did not exclude the juror because of race, but rather, because the juror's body language indicated he was not taking the voir dire questioning seriously. This justification, without further details as to the juror's body language, appears to be a mere pretext for exercising a peremptory challenge based on race. Because J has a right to a jury of his peers, and the African-American juror was likely excluded based on his race, the court erred in granting the prosecutor's peremptory challenge.

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- EXAM 1, QUESTION 2 -

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EXAMINATION NO. 1;

QUESTION NO. 2: ANSWER IN RED BOOKLET

Plaintiff Paul hires Attorney Ann to file a common law breach of contract suit against Defendant David. Paul resides in California. The contract was negotiated and entered into in Las Vegas, where David resides. Ann drafts a Complaint and files it in a federal district court in Nevada. The Complaint alleges that Paul suffered damages "in excess of $10,000."

Ann gives a copy of the Complaint to Paul and asks him to serve it on David. Paul completes the service at David's Las Vegas home on January 1 by handing the Complaint to David's 17 year-old son. David hires Lawyer Linda who files an Answer and Counterclaim on February 1. On February 5, Linda files a Motion to Quash Service of Process. Ann opposed the motion and filed a Reply to the Counterclaim on March 1. The Motion to Quash was denied without argument.

On March 10, Ann and Linda meet for a Rule 26(f) Discovery Conference. At the conference, Ann requests that Linda provide her with copies of the parties' correspondence. Linda emails copies of the requested correspondence to Ann on April 1, along with a Demand for a Jury Trial. On April 15, Linda receives an unfiled Amended Complaint in the mail from Ann to which Linda does not respond.

After discovery is concluded, the parties begin a bench trial on October 1. Just prior to calling her first witness, Linda hands Ann a list of previously undisclosed witnesses who will testify on behalf of David. After a week-long trial, Linda emerges victorious. The Judge was particularly impressed with the testimony of David's expert witness. Ann did not hire her own expert witness to rebut the testimony of David's expert. Unlike Linda's other witnesses, David's expert was disclosed, but the expert's report was not provided until the first day of the trial.

A judgment is entered in favor of David on October 10. On November 1, Ann files a Motion for a New Trial that is denied on November 30. On December 31, Ann files a Notice of Appeal of the judgment.

Shortly thereafter, Ann, again on behalf of Paul, files suit against David in a state court in Reno, Nevada. The state court complaint alleges all of the same claims and causes of action that

were decided in the federal action. David again retains Linda to defend him. Linda responds to this new Complaint by filing a Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted.

1. Identify every procedural error made by the attorneys in the first action and discuss the relevant rules and doctrines.

2. Should the Motion to Quash have been granted? Explain.

3. Was the filing of the action in state court and the attorney's response proper? Discuss.

2)

1. Procedural Errors

Filing of action in Federal Court

In order for a case to be filed in federal (fed.) court, the court must have both personal jurisdiction over the matter and subject matter jurisdiction.

Personal Jurisdiction

Personal jurisdiction addresses whether the Defendant has such minimum contacts with the state so as not to offend traditional notions of fair play and substantial justice. To detemine whether there is sufficient contact, there must be contact which requires both purposeful availment and foreseeability of being sued in the state and fairness to the defendant by showing there is a connection between the Defendant's actions in the state and the reason for the lawsuit. Personal jurisdiction is simple when the defendant lives in the state or has been personally served in the state. Here, Defendant is a resident of Las Vegas, NV and the action was filed in NV so there is personal jurisdiction.

Subject Matter Jurisdiction

A court has subject matter jurisdiction over an action if there is either diversity of citizenship or a question that arises under federal law. Diversity of citizenship requires both complete diveristy and a controversy that exceeds $75,000 (75k).

Federal Question

The claim asserted must arise under federal law. Here, the claim involves a common law breach of contract and therefore does not involve federal law. Therefore the court could not exercise subject matter jurisidiction based on federal question.

Diversity of Citizenship

Citzenship

Citizenship is determined at the time of the filing of the action and for natural persons it requires domicile in the state. Domicile is determined by physical presences in the state with an

intent to remain there. Here we are told that Paul resides in California and David resides in Nevada, therefore there is complete diversity.

Amount in Controversy

The amount in controversy must exceed 75k in order for the court to exercise jurisdiction. A plaintiff may aggregate claims if there is only one plaintiff and one defendant in order to meet the amount in controversy. Here, Paul has claimed that he has suffered damages in excess of $10,000. Although both federal and nevada courts are notice pleading states and only require that normal damages be plead as in excess of $10,000, it is doubtful that Paul's claims for a common law breach of contract claim will exceed 75k. Depending on the type of damages and claims stated and what the subject matter of the contract was, Paul may not meet the amount in controversy requirement and therefore the court does not have subject matter jurisdiction based on citizenship.

Assuming the amount in controversy exceeded 75k, following are the other procedural issues.

Venue

A Plaintiff may lay venue in the federal district where either the claim arose or one of the defendant's resides. Here, venue was proper because it was filed in the federal district court where the contract was negotiated and entered into along with where the David lived.

Service of Process

In NV, service of process must be served within 120 days of filing the complaint and must include both the complaint and the summons. The general rule is that service of process must be personally served on the Defendant by a disinterested party over the age of 18. Although, the Court does allow for substituted service. Here, the Complaint, although the facts are silent as to whether the summons was included which is required to have service of process, was possibly served within the 120 days although the facts do not indicate that the Complaint was actually filed or when it was filed.

Personal Service

As stated above, a disinterested person over the age of 18 may personally serve a Defendant to an action. Here, Paul was instructed to effectuate personal service on David which is in violation of the rules and therefore would nto have been proper service.

Substituted Service of Process

The court allows service to served on someone other than the Defendant if the person served is of suitable age that lives and defendant's home. Here, it could be argued that David's 17 year old son was not of suitable age even though he resided there. Although there is no age limit on what is considered suitable, a 17 year old child may be considered old enough especially if they look there age or older. Therefore, service on the son may have been proper.

Answer and Counterclaim

Answer

A answer must be filed 20 days after of being served with the Complaint and Summons, here the answer was filed more than a month after service was conducted and therefore was outside of the 20 days. Ann could have filed a default judgment before Linda filed her answer but since she didn't the court might go forward with the action.

Counterclaim

A party may assert either a compulsory or permissive counterclaim against the Plaintiff. A compulsory counterclaim must involve claims that arises out of the same transaction and occurrence and will be waived if not asserted in this action. A persmissive counterclaim is any claim that the Defendant may have against the Plaitniff. Here, Linda's assertion of the counterclaim was proper even though the facts do not indicate enough information to determine whether the counterclaim was permissive or compulsory. However, because it was asserted with an untimely answer, the same argument made above could apply here.

Reply to Counterclaim

A party must file their response to a counterclaim within 20 days from being served with the counterclaim. Here, Linda filed her counterclaim on February 1 and Linda responded to it on

March 1 which is more that 20 days after the counterclaim was filed.

Motion to Quash

This will be discussed below under the second part to the question even though there was some procedural issues with its filing.

Rule 26(f) and Discovery Conference

A Rule 26(f) conference may be conducted after the parties have filed their complaint and answer but prior to either party conducting discovery. At the meeting, the parties will set deadlines for discovery and the amount of time that will be needed at trial.

Requests to Produce

A party may serve on either a party or non-party a requests to produce any documents or other tangible items in there control. Here, Ann requests that Linda provide her with copies of the parties correspondence, orally at teh discovery conference which was in proper. The proper way to requests these documents is through a Request for Admissions and therefore, Linda does not have to produce the correspondence until properly requested.

Deliver of documents

Normally, documents that are in answer to a requests to produce must be given in paper form unless the requests was to voluminous, then it can be delivered on a cd or dvd. Here, there is some question to whether Linda's emailing the correspondence was a proper way to respond to Ann's requests for production. However, because Ann's request was in an improper form, Linda may be given some leeway since she did produce the documents.

Joint Case Conference Report

Once the parties conclude there discovery conference, they should submit to the court a joint case conference report (JCCR) that outlines the discovery deadlines and witness list, which should include any experts. Here, neither party complied with this requirement.

Undisclosed Witness List

A party must disclose there witnesses prior to the close of discovery but may be permitted to supplement that list within a reasonable time before the time of trial. Here, Linda's disclosure of her witnesses prior to calling her first witness. This is inappropriate and any witnesses on that list may and will be excluded from testifying on David's behalf.

Demand of Jury Trial

A demand for jury trial must be placed on the last filed pleading that raises a issue that is triable by a jury. Here, Linda demanded a jury tril in an email to Ann that included discovery documents. Because the demand must be made to the Court and not just the other side, and must be on a pleading to the Court like Linda's Answer and Counterclaim, the demand was improper and therefore it was proper for the Court to conduct that trial in a bench trial.

Amended Complaint

A complaint may be amended once as a matter of right before the Defendant answers. After the Defendant answers, the Plaintiff must seek leave of the Court to amend its Complaint. Here, Ann mailed Linda an amended complaint. Although an amended complaint may be amiled to the attorney of record, there is no facts to indicate that Ann sought out permission of the court who granted her motion to amend the complaint, therefore any allegations, defenses, or claims stated in the complaint will not be recognized by the court and cannot be tried by Ann.

Expert testimony and report

A party may have an expert testify on their behalf if the expert is identified during discovery and writes a report expressing its experise and opinion, including basis for opinion. This report must be given to the opposing side 30 days before trial. Although the expert was properly identified as a witness for David, he did not submit a report in 30 days of the close of discovery, but rather on the first day of trial, this will likely disqualify him from testifying as a witness. This is especially so since Ann did not get an expert of her own and could argue that she did not do so because she was unaware of what the expert would testify to and therefore did

not know that she would need an expert to rebut David's expert's testimony. Lastly, because the judge was so impressed by the information testified to by David's expert, this is even more reason to deny the testimony.

Motion for New Trial

A party may file a Motion for a New Trial within 10 days for the entrance of judgment. A motion for new trial will be granted if there was improper conduct on behalf of a juror, attorney, or judge; if there is new information discovered that was not discoverable during the original action; or if the weight of the evidence is against the decision rendered. Here we are not told the reason Ann filed for the new trial but there is a problem considering it was not filed 10 days after the judgment was rendered. Therefore, the denial of her motion was proper.

Notice of Appeal

Once the court has entered a final judgment in an case, a party may, within 30 days of the entrance of the order, file a Motion to Appeal with an appelate court if in federal court, or the NV Supreme Court if in NV's district court. Here, because Ann filed a motion for new trial, there was still something for the court to do and therefore there was no final judgment entered. Once the court denied the motion on November 30, there was a final judgment and Ann had 30 days from that day to file a Notice of Appeal. Since she filed on December 31, more than 30 after the final judgment was filed in the lower court, her notice of appeal was untimely and should have been rejected.

Res Judicata

A party may not bring suit that has already been determined. In order for res judicata to apply, the parties to the action must be the same parties and the same claims or causes of actions must be plead that were both plead and decided in the earlier proceeding. Here, Ann is attempting to assert the same claims and causes of action as she did in federal court. Because there was a final decision on the merits in the earlier case and the same parties and claims are now being asserted in a different forum, Ann should be stopped from filing the action in state

court.

2. Motion to Quash

A motion to quash service of process is like a motion to dismiss for improper service of process. With both motions, this defense is one of the Rule 12b defenses that must be brought at the earliest time or it will be lost. Therefore, to be able to use this defense it must have been brought either in Linda's answer as an affirmative defense or in a separate motion prior to filing her answer. It also would have had to be filed during the 20 day window a party is given to file their answer. Here, Linda filed her answer and counterclaim on February 1 and then filed the Motion to Quash 5 days later on February 1. Although the defense raised by Linda was proper and would have gotten the case dismissed because Ann did not properly serve David, since Linda did not raise the issue in her first pleading to the court, the defense is waived and she cannot later assert it.

3. State Action and Motion to Dismiss for Failure to State a Claim

Filing in State Court and Res Judicata

As stated above, a case will be barred from being brought again if there was a final judgment in the case and the new case raises the same issues and claims and involves the same parties. Here, Ann is attempting to avoid application of the negative judgment by bringing the exact same case in state court. Although they are different forums, res judicata will still apply and Ann will be barred from bringing the action in state court.

Motion to Dismiss for Failure to State a Claim

A court may grant a motion to state a claim upon which relief may be granted if all the allegations in Plaintiff's complaint are taken as true and Plaintiff is still not entitled to a judgment of relief in her favor. Although in the state action, Linda properly brought this motion at the first instances, it was the wrong way to have the case disposed of. Under this rule, a court would look at the complaint filed by Ann and determine whether there was a valid claim of law for them to adjudicate. Here, there is a valid claim and therefore, Linda could lose on this motion. To have the case thrown out of state court, Linda should have raised the res judicata defense which would

have barred Ann from suing in state court as discussed above.

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- EXAM 1, QUESTION 3 -

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EXAMINATION NO. 1;

QUESTION NO. 3: ANSWER IN DARK GREEN BOOKLET

When the suburban Southern Nevada city of Numa was incorporated in1980, it set aside a 50-acre tract for a park. The city council designated ten acres as a "quiet contemplative meadow" with unique foliage, many park benches, and grassy areas for yoga, tai chi, meditation, and other similar quiet activities. Over the first few years of development, pursuant to its original plans, the city erected three memorials in the Contemplative Meadow: a Japanese lantern bearing a plaque dedicated to peace and World War II atomic bomb victims, a statue of Moses bearing the inscription "The Giver of Laws," and a 1:10 scale model of Stonehenge. This area has become a particularly popular site for meditation and other spiritual pursuits.

Six months ago, the city council decided to erect a fourth memorial, a nine-foot diameter bronze globe with the U.S. flag as a memorial to "America the Liberator of the Oppressed: From Europe to Iraq." The city also solicited proposals for a privately-funded fifth memorial, under the theme "Subjects for Quiet Contemplation and Inspiration" and the guideline that the entry be aesthetically pleasing. Entrants had to agree to pay all costs to erect the memorial. Selection was to be made by the city council.

Assa's Disciples, a religious organization with 500 Nevada adherents out of Nevada's 3 million population, proposed a nine-foot-high statue of its emblem, the biblical Ten Commandments held high by their Goddess, Assa. The other entries consisted of modern sculptures without any inscriptions other than the name of the artist. The city rejected Assa's Disciples' proposal because the proposed memorial had a religious theme, and chose instead the proposal for bronze ballet dancers. Assa's Disciples filed suit in federal district court in Las Vegas, alleging a denial of its constitutional rights.

Twenty-five members of Bill's Boys for Peace, an anti-war organization, showed up at the Contemplative Meadow with picket signs to protest the planned erection of the "America the Liberator" memorial, challenging its content and exclusion of opposing views. Carrying picket signs, "Don't Glorify Murder" and "America Is No Liberator," they chanted, "Peace Now!" until the Numa police department ordered them to leave the Contemplative Meadow. Bill's Boys and the

twenty-five demonstrators sued Numa and its police department for this removal in federal district court.

Discuss fully the possible constitutional claims of Assa's Disciples and Bill's Boys, and the possible defenses of the City of Numa.

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Assa's Disciples ("AD")

AD's brought there calim in a federal district court in Nevada, claiming consitutional rights violations. This claim will likely be brought on a thoery of freddom of religion under the 1st amendement to the consitution.

Standing

A person must have standing to bring a claim. A person ahs standing if they have a concrete stake in the outcome of teh litigation. There must be an injury personal to the person caused by the government, which could be redressed by the case.

Organizational Standing

An orginization normally does not have stadning to challenge an injury which occurs to its members. However, in Nevada, an organization will have standing if it is a case in which individual members would have standing, the members do not seek redress personally, the organization itself has an interest in the outcome of the litigation, and injunctive relief is sought. In federal court, this standard is the same, except there is no requirement that injunctive relief be sought. Here, AD is a religious organization, so it must have an interest in the outcome itself, and its members personally musyt have a redressaable grievance against the state. AD's members submitted the proposal to the city, so they were personally harmed, adn the organization itself was harmed because there would have been more awareness about the religion had the momument been chosen. The members of AD have not sued, and it does not appear from teh facts that they are planning to sue Numa. Therefore, AD wil lhave standing to challenge this decision.

Ripeness

The court may not hear AD's claim at this point because it is void for ripeness. A court may not hear a case if the injury in fact to the plaintiff is one which has not in fact happened yet. Here, AD's interest may not have been affected since the construction of the statute has not yet started. However, a redressable harm has occurred to AD, as the non-selection of their statute is harm for

which has already occurred. Because the city choice to build the bronze ballerina and not AD's monumnet, the claim is not void for ripeness.

Sovereign Immunity

The 11th Amendment gives state governments immunity against claims unless they are exclussively allowed by Congress, or the government waives such immunity. Here, the constitution itself allows the redress, as teh 1st amendment specifically states that there shall be no entanglement of church and state. Presumably Numa has not waived its sovereign immunity, but Congress does authorize suits such as this one.

Freedom of Religion

AD's claim will be based on the 1st Amendment of the constitution, and its freedom of religion clause. The Supreme COurt has said that a state may not favor one religion over another without violating the 1st amendment, Here, AD will argue that Numa is favoring the Judeo=Christian religins over its own, because they allowed fir a statute of Moses, a religious symbol in Judeo-Christian religions, to be on the property, but denied its statute because it had a religious purpose. Numa will argue that the statute of moses is a secular symbol of law, as the monumnet is dedicated ot the giver of laws, adn has no religious meaning. However, recent Supreme Court cases have stated that having a statute of the 10 commandments in the lawn of a public government building was religious, and it is likely that the court will see the giver of teh commandments as a religious symbol as well.

Numa will further argue that it is not in violatiomn of the constitution since it has fulfilled the Supreme Court test for freedom of religion. The Supreme Court has said that government action does not offend the 1st Amendment's Freedom of Religion Claise if it has a secular purpose, it does not establish one religion over another, and it does not promote excessive entanglement of church and state. As was seen above, it may be likely that the Moses statute does not have a secular purpose, adn would fail on its face. However, assuming this not to be true, the process of selecting the monuments in the park do not establish one religion over another, since the decision process was one which asked for all kinds of proposals, not just those wihtout religious meaning.

Further, there is not excessive entanglement here, since the city has not done anything to promote or help other religions while not helping AD. Therefore, it is possible that this denial of the monument by Numa was not a 1st amendment violation.

Numa will also argue that if the current statute of Moses is unconstitutional, than AD's proposed statute would also violate the 1st Amendment's Freedom of Religion Clause, as it would again be seen as endorsing one religion over another. Since the Supreme Court has recently said that a statute of the 10 commandments in front of courthouse was an illegal indorsement of religion by the state, and AD's proposed statute includes the 10 commandments, as well as a dipicition of their goddess, Numa is likely justified in refusing to construct this statute to avoid litigation in the future from persons who are offended by the religious nature of the propsed monument.

If Numa's denial of AD's monument is seen as a violation of the group's 1st Amendment right of Freedom of Religion, then Numa will have to show that their decision passes strict scrutiny. To make this showing, Numa will have to show that its decision was compelling to support a substantial government interest. Here, Numa will not be able to make this sowing, since the governmental interest it will push will be separation of church and satte, which would notmally pass strict scutiny, but the fact that there is already a Moses statute in the park will be make Numa's argument pretext, since they already have a religious statute in the park. Since the court will only look at the real purpose for the restriction in strict scrutiny, the pretextual reason offerred by Numa will be ignored, and the city will not be able to make a showing to pass strict scrutiny.

Freedom of Speech

AD may also attempt to challenge the city's decision on the grounds that it violates the groups 1st amendment right to free speech. The government may only redtrict certain kinds of speech, but may restrict by means of content-neutral time, place, and manner restrictiions. A restriction is content neutral if it does not favor one viewpoint over another. Here, Numa has selected speech on the basis of religion, so it is not content neutral. even though the restirction on its face seems content neutral, since it was looking for monumnets with the theme subjects for quiet

contemplation and inspiration, the effect of the restriction here is not content-neutral, since the city specifically told AD that it was denying its monumnet because of the religious nature of the statute.

Content-Based restrictions

In order for the court to uphold Numa's content based restriction here, Numa will have to show that there decision meets a hybrid form of strict scrutiny. Numa will have to show that the restriction was necessary to forawrd an important governmental interest. Here, Numa will likely be able to pass consitutional muster on this test, since it will argue that it is necessary to prevent endorsing one religion over another, and staying in compliance with the 1st amendments decree of separation of church and state. This is one of a few arguments which will actually allow a state to pass strict scrutiny, since the court will not condone the violation of the constituion in order to effectiuate the rights fo an individual or individuals. Therefore, the restriction on AD's speech by not allowing the statute ot be displayed will likely be upheld on 1st amendment freedom of speech grounds.

Bill's Boys for Peace ("BBP")

Standing

BBP must also have organizational standing to sue Numa. In Nevada, standing for an organization is allowed, but only to seek injunctive relief, if the requirements stated above are met. Here, BBP, as an organization, is suing Numa for damages, not for injuctive relief. Therefore, BBP's claim, as an organization, would have to be dismissed if this was brought in a Nevada State court. However, BBP will have standing to sue Numa in te federal district court, since there is no such requirement there. However, as discussed below, since the members personally have brought suit against Numa, BBP will not have organizational standing to sue Numa, since the members have sued the city personally for redress.

25 Members Standing

The 25 members of BBP must also have standing to sue Numa. Each member was personally

removed from the park and may have had thieir constitutional rights violated. Therefore, each member has a concrete stake in the outcome of this litigation, and has suffered a personal injury which can be redressed by the case, and have standing to sue Numa in federal district court.

Soveriegn Immunity

As above, Numa will have soverign immunity under the 11th Amendment, but Congress has authorized this type of suit also, as it concerns the states impingment on a constitutioally protected right.

Freedom of Speech

The members will bring suit against Numa for violations of their rights of free speech. The government is limited in the type of speech which it may restrict and where it may restrict such speech.

Public Forum

A public forum is one that has traditionally been made availible for speech, and which the government must constitutionally leave open to speech. Among these public forum are sidewalks and public parks. Here, the park was public, but it was created for the purpose of quiet enjoyment and contemplation. However, the purpose of the park will cause it to change from a public forum if the place is one that has traditionally been made availible for speech. If the court does see the park as a public forum, Numa will have to show that the removal of the members of BBP was necessary to effectuate an important governmental interest. Here, Numa will not be able to make this showing, since the removal of the members of BBP was necessary only to continue the quiet enjoyment of the park, not an important governmental interest. There are no facts that state that violence was imminent or ever threatened against the members of BBP, and beyond this, Numa will not be able to sustain that there was an important governmental interest.

Non-Public Forum

If the court does not see the park as a traditional public forum because of the reasons for the parks dedication, then it will see it as a non-public forum. A non-public is one that was not

traditionally open for speech, and the government is not constitutional compelled to leave open to speech. These forums tradionally included outside prosons for safety, and the areas around courthouses. If the court sees the park as a non-public forum, the member of BBP will have to show that their removal was not rationally related to a legitimate government interest. The members of BBP will not be able to make this showing, since Numa will say that the removal was rationally related to the interest of keeping the park quiet and its patrons safe. Since this heavy burden is on the members of BBP, it is likely that if the court takes this position of the park, they will not succeed in there case against Numa.

END OF EXAM

STATE BAR OF NEVADA
JULY 2008 EXAMINATION
APPLICANTS' ANSWERS TO QUESTIONS OF NEVADA BOARD OF BAR EXAMINERS

- EXAM 1, QUESTION 4 -

JULY 2008

EXAMINATION NO. 1;

QUESTION NO. 4: ANSWER IN ORANGE BOOKLET

Amy owns a fee simple interest in a parcel of land in Nevada. The only improvement on the land is a bungalow. Amy executes a 50 year lease with Betty to rent the bungalow and the land on which it sits, which are located within the southern third of Amy's parcel. Amy covenants in the lease that neither Amy for herself, nor her heirs, successors or assigns, will construct any multi-family or commercial buildings on the parcel. There is no prohibition on assignment or subleasing in the lease. Betty does not record the lease.

Amy sells the entire parcel to Carl, subject to Betty's lease, and gives Carl a copy of the lease. Amy's deed to Carl contains no restrictive covenants. Carl pays value for the parcel and records the deed.

Carl subdivides the parcel into three (3) lots: Lot 1, Lot 2 and Lot 3. The bungalow and its adjacent land are located entirely within Lot 3. Carl conveys Lot 2 for value "to David for life" in a recorded deed containing no restrictive covenants. Carl tells David that Betty leases the bungalow on Lot 3 on a long term basis, but does not give him a copy of the lease. Carl continues to own a fee simple interest in Lot 1 and Lot 3.

After Carl subdivides the property, Betty subleases the bungalow and land on which it sits to Ethel for the balance of the lease term. Betty charges Ethel more rent than she is paying, pointing out that the covenant in the lease assures Ethel quiet enjoyment of the bungalow for years to come. After Betty subleases to Ethel, David starts to build upscale condominiums on Lot 2 and Carl starts to build a commercial shopping center on Lot 1.

1. **Fully discuss Ethel's rights against Betty, Amy, Carl and David.**
2. **Can Ethel stop David from building the condominiums? Explain**
3. **Can Ethel stop Carl from building the shopping center? Explain.**

4)

Ethel's (E) rights: E is the leasee of the property (Lot 3) for the balance of Betty's (B) term. B's original lease from Amy (A) for a term of years (50 years) was a valid lease if it was put into writing (it must have been because Carl is given a copy of the lease), described the material terms (years and land to be leased, including the covenant not to build), and if it was signed by Betty. Assuming all 3 of these elements were present, the lease from A to B was valid.

B's subsequent sublease to E was also valid. The original lease contained no prohibition on assignment or subleasing, and Nevada real property law public policy favors the free alienablility of land. In this case, B's sublease to E for the duration of the lease does not violate any terms of the lease and is therefore valid. A sublease is different from an assignment in numerous ways. A subleasee cannot be sued by a landlord to collect rents while an assignee can be. Also, a sublease is given only a portion of the lease, while an assignee is given the remainder. In this case, even though the parties call the transfer from B to E a "sublease," the court may treat it as a transfer. Since B does not retain any interest in the property (according to the fact pattern, B transfers, to E "for the balance of the lease term"), the court may find that the transfer was an assignment of all of the rights that go with the land. This probably is not the case though. From the facts, it appears that E is still paying rent to B, and B in turn pays rents to Carl (C). B "is charging E more rent than she is paying," which makes it seem that B has kept her relationship as leasee with C in tact and holds a seperate leasee/leasor agreement with E. If this is the case, then E and B have established a sublease and B remains responsible to C for the rents due on the original lease while E is responsible for rents due on the sublease agreement between her and B.

If the transfer is labeled a sublease, E will not be liable to C for rents due. Because the courts view a subleasee as not being in privity of estate with the landlord, the responsibility to keep rent payments current does not fall on the subleasee, but instead on the original leasee. In this case, that appears to be of no concern to E. She seems to be paying her rents to B, who in turn pays to C. C also seems to be fine with the relationship where he continually accepts rents from B.

Under the terms of the apparent deal between E and B as subleasee, E has enforceable rights against B as her landlord, including the guarantee of habitability, and a right of quite

enjoyment.

If the transfer is labeled as an assigment (probably not), E will have different obligations then she would if the term was labeled a sublease. Because it is labeled a transfer, E will be liable to Carl (C) for rents due on the property. Because the court view an assignee as being in privity of estate with the landlord (courts don't see a subleasee as in privity of estate), the responsibility to keep rent payments current to C falls on E, even though no contract was signed between C and E. Because she has the responsibility to pay rent, E gets the reciprocal benefit of all the responsibilities that a landlord must make, and can enforce them against C. E is warranted a guarantee of habitability (in NV) and is warranted a guarantee of quiet enjoyment (in NV).

If it is labeled a transfer, E would have no rights against B, as all of her rights against B extinguished when the transfer was made and E took the over the lease.

E has no rights against A, either as a subleasee or assignee, because there is no privity of contract between A and E (there was no signed contract involving the two of them) and no privity of estate exists between the A and E (their is no relationship in land between the two of them).

E does not have any rights against D, either as a subleasee or assignee. As shown below, E cannot enforce the restrictive covenant against D because D had no notice of the convenant, nor can she enforce any right of quiet enjoyment against D because there is no privity of contract with him. While she has rights against D like against anybody else in the world (right to not be trespassed against, right of protection from nuisance, etc), she has no enforcable contract rights against D stemming from the lease or the covenant in the lease.

E's right to stop D from building condos: For E to stop D from building the condos on Lot 2, she must show that the burden of the restrictive covenant runs to D. If E has no concern for money damages, she must make a showing that there was intent in the original deal for the equitable servitude to run, D had notice of the covenant, and that the convenant touches and concerns the land.

1) Intent: To show that there was intent for the burden of the coventant to run to D, the best place to find this answer is in the original lease. In the original lease between A and B, A makes clear that neither herself, nor her heirs, successors or assigns will construct multi-family buildings on

the parcel. This strong language shows the intent of A to have this covenant run to future land-holders.

2) Notice: For the burden of the equitable servitude runs to D, it must be shown that D had notice of the convenant. Here, the facts tell us that D was "told" of E's lease, but was not given a copy of the lease. If D was told of the covenant in the talk, he has actual notice, but assuming the covenant was not disclosed to D at that time, he has no actual notice of the covenant. Actual notice is found when the person who is on notice was actually told of the existence of the covenant. As well, in C's transfer to D, there was no mention of the covenant in that document either. Also, D had no constructive notice. Constructive notice occurs when the convenant is recorded in the county records and a reasonable search would find the record. In this case, it is stated that neither Betty nor Amy ever recorded the lease, so there would be no way that D could have constructive notice of the covenant. The final way for D to gain notice is through inquiry notice, which exists upon physical inspection of the land. A physical inspection of Lot 3 would not (and could not) put D on notice of this particular covenant because it is a negative convenant, and there can be no evidence of a negative covenant of this sort to be discoverable on inquiry notice, at least in a situation like this. It appears that D has not notice of the equitable servitue.

3) Touch and Concern: The final element that must be shown to have an equitable servitude's burden run to successors in interest is that the covenant must touch and concern the land. To touch and concern the land, the covenant must "effect the value of the land" in some way. In this case, the value of the land would be affected if multi-family buildings were constructed next door, so this covenent does touch and concern the land.

As for the burden of the equitable servitude running to D, because D had no actual, constructive, or inquiry notice of the covenant (assuming she was not told of it when told about B's lease of Lot 3), the burden cannot run to him, and therefore E cannot enforce the equitable servitude against him. If, on the other hand, D did have actual knowledge of the covenant from the conversation with C when he obtained his estate, D would have adequate notice and therefore could be enjoined from building the condos.

If E was interested in money damages, she would be unable to get those from D either. To enforce a burden of a convenant at law (covenant with finacial damages), the enforcer must show the same three elements of an equitable servitude (intent, notice, and touch and concern) as

well as showing that the two parties are in horizontal and vertical privity. Even if E could show privity here, notice would still be lacking.

E has no recourse based on the covenant to either enjoin D from building the condos or from financial damages.

E's right to stop C from building the shopping center: For E to stop C from building the shopping center on Lot 1, she must show that the burden of the restrictive covenant runs to C. If E has no concern for money damages, she must make a showing that there was intent in the original deal for the equitable servitude to run, C had notice of the covenant, and that the convenant touches and concerns the land, just like above.

1) Intent: As shown above, there was intent in the original deal between A and B for the covenant to run to successor in interest of A's property, so the intent element is met to not have shopping malls ("commercial buildings" as the original lease call them) built on the land.

2) Notice: For the burden to run to C, E must show he had notice of the covenant. Unlike D who was just told of the lease between A and B and never saw the document itself, C was given "a copy of the lease," which included the covenant not to build. D had actual notice of the covenant not to build. Therefore, this element is met.

3) Touch and Concern: As shown above, the covenant not to build "effects the value of the land" and therefore touches and concerns the land. This element is met as between C and E.

As for the burden of the equitable servitude running to C, C has actual notice, there was intent, and the covenant runs with the land. All three elements are met, so E can enjoin C from building his shopping mall.

If E was interested in money damages, she would also have to show there was both horizontal and vertical privity. To show vertical privity, E would have to show that she retained that land from somebody who was a party to the covenant. In this case, because she obtained the land from B and B was an original party, then there will be vertical privity. As well, C recieved the land directly from A who was a party to the original lease, so there is vertical privity on that side. To show vertical privity, you must look at the original land transfer and see if more was transfered then just the covenant. In this case, A transfered her estate to C, including the covenant. Therefore, there is horizontal privity. In this case, E will be able to sue for money

damages to her land as well as an injunction if a shopping mall is built because all four elements (intent, notice, touch and concern, and privity) are all met.

END OF EXAM

STATE BAR OF NEVADA
JULY 2008 EXAMINATION
APPLICANTS' ANSWERS TO QUESTIONS OF NEVADA BOARD OF BAR EXAMINERS

- EXAM 2, QUESTION 1 -

JULY 2008

EXAMINATION NO. 2;

QUESTION NO. 1: ANSWER IN PURPLE BOOKLET

Larry Smith is the owner of Larry's Motor Sports ("Larry's"), a Nevada corporation and retail dealer for Speedy Motorcycles and All Terrain Vehicles ("ATVs") ("Speedy"). The bulk of Larry's sales are made under installment credit contracts. Larry advertises that it has the right products to perform well in the harsh Nevada desert.

Speedy loaned money to Larry's to finance a purchase of new motorcycles and ATVs. In connection with this loan, Speedy took and perfected a security interest in Larry's inventory, including all after-acquired property. After obtaining the loans from Speedy, Larry decided to expand his business to include sales and leases of used motorcycles and ATVs from other manufacturers and applied to Big Bank for additional financing.

Big Bank agreed to provide Larry's with funds to buy used motorcycles and ATVs for both sale and lease; in exchange, Larry signed a security agreement that granted Big Bank a security interest in "inventory," and authorized Big Bank to file a financing statement covering the inventory, which Big Bank did ten days later. The financing statement listed the debtor as "Larry Smith *dba* Larry's Motor Sports" and listed the collateral as "inventory." For the debtor's address, it provided Larry's home address, not his business address. A month after the financing statement was filed, Larry sold his house and moved in with his brother. Larry also moved excess inventory from the dealership offsite.

Under the loan agreement between Big Bank and Larry's, Big Bank required Larry's to turn over all title certificates relating to the motorcycles and ATVs in its inventory. Big Bank kept these title certificates in its safe and released them only as Larry's made retail sales of motorcycles and ATVs. Big Bank also required Larry's to turn over any lease or installment credit contract it received from retail customers which were also kept in its safe.

Larry's arrangement with Big Bank was in violation of a provision in Larry's security agreement with Speedy that he would not give Speedy less security, as well as an exclusive dealing clause in Speedy's contract. When Speedy discovered what Larry had been doing, Speedy sent a letter to Big Bank demanding the return of all title certificates and sale and lease contracts.

Dave's Trail Rentals, a recreational off-road rental business, purchased ten motorcycles from Larry's under a sale contract. Dave's contract with Larry's contained a provision stating that **"Seller makes no representations or warranties, express or implied (including the implied warranties of merchantability and fitness)."** Dave purchased motorcycles and ATVs from Larry's based on Larry's advertisements and statements from Larry's salesperson that he had the best products for the Nevada desert and they would require little, if any, maintenance.

Two months after purchase, Dave returned seven of the ten motorcycles claiming that they were defective because the ignitions kept stalling from dirt build-up as the motorcycles were used exclusively on desert trails. Larry offered to do any necessary repairs, but Dave refused, claiming that he wanted his money back.

1. **What are the potential claims of Speedy Motorcycles and ATVs?**
2. **What are the potential claims and liabilities of Big Bank?**
3. **Does Dave's Trail Rentals have any potential claims against Larry's Motor Sports?**
4. **What are the rights and liabilities of Larry's Motor Sports and/or Larry Smith?**

Please discuss fully, including any defenses each party may raise.

1)

1. Speedy Motorcycles & ATV's

Applicable Law:

Security interests are generally governed by UCC Article 9. Nevada has adopted UCC Art. 9. Therefore, for any and all security interests in this problem, UCC Article 9 will govern.

Security Agreement

A security agreement, to be valid must be in writing, identify the parties to the security agreement, contain an adequate description of the collateral to be attached, and signed by the parties. We have no facts regarding the contents of the security agreement, so for purposes of this question I will assume that it was adequately executed.

PMSI

A security interest will be given a super-priority as a Purchase Money Security Interest (PMSI) if it meets certain criteria. A PMSI can be obtained in one of two ways: 1) a seller sells goods on credit and as collateral takes a security interest in the goods sold for the amount of the purchase price; or 2) a lender may loan money to a debtor for the specific purpose of purchasing particular goods and the lender then takes a security interest in those goods. In the case at hand Speedy will be considered a holder of a lender PMSI. Speedy lent Larry's the money to purchase the motorcycles and ATV's and at the same time reserved a security interest in those goods. A PMSI will be considered perfected by properly filing on the inventory prior to possession by the debtor and giving notice to any other parties with a security interst in the goods. Speedy took a security interest in the goods at a time in which no other parties had a security interest and the facts state that the security interest was "perfected" so it will be assumed that there are no defects in Speedy's PMSI.

After-Acquired Property

A security agreement may provide that a creditor's security interest will automatically attach and be collateral to the present debt owed to any after-acquired property. Speedy's security agreement with Larry's has such a provision included. Therefore, Speedy's security interest will

rightfully attach any property acquired after the security agreement has been executed. Additionally, the holder of the security interest will not need to refile on that after-acquired property if the filing would be done in the same place as the filing on the initial security agreement. If the initial filing is sufficient to provide notice to any subsequent creditors of the security interest in the collateral it will be considered sufficient for perfection. Therefore, because the after-acquired property of Larry's was also inventory the prior perfection (which must have been done by filing) of Speedy's security interest will extend to the after-acquired inventory.

Default

A default occurs when a provision of the security agreement is not met by the debtor. There are generally no particular events of default, rather the security agreement will be the place that courts will look to in order to define what an event of default is. The security agreement between Speedy & Larry's specifically provided that less security that what they were provided under the original contract. Additionally, the security agreement provided that Speedy would have the right to exclusive dealing with Larry's regarding the retail of motorcycles and ATVs. An event of default will generally allow a creditor and holder of a security interest to initiate foreclosure proceedings on the security interest that creditor holds in debtors collateral. Creditors may also, provided the security agreement contains such a provision, accelerate the payments of the debt owed on the account. We have no facts regarding whether the security agreement provides for such a remedy.

Priority

A PMSI generally provides the holder of such a super-priority against other holders of security interests in the same collateral. As against a holder of another PMSI a lender PMSI will lose out to a seller PMSI. However, when the two holders of lender PMSIs are fighting for priority the first to file or perfect will be given priority. As against Big Bank, Speedy's PMSI will be given priority because they were the first to file or perfect. Therefore, Speedy's will likely have priority as to redemption of the collateral against Big Bank.

2. Big Bank

PMSI

- Inventory

As mentioned above, a creditor may obtain a super-priority PMSI through certain procedures. Where the collateral involved is inventory, a creditor seeking to obtain a PMSI in priority against previous creditors must 1) file and perfect the security interest prior to the debtor obtaining possession, and 2) notify any and all parties with an interest in the collateral of the new security interest. Since Speedy already had a security interest regarding Larry's inventory, if Big Bank wished to obtain a PMSI regarding the inventory it needed to meet the above conditions. There are not facts sufficient to detail whether Big Bank met these specifications. Nevertheless, it is apparent that Big Bank failed to provide notice of the security interest to Speedy's and therefore will not have a PMSI regarding Larry's inventory.

Security Interest

- Accounts

However, Big Bank may be able to claim a security interest in Larry's accounts. Accounts are basic rights to payment by the debtor. Here the leases and installment credit contracts that Big Bank holds would be considered accounts. However, Speedy's may be able to claim that the accounts are in fact proceeds of the inventory - to which Speedy's already has a PMSI. Additionally, a security interest may be perfected by filing, possession or control. Therefore, as against other creditors claiming a security interest in the accounts, whoever has possession of the accounts will generally be given priority. Thus, because Big Bank has possession of the accounts they will likely be given priority regarding Larry's accounts.

Proceeds

Proceeds are profits that naturally occur from the disposal of collateral. Generally, proceeds need not be mentioned in a security agreement in order to be part of the collateral for a creditor with an attached security interests. Because the accounts are naturally the product of selling the inventory Speedy's may make a claim that they are the proceeds of the inventory to

which their security interest is attached.

Financial Statement & Filing

A financial statement (FS) must generally include particlar items in order to be valid. It must include the parties to the security interest, and it must sufficiently identify those parties such that other creditors would be reasonably able to discover the filing. Additionally, a FS must include a description of the collateral that would provide other creditors with notice that the collateral they seek to attach may be subject to another security interest. Here, when Big Bank filed the FS it was sufficient had they had a valid security interest in Larry's inventory. ALso, a FS will be good as against other creditors so long as it reasonably identifies the party against whom the security interest is enforceable and describes the collateral. If a debtor changes its name or address in such a way that other creditors would no longer to able to reasonably discover the FS, then the FS will still be considered valid for 4 months following the change. Here Larry's change of address and removal of collateral from the specified premises will likely not make the FS unenforceable against his collateral. Therefore, Big Bank's FS will still be valid against Larry's inventory, despite not having priority against Speedy's.

3. Dave's Trail Rentals

Applicable Law

The contract involved here deals with the selling of goods, i.e. purchasing ten motorcycles, and therefore will be governed by the UCC.

Consumer Goods

If the goods covered under the contract are purchased for household, personal or family purposes then certain exceptions to the general UCC will apply. Dave's bought the motorcycles for off-road rental business and therefore the motorcycles will not be considered consumer goods.

Express Warranties

Express warranties are those made by a seller of goods regarding the products sold.

Express warranties, if found, cannot be disclaimed. Generally advertisements and statements of opinion will not be held to be express warranties, unless those expressions create a reasonable reliance on the statement by the purchaser. Here, the statements by Larry's that he had "the best products for the Nevada desert and they would require little, if any, maintenance will likely be found to be express warranties of quality. Therefore, Dave's will have a claim against Larry's for a breach of express warranty.

Implied Warranty of Fitness for a Particular Purpose

The Implied warranty of fitness for a particular purpose provides a buyer of goods that the goods that are being purchased will work for a very particular intended use. This implied warranty can be disclaimed by disclaiming any implied warranty unless representations by the seller induce reliance that the goods will appropriate for that particular use. Thus, Larry's representations that there is no implied warranty for a "purpose" will likely not preclude Dave's from asserting a breach of the implied warranty because Larry's assertion that his products are the "best products for the Nevada desert" induced Dave's to purchase them for use in the desert.

Implied Warranty of Merchantability

Implied warranty of merchantability provides that when the seller of goods sells those goods they are of a proper working condition. The implied warranty of merchantability can be disclaimed, but to do so the disclaimer must be conspicuous and specifically mention "merchantability." Additionally, the implied warranty of merchantability can be disclaimed by stating that a good is "as is" or "with all defects" but because Larry's did not provide such a statement it does not apply. If Larry's is found to have not disclaimed the implied warranty of merchantability, it will likely be because the disclaimer was not sufficiently conspicuous.

Right to Repair

Although Larry's may be in breach of various warranties, Larry's has a right to repair or fix the breach. Thus when Dave's refused to allow Larry's to do the necessary repairs Dave may be in breach. Only if it can be established that the repair cannot provide relief to Dave's would he then be entitled to his entire purchase price back. At which point he would also be required to

return any motorcycles still in his possession to Larry's.

4. Larry's rights & liabilities

Larry will likely be liable for defaulting on his security agreement with Speedy's and therefore may be forced to hand over possession of the collateral subject to that agreement. Additionally, if the security agreement provided such a provision, on default Speedy may elect to accelerate the debt and therefore Larry would be liable to pay the entire balance of the loan. Big Bank likely has a security interest on Larry's accounts and therefore may demand that any payment made on those accounts be assigned or handed over to Big Bank. Additionally, because Larry's made express waranties regarding the products sold to Dave's, Larry's will be liable to repair the motorcycles to proper working order.

STATE BAR OF NEVADA
JULY 2008 EXAMINATION
APPLICANTS' ANSWERS TO QUESTIONS OF NEVADA BOARD OF BAR EXAMINERS

- EXAM 2, QUESTION 2 -

JULY 2008

EXAMINATION NO. 2;

QUESTION NO. 2: ANSWER IN YELLOW BOOKLET

Loren, a Nevada licensed attorney, was recently terminated from a law firm specializing in real property law due to a drastic drop in business. Loren's only legal experience had been in the real estate field since he became a lawyer seven years earlier. He decided that he needed to broaden his practice so he ran this advertisement in the local newspaper:

> "LOREN, a real fighter for you. Need help with BANKRUPTCY, DIVORCE, or collecting money for an INJURY – call LOREN at 555-4321. I will give you the experienced legal assistance you need - BETTER RATES THAN ALL OF THOSE LAWYERS ON TV!"

Loren's first client was Cara who contacted him in response to the newspaper ad. When they met she told him that she had been in two car accidents. The first accident happened in 2007, when her car had been rear-ended while sitting at a red light. That accident had occurred in California but she had the driver's license and insurance information from the other driver. Cara had undergone ten chiropractic treatments in California for back injuries from that accident before she moved to Nevada. Her back still bothered her when she was again rear-ended while at a stop sign in Las Vegas in 2008. She wanted more chiropractic treatments since she had not recovered from the back injury. She didn't believe that the Las Vegas accident affected her former back injury.

Loren said that he wasn't a California licensed attorney but that he'd call the adverse driver's insurance company for the California accident and try to get a settlement so that she would not have to retain a California lawyer. He would settle that case first and then try to collect money for the second accident. He told her to get the additional chiropractic treatments in Las Vegas and then he stated that he would try to get that treatment paid from the Las Vegas accident settlement. Loren told her to go to Crack-&-Snap Chiropractic clinic because he had an agreement with the clinic regarding billing for treatment. Crack-&-Snap Chiropractic would send bills to be used for settlement negotiations. Loren would send the total chiropractic billing amount to the insurance company as part of his settlement demand. When the case settled Crack-&-Snap Chiropractic would only require payment of 75% of the bill. What Cara did not know

was that after payment of 75% of the chiropractic bill, Crack-&-Snap Chiropractic would send Loren a check equal to 25% of the total billing as a referral fee.

Loren gave Cara this agreement which he said explained his fee:

> "I agree to pay Loren 30% of any money collected for my 2007 and 2008 car accidents. If there is a quick settlement the fee will be reduced to 20%."

Loren discovered that the California driver had an insurance policy of only $15,000. Loren accepted a $10,000 offer during his second telephone call with the driver's insurance representative. Loren then called Cara and told her that he had settled the California accident for $10,000. He said this was a great deal because she didn't have to file a lawsuit in California. He said that his fee would be 30% since he had to make so many phone calls. He and Cara endorsed the settlement check which Loren deposited into his office checking account. He later mailed Cara a check for $7,000 as her share with a thank-you card.

Loren then filed suit for the Las Vegas accident. After he received the Answer, he sent the adverse attorney a copy of the bill for Cara's 18 chiropractic treatments in Las Vegas with a copy of the police report for the accident. A week later Loren called the adverse attorney, advising that he wanted to establish a large personal injury practice and wanted the reputation of obtaining early settlements. Loren told the adverse attorney that he'd accept an offer equal to twice the chiropractic bills since most personal injury lawyers would demand three times the medical expenses. The offer was promptly accepted.

Loren then called Cara and told her that he'd already gotten her case settled. The settlement check was signed by Loren and Cara and deposited into Loren's office checking account. After the settlement check cleared the bank, Loren deducted 30% for his fee, deducted 75% of the chiropractic bill and deducted $500 which he estimated was a fair amount for office overhead. A few days later, Loren mailed Cara a check for the remaining settlement funds with another thank-you card. Loren then sent a check to Crack & Snap Chiropractic clinic for 75% of its total billing. A few days later, Crack & Snap sent Loren his referral fee, which was equal to 25% of the total clinic billing.

DISCUSS all improper professional conduct of Loren.

2)

QUESTION 2: PROFESSIONAL RESPONSIBILITY

An attorney in Nevada is bound and obligated to follow the Nevada Rules of Professional Conduct. Falilure to do so can result in punishments anywhere from private repremands to having the liscence to practice law revoked. In this case, Loren, a nevada attoreny, violated many rules of the NRPC.

Advertisment:

Duty not to make misleading statements/ duty to provide competent representation. A lawyer has the duty not to make false or misleading statements in advertisements. This includes making misleading and non-verifieable statements. IN this case, Loren made the claim that he would provide "the experienced legal assistance you need." Although this statement may not be directly false (see next paragraph) it could be construed as misleading. A person seeing this adversitement is likely to think that Loren has much experience in the fields of bankruptcy, divorce and personal injury. However, as Laron was a real property lawyer for his entire 7 year career, he certainly has almost no experience in the listed fields. Therefore, he breached his duty.

Loren would argue that he only has to provide competent legal representation. Competant legal representation requires the requisite time, skill and care to perform a legal task. If an attorney does not currently have the requisite skill, he may acquire it or associate with counsel that does have the requiste skill. However, the adverisment does not say that Loren is merely competent, it implies that he is experienced. As this is a false, or at least misleading statement, Laron is subject to disipline.

Duty not to make unverifiable or false claims/vague claims about fee aggreeemnts. A lawyer may not make unvearifieable claims. In this case, Loren states that his fees are less than the "TV" lawyers. Such a claim would be difficult to verify. Further, such a claim is impossible to verify from the adverstiement alone. This leads to a second breach. Advertisements must

contain the range of possible fee agreements. Lorens' did not.

Most importantly, the advertisement was false, Loren claimed to be "lower" in fees than the "TV" lawyers. However, taking a 20-30% fee agreement likely is not lower than was all attorney how advertise on TV would take. This part of the advertisement is likely blantantly fasle. Thus, Loren is subject to discipline.

Fee Agreeemnt: Attorny must put in the advertisement that the client might have to pay the other side's expenses and legal fees. Loren did not.

Other duties: Loren must also file the adverstiement witht he state bar within 15 days of its publication. Further, he must keep a copy of it for 4 years. It is unclear as to whether Loren did this. Loren did list the attorney responsible for teh advertsitment, which is good and required, howeveer, he failed to list his last name, the address of his firm, and his bar number.

Duty not engage in the Unauthorized practice of law. An attoreney may not engage in the unauthroized practice of law. This include practiceing law in juristidctions where the attoreny is not licensed. In this case, Loren was not licensed to practice law in California, but did. He is there fore subject to sanctions. Loren will claim that he never entered into californai and the plaintiff was a nevada resident. However, the accident was clearly under the jurisdiction of califiornia. Thus, Loren should have refered CLara to a californai license attorney or have complied to California's pro hoc vice rules, which would have allowed Loren to do limited practice in california. Howver, loren did not and is thus liable for the unautheroized pracitce of law. NRPC states that a violation of such a rule subjects a Nevada attorney to discipline from both Califiornia and Nevada.

Duty Of Loyalty and Candor and Conflict of Interest to the Client.

Duty Candor. An attorney has the duty to be upfront and candid with his client. Loren

vilated this in several ways. First, in light of the advertisement, which Loren knew Clara had seen, Loren should have disclosed that he was new to this area of law. Second, loren had a duty to disclose the secret referal agreement he had with the chiropractor (more on this below).

Further, an attorney has a duty to disclose all offeres of settlement to the client, and follow the client's instructions regarding such offers. In this case, Loren recieved two offeres of settlement. Loren (L) accepeted both offeres without consulting Clara (C). L, further, did not discuss with C that the insurance in the first accideent had a $15,000 dollar limit and that L had only accepted $10,000. Further, Loren was missleading to C because he told C that he would use the Chiropratic bills to help in the settlement, but he did not use the bills in the first settlement, the one he knew had caused C's injuries. The, L also was false to C in this way.

Duty of Loyalty. An attorney has the duty to be loyal to his client and fairly represent the interesets of this client. In regards to the second accident, L had the duty to represent the interests of his client. The statement made by L to the other attorney, that L would accept a lower settlement in order to close the case quickly for L's personal reputation, was a breach of loyalty.

Duty to Avoid Conflict of Interest: Referalls and Referal Fees. An attorney has the duty to avoid conflicts of interest. Included in this duty is the duty not to recieve referal fees for sending clients elsewhere. Although technically the NRPC states that an attorney may not GIVE fees in exchange for referals, except for reasonable fees to licensed attroney referal services, receiving fees to send a client to another professional would be considered a conflict of interest. Further, an attorney may not have an exclusive reciprical referal arrangement with anther professional. L seems to have violated these two rules by accepting the referal fee and not disclosing it the C and the nature of the referall arrangement seems to violate the second principle in the paragraph. Further, an attorney must, from time to time, review the quilaity of the people he referes his clients to.

Duty of Accounting for Client's Funds. (the trust account or lack thereof). An attorney has the

duty to keep the clients funds seperate from the attorney's funds and safe. In this case, L put both of the settlement checks in his general office fund. This was a violation and subjects him to sanctions. It does not matter that C recieved what was rightfully hers at the end (if she did). The co-mingling of funds is forbidden.

Duty of Candor to the Opposing Side. An attorney has the duty not to make false or misleading statmentss to attorneys representing the opposing party. In this case, L made misleading and false statements to the attorney representing the second car crash. L sent the chiropractic bills to the second attorney when he knew that C believed the damage causing the chiropractic bills was not caused by the second crash, but rather the first crash. Therefore L misrepresetnted the facts and is subject to dicipline.

Further, L misrepresented the facts regarding the actual cost of the chiropractic bills. L knew that bills were worth only 75% of their face value. Further, L knew that the real cost was onlyy 50% of the bills's face value when one takes into account the unlawful referal agreement between the chiropractor and L. Therefore the evidence inducing the settlement was misleading because it was not applicable to that accicedent and it was 100% larger that it should have been.

FEES:

Resonable Fees. An attorney has the duty not to charge excessive fees. Fees may be based on expertise and skill required for the matter and the time and expense put into the matter and what is traditional for such matters in the area. The facts do not say what traditional fees in the area are, however, we know that L is not expeirenced in this field, that this field is likely not a specialized field, and that L did not spend much time on the settlemnets, as the first settlment was made on the second phone call and the second settlement was apparently made in one phone call after the chirpractic bills were recieved. Thus, the 30% fee was probably excessive. Further, since the agreement stated that a quick settlement would result in a 20% fee, L is in breech of the agreement, as both were quick setlements.

Vague Fee Agreement/ Written Contigency Fee. A contitngency fee must be in writing. Further, any ambiguities will be construed against the attorney. In this case, the agreement was in writing, which is good. However, the contract was vague as to whether office costs were part of the 20-30% or whether they were in addition to 20-30%. Since the contact was vague, it will be construed against L. Thus, the $500 L deducted from the second settlement should not have been deducted at all, but should have been considered already included in the 30% he took. Thus, L violated the rules and is subject to dicipline.

STATE BAR OF NEVADA
JULY 2008 EXAMINATION
APPLICANTS' ANSWERS TO QUESTIONS OF NEVADA BOARD OF BAR EXAMINERS

- EXAM 2, QUESTION 3 -

JULY 2008

EXAMINATION NO. 2;

QUESTION NO. 3: ANSWER IN DARK BLUE BOOKLET

John and Melissa, both of whom resided in California at the time, were married in Reno, Nevada, in 1987. They continued to reside in California after the wedding where John had been employed by Acme, Inc. since 1982. His employment with Acme continued during the marriage. John was paid a salary and also received 1000 shares of Acme stock each year as his compensation.

In 1992, five years after the wedding, Melissa inherited a home in Reno. John and Melissa then moved to Reno to live in the home. There was no mortgage on the home but they paid the taxes and insurance with John's salary. John continued to work for Acme as a consultant after moving to Reno and received a salary for his services but no longer received any stock. At the time they moved to Reno, John sold 2000 shares of Acme stock and used the proceeds to make improvements to the Reno home increasing its value.

In 1997, five years after they moved to Reno, John and Melissa bought a bookstore in Reno. John used the proceeds from a sale of the remaining stock he earned while working for Acme in California to make the purchase. John incorporated the business and made himself the sole shareholder. Title to the real property where the business was operated was taken in John's name alone. Melissa ran the business with John's help. They used John's salary to purchase inventory and to pay business expenses when there was insufficient business income.

Five years later, in 2002, at an anniversary party at the Reno home, John's father stated that he was giving his Oregon cabin and surrounding land to John and Melissa as an anniversary gift. John's father then executed a deed conveying the Oregon land and cabin solely to John. The deed was properly recorded in Oregon. You are to assume that under Oregon law, record title controls ownership.

John and Melissa used the Oregon cabin as their vacation home. They purchased a truck for their use at the cabin. John used his salary to purchase the truck in Oregon and took title to and registered the truck solely in his name in Oregon. You are to assume that, under Oregon law, the registered title controls ownership of the vehicle.

In 2007, John and Melissa were involved in an automobile accident in Nevada as a result of John's negligence. Melissa was seriously injured. Melissa consulted with a lawyer about her potential tort claims, including claims for her medical expenses, lost income and pain and suffering.

While meeting with her lawyer, Melissa, unhappy with her marriage, asked the lawyer about her rights if she were to seek a divorce from John.

Applying any appropriate conflicts principles, identify and discuss the separate and community property interests of John and Melissa in the following assets:

The Reno House

The Bookstore

The Oregon Cabin

The Truck kept in Oregon

Melissa's Personal Injury Claim

3)

Separate and community property interests of John and Melissa in the following assets, and discussion of conflicts principles, where applicable:

Nevada is a community property state, and assets acquired during marriage are presumed to belong to the community. Property acquired even if during marriage by gift, devise, descent, or inheritance, or in exchange for the separate property of the spouse or for recovery of pain and suffering in a tort cause of action for personal injury is the separate property of the spouse. The burden of proving the separate character of property is on the party claiming its separate nature, and it must be proven by clear and convincing evidence. Generally, the court will look to the source of funds used to acquire the asset to determine its character. Mere change in form of separate property is not enough to make it community; it must be transmuted or gifted to the community to change its form.

The first issue is the validity of the marriage. John and Melissa were married in Reno, although they were California domiciliaries. A valid marriage requires consent, capacity, age, a license, and a ceremony officiated by someone qualified to do so. There are no facts indicating that any of these elements were missing, so the following presumes a valid marriage.

1. The Reno House

Melissa inherited this home five years into the marriage. Property otherwise acquired would be presumed to be community, but this property was received as an inheritance, so it is her separate property. When community funds are used to pay a mortgage on a separate asset, problems with valuation of the respective interests can arise. However, there was no mortgage on the property, so the entire appreciation of the home will also be Melissa's separate property. Even though community funds (John's salary) were used to pay the taxes and insurance on the home, this is not considered by Nevada courts to be a cause of the appreciation of a home, so again, none of the appreciation of the home will be attributed to the community. Finally, when property is held by tenants in common, and one tenant lives on the land, the other tenants are not entitled to

reasonable rental value from the tenant in residence. By analogy, it is unlikely that Melissa's separate property will be credited with the reasonable rental value of the home during the period the spouses lived in the home. Upon divorce then, the entire home will be Melissa's separate property.

Improvements: In general, the valuation method for improvements to separate property made with community property (the proceeds of the sale of stock, part of John's employment compensation) is reimbursement. However, upon a clear showing that the main cause of the appreciation of the separate asset during the time of the marriage is attributable to the improvements, the court may apportion or completely apply the appreciation to the value of the community. The facts only indicate that John sold 2000 shares of his Acme stock to improve the home and that the improvements did increase the value. If most of the appreciation of the home is due to these improvements, then the appreciation will be given to the community in divorce. Although John worked for and received 1,000 shares of stock from Acme for five years prior the marriage, he earned stock for 5 more years during the marriage, so it is unclear whether the 2000 shares of stock are from his separate (pre-marriage) grants of stock, or his community (during the marriage) grants of stock.

2. The Bookstore

The bookstore business was purchased during marriage with proceeds from the remaining shares of stock John earned while working in California. John worked for Acme in California for five years before marriage and during the first five years of marriage. He sold 2,000 shares five years prior to buying the bookstore, leaving 8,000 shares. It is unclear which of the shares were used at what time (separate or community). However, no matter what the status of the first 2,000 shares, the 8,000 shares constitute both community and separate (5,000 shares of each total, so 2,000 of either one or both leaves some remaining in either category). The business is community property to the extent that it was purchased with community property.

Nevada uses one of two methods to value a business purchased with separate property but run

with the assets and labor of the community. The first is the Pereira method, which applies a reasonable rate of return to the value of the separate property at the time the business started for the number of years the business was run during the marriage. This constitutes the separate property of that spouse. The rest belongs to the community. This method is used when the appreciation of the business is due to the efforts of the community; here, the facts state that John took title, incorporated it, and was the sole shareholder, but also that "Melissa ran the business with John's help." John's income (community property) was used to help the business pay expenses as well. Therefore, the appreciation is due to the efforts of the community, despite title and ownership in John. Therefore the Pereira method, Nevada's default method, will be used.

The alternative method is the Van Camp method, in which a reasonable value of the services provided by the communityn is determined, and the expenses actually paid for by the business proceeds are subtracted. This amount times the number of years of marriage is used to determine the community interest, and the remaining is the separate property of the spouse whose business is his or her separate property. This method is only used when the cause of the appreciation of the business is the nature of its goods or services rather than the efforts of the community.

3. The Oregon cabin

Fifteen years into the marriage, John's father stated he was giving his Oregon cabin and the land it sat on to the couple as a gift. This oral statement is invalid for two reasons; first, because the Statute of Frauds requires conveyances of real property to be in writing, and second, because it was a gratuitous promise not made for consideration. Therefore, Melissa has no rights on a contract to enforce the promise, and title will control. In Oregon, according to the facts, record title controls ownership. When John's father actually executed, delivered, and recorded the deed, he conveyed it solely to John. Gifts given during marriage are the separate property of that spouse. Therefore, the cabin is the separate property of John, and he can prove it because a recorded deed creates a presumption of delivery (and thus validity of the deed). This satisfies the clear and convincing evidence standard required to show that the cabin is John's separate property.

If the parties' divorce is handled by a Nevada court, it will be a bilateral divorce, which allows the court to hand down a binding property distribution/settlement and other ancillary awards because it has personal jurisdiction over both spouses, in addition to the divorce decree. However, Nevada will apply its conflict of laws principles (a combination of the First Restatement vested interests approach and the Second Restatement most significant contacts approach) and apply the law of the situs of the real property. Therefore, Oregon law will apply, which as stated above, means the property belongs to John as his separate property.

4. The truck kept in Oregon

John used community property to purchase the truck the spouses used in Oregon at the cabin. However, again, title to the asset in Oregon constitutes ownership of the vehicle. Under Oregon law, then, because John took title and registered the vehicle solely in his name, it would belong to him. The truck is not real property, and therefore Nevada would not apply the law of the situs to the property. Instead, Nevada would look to its conflict of laws principles to determine whether to apply its own law (the source of funds used to acquire the asset controls) or the law of Oregon (title controls).

Under the First Restatement vested rights approach, the place where the rights of the parties vested controls. In a purchase of personal property, ownership occurred where the money was paid for the asset. Under the Second Restatement most significant contacts test, the Nevada court would probaby apply Nevada law, although it is a close call, by looking at connecting facts and certain policy principles. The vehicle was purchased, stored, titled and registered, and driven in Oregon, so Oregon has an interest in ensuring that its recorded titles accurately reflect the ownership of vehicles in the state by, among other things, having its recorded title given full faith and credit by other states. But on the other hand, the funds used to purchase the vehicle were the funds of a community, the members of which reside in Nevada. Nevada has a public policy interest in ensuring that its community property laws are upheld so that one spouse cannot siphon community money into states who recognize ownership by title by purchasing assets there in one

name only. Nevada also has a more significant interest in this case because the spouses are residents, rather than Oregon, whose public policy in favor of effective and accurate title can still be served as to its own residents even if Nevada does not apply Oregon law to the truck. Therefore, Nevada has a more significant interest in applying its own law to community funds earned in that state, and Nevada law will apply. Thus, the truck is community property.

5. Melissa's Personal Injury Claim

Twenty years into the marriage, Melissa was seriously injured in Nevada as a result of John's negligent driving. Normally, tort damages for personal injury and pain and suffering are the separate property of the injured spouse, because of the policy reason that the injury is personal to that spouse. Other awards, such as those specifically for wage replacement, are community. The pain and suffering component is not considered mere wage replacement.

Generally, one spouse is not liable for the torts of the other spouse, unless he or she would be liable even absent the marital relationship. Melissa would not normally be liable for John's negligent driving, unless the purpose of his driving was to carry out a benefit for the community. Here, John was driving Melissa somewhere, which constitutes a benefit to the community. Therefore, community assets would be at stake for this tort, in addition to the separate property of John if the community funds are insufficient. The facts indicate that Melissa's injuries are severe, so in the case that the community is exhausted to pay for her medical bills, etc., John's property can be used to pay damages, and to the extent they are for pain and suffering and hospital bills, those amounts would become her separate property. It seems highly unusual to sue the spouse though.

Rights upon Divorce

Nevada uses a system of statutory no fault divorce, which it just switched to recently. Here, the spouses would probably divorce for incompatibility reasons under the statute. As a result, community property is subject to equal division, unless there are compelling reasons (probably

only financial misconduct one one spouse) for deviating from this allocation. Melissa would be entitled, then, to half of the value of the community property as described above, as well as retaining title to her separate property (the court may not give one spouse's separate property to the other spouse, although it may be set aside for security of alimony or child support payments). This applies as well to John. If suing her husband for his negligent driving does not work, the court might be willing to deviate to help her recover from her injuries.

Either spouse may be entitled to alimony, which is either ongoing payments or a one-time lump sum intended to keep one spouse in the manner of living to which he or she became accustomed during marriage. The court will consider an agreement of the parties, although it is not bound by it, the respective earning capacity of the spouses, whether there is a need for rehabilitative alimony, the health and age of the parties, and the length of the marriage (the longer the marriage, the more interdependent they are deemed to have become), among other factors the court deems appropriate.

As discussed above, Nevada has personal jurisdiction over both spouses, so a final judgment on the merits of the divorce will be entitled to full faith and credit by sister states, although usually the court retains jurisdiction over modifications of the alimony payments. To the extent the awards can be modified, they will still be given effect by other state courts through comity principles.

STATE BAR OF NEVADA
JULY 2008 EXAMINATION
APPLICANTS' ANSWERS TO QUESTIONS OF NEVADA BOARD OF BAR EXAMINERS

- EXAM 2, QUESTION 4 -

JULY 2008

EXAMINATION NO. 2;

QUESTION NO. 4: ANSWER IN LIGHT GREEN BOOKLET

The Smith family from Las Vegas decided to experience the rural life by booking a vacation at Fred's Circle Bar X Guest Ranch, a sole proprietorship, in Elko, Nevada.

Excited to be outside the confines of the city, the 5-year old Smith twins, Adam and Bobby, wandered off to explore the ranch. The twins noticed some planks lying in a field behind the guesthouse. A sign reading "DANGER – Mineshaft" lay on the ground nearby. Curious, Adam moved one of the planks, lost his balance and fell down the mineshaft, sustaining multiple injuries.

Exhausted and irritated by the constant demands of the diva-like Mrs. Smith, Jake, a longtime employee of Circle Bar X, stuck a burr under the saddle of the temperamental horse that Mrs. Smith was scheduled to ride on a trail ride with her husband that day. When the horse was brought out and Mrs. Smith settled into the saddle, the horse began bucking and tossed Mrs. Smith off, kicking her in the head, as her husband watched in horror. Mrs. Smith, a surgeon, was rendered unconscious by the kick and remained in a coma for several days. As a result of witnessing the accident, Mr. Smith, a novelist, has nightmares and is unable to work on his book.

In reliance on an inaccurate survey map, Rancher Earl, the next door neighbor of Fred, removed fencing on the properties' boundaries to expand one of his crops. In preparation for the crop expansion, he flooded a portion of Fred's field. As a result of the removed fence, Rancher Earl's extremely aggressive bull escaped. The bull spied Bobby Smith and charged him, tossing him in the air and goring him.

Identify and discuss fully the possible causes of actions and any applicable defenses of all the parties.

4)

Smith Family v. The Ranch

Negligence

The Smith family will claim that Fred's Circle Bar X Guest Ranch (Ranch) was negligent in protecting and warning against a dangerous condition. As a result, their son Adam was injured.Negligence has 4 elements (1) Duty, the ranch has a duty to all foreseeable P's. Palsgraff. Adam was a gust at the ranch, so the Ranch owes him a duty. (2) breach, this duty was breached when the Ranch failed to protect against an artifical condition on the property. (3) But for the lack of proper precautions, Adam would not have been harmed. Also, was it foreseeable that someone could fall into the mine shaft? Sure, so its fair to hold the Ranch responsible. (4) Damages, Adam was injured. The Smiths will claim the Ranch was negligent.

The ranch will claim that they acted reasonably in warning about the mine with a sign that clearly stated "Danger-Mineshaft" However, the sign was laying on the ground, did it fall down. In any event the Ranch will claim there was a warning. NV follows the minority position in Rowan and dispenses with the common law classifications of licensee, invitee, etc. Here, the person is held to a reasonable person standard. Well, there was a sign, but the ranch owed the Smiths a duty of extreme care and courtsey as guests. So, if this was private property, a sign would be fine, here it's not. The Ranch is negligent

The Ranch will counter Adam was comparatively negligent. He saw the sign, why did he approach the mine? DId Adam act unreasonably? Well Adam is 5 years old. He will be held to the standard of a child with the same age and experience. Would a 5 year old appreciate the danger here, no.

Attractive Nuisance

The owner could be charged with having an attractive nuisance. The test is foreseeability. When there is an artifical danger in the property and the owner of the land knows that children could come into contact with the danger, the owen must take precautions to ensure the danger is

secured espcially when the cost to cure the danager is small compared with the harm the could result. The Ranch caters to familys with kids, like the Smiths. So, they knew there would be kids. The Ranch knew about the mine shaft as evidenced by the sign on the ground and the cost to secure the mine would be slight in comparision to a small child like Adam getting hurt.

The Smiths v. Jake

Battery

The Smiths will claim that Jake intended for a battery to occur. A batery is a harmful or offensive contact. By putting a spur under Mrs. Smiths's horses saddle, he intended for her to be harmed and she was and seriously. Jale is guilty of battery.

Intentional Infliction of Emotional Distres (IIED)

Mr. Smith will claim Jake is guilty of IIED. Here, through Jakes extreme and outrageous conduct, MRS. Smith was seriously hurt. While, Mr, Smith suffered no physical manifestation of the harm per se, he did suffer sever emotion distress. Also, Mr. SMith was in the "zone of danger" and since he is married to Mrs. Smith He has a valid claim to IIED

Negligent Infliction of an Emotional distress

Mr. Smith could try to file a claim for NEID. He was in the zone of danger and the hos wife was injured. However, was there a physical manifestation? Well, the facts state that he was unable to work on his book. Is this a physical manifestation? Perhaps, but IIED is a better cause of action for Mr. Smith to persue against Jake

Vicarious Liability

The Smiths may also try to hold the Ranch liable for Jakes actions. He was an employee of the Ranch after all. If he was serving his master, then the Ranch would be liable as well. Note, In NV, there is no joint and several liability for negligence claims.

The Ranch will claim that they are not responsible for the Battery of Mrs. Smith or Mr. Smiths

IIED as the tortious conduct of Jake was not in the course and scope of his employment. He was hired to help out at the Ranch, not to injure customers. The master is not liable for the tortious acts of his service if outside the course and scope of employment, The Ranch will not be held vicariously liable for Jakes's tortious conduct.

Negligent hiring/retention

Jake is a long time employee of the Ranch, if Jake had done this sort of thing before, then the Ranch would be liable, but I'd need more facts.

Ranch v. Earl

Trespass to land

Tresspass is an intentional tort. One may be liable for trespass by entering the land of another, or allowing or placing an object on the land of another. When Rancher Earl took down the boundary between his property and the Ranch, a portion of the Ranches field was flooded. Water entered the land, this is enough for trespass

Trespass to chattle/conversion

If the the portion of the fence Earl removed was owned by the Ranch, Earl may be liable for trespass to chattle or conversion based on whether or not the fence posts were damaged when they were removed and if they were put back or not.

Negligence/flooding

Negligence has 4 elements (1) Earl has a duty to forseeable P's. The Ranch was his neighbor, therefore he is a foreseeable P. (2) Earl had a duty not to tear down the Ranch's property (fencing), (3) this duty was breached when Earl torn down the fence. (4) but for the removal of the fence, the Ranch would not have flooded. (4) damages, the Ranchs fields flooded. It's not clear what was on the field, crops, any property, etc. If there was anything of value in the field, then the damages requirement is satisfied

The Smiths v. Earl

Negligence

The Smith's may claim that Earl is liable for their son's injury based on a negligence theory. Was Earl unable to see a large bull in a field? Certainly taking down part of a fence could allow a bull to escape. If the bull escaped, could someone be harmed? Sure. (1) Earl had a duty to free a dangerous bull, as any person in the area could foresesably be harmed. (2) He breached that duty by removing a fence post, but for the removal of the post the bull would not have been let free and (3) Bobby was injured.

Earl will claim that he removed the post in error as a result of an inaccurate survey map and that he didnt intend for Bobby to be harmd, but intent is not a requirement in a negligence case

Earl may want to file a negligence claim against the publisher of the survey map as they may have been negligent in not properly outlining boundary lines is the reason Earl took down the worng fence post in the first place. Other theories could be breach of implied warranty or merchantibility and perhaps even products liability/design defects case based on when he bought the map and from who, but I'd need more facts.

Strict Liability

Finally, the Smiths may claim that Earl strictly liable for the harm to their son Bobby as a bull is not a domesticated animal. Therefore, the owner of an undomesticated animal will be held strictly liable for any harm the animal may cause.

Earl may claim he used every precaution to keep the bull from escaping. He didn't, and even if he did, it's not a defense in this instance. Earl will be held strictly liable

END OF EXAM