



JULY 2010 EXAMINATION

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



**STATE BAR OF NEVADA
JULY 2010 EXAMINATION
APPLICANTS' ANSWERS TO QUESTIONS
OF NEVADA BOARD OF BAR EXAMINERS**

- EXAM 1, QUESTION 1 -

JULY 2010

EXAMINATION NO. 1;

QUESTION NO. 1: ANSWER IN LIGHT BLUE BOOKLET

Until recently, Paul was a paid, part-time referee for a local youth basketball league in Nevada. After refereeing a youth basketball game several weeks ago, Paul walked toward an exit in the gym. Donna, the mother of a player on the losing team, ran from the bleachers and began cursing at Paul as he approached the exit. Paul tried to ignore Donna, but Donna stepped in front of Paul before he reached the exit doors. Donna waved her finger in Paul's face and continued her expletive-laden tirade against Paul. As Paul turned to look for another way out of the gym, Donna grabbed the whistle around Paul's neck and told him to look her in the eyes when she was talking to him.

Paul, holding his car keys, told Donna that he just wanted to get into his car and leave. Donna grabbed the car keys and told Paul that he could not leave until Donna "was done with him." Another parent from the team intervened, and was able to calm Donna down after several minutes and get Paul's keys away from Donna. As Paul was finally able to leave the gym, Donna screamed at him "you will be sorry for costing my son's team the game."

Paul did not think about the confrontation with Donna until much later that evening. Paul awoke to a person, who was screaming and honking the car horn, driving on the street in front of the home he was renting. Paul looked outside of his bedroom window to see a woman resembling Donna behind the wheel of a pick-up truck. The pick-up was driven over the curb and destroyed the flower gardens that Paul planted in his front yard.

The next morning, Paul received a phone call from the president of the youth basketball league telling Paul that he was being fired. The president of the youth basketball league explained that he received an e-mail from Donna stating that Paul was "a murderer and a drunk, and that he should be fired from his job refereeing youth basketball games." The president of the youth basketball league told Paul that Donna's e-mail included a link to an online newspaper article which reported that Paul had previously been charged with felony driving under the influence causing death to another motorist. Paul tried to explain that the charges against him had been thrown out of court, but the league president hung up the phone.

Identify and analyze Paul's potential claims against Donna, and any applicable defenses.

1)

ISSUE

Identify and analyze Paul's (P) claims against Donna (D)

POTENTIAL CLAIMS

Paul's Burden

To prevail in any Tort case, as for any other civil case, P would have to show the elements of each tort to the standard known as "preponderance of the evidence", or simply put, show that it is more likely than not that he suffered the torts at the hands of D.

Assault - GYM

Generally, a claim for assault may be brought there where the defendant acted with Intent, and caused, in Plaintiff, a reasonable apprehension of immediate or imminent battery. In other words, where a defendant brings, through his or her actions, a plaintiff to believe they are about to be hurt, injured, or otherwise offensively touched.

Here, Paul ("P"), has a claim against Donna ("D") for Assault. Right after the game, where D approached Paul, she "stepped in front of Paul ... [and]...waived her finger in Paul's face". P's claim would be successful if he could show that he was in reasonable apprehension of D's conduct. Moreover, showing Intent by D, given the fact pattern, should not be a problem for P, as intent appears clear. Also, P's apprehension could be further justified by the fact that D was acting in a very belligerent fashion. The fact pattern in fact points to D "cursing at Paul as he approached the exit doors" and as she waived her finger in front of P, D "continued her expletive-laden tirade against Paul".

given the above, P should bring a claim of Assault, and it may well be successful.

D's Defenses to Assault

D's only true defense in a claim by P for assault would have to circle around the fact that he was never in reasonable apprehension as she didn't lift her hand to hit him, or threaten to hit him, but rather only waived her finger while yelling. This is a defense that may work. As for the other traditional defenses, such as Consent, Self-Defense, Authority, etc...none would truly apply here.

Battery - GYM

The tort of Battery, arises there where a defendant, with Intent, creates a contact with the Plaintiff that is Harmful or Offensive. Unlike criminal law, where assault and battery merge (as one is a lesser and included offense of the other), in torts these don't. Therefore, one can maintain a claim for both assault and battery. Moreover, there is no need for the contact to be directly onto Plaintiff, but rather, the contact may well be upon something attached to the Plaintiff or the contact may be through an instrument that reaches the Plaintiff's person.

Here, again, P has a good claim of battery against D. When D grabbed P's whistle first, and then grabbed his keys from his hands, she created what could reasonably be interpreted by a fact finder to be an offensive contact or a harmful contact. As for Assault, the intentional element is clear, in that P need only to show that D intended to touch him and create the harmful or offensive contact: the fact pattern shows that D grabbed the whistle and then grabbed the keys.

given the above, P has a good claim of battery against D.

D's Defenses to Battery

D could again try to defend her actions by saying that her intent was limited to holding P there, and not causing harmful or offensive contact. However, that argument would fail, as the intent goes towards the actions, not towards the goal of the defendant. Moreover, as above, other traditional defenses would most likely fail.

False Imprisonment - GYM

The tort of False Imprisonment (FI), requires a Defendant, acting with intent, to seclude or sequester a plaintiff. Additionally, the tort requires that the Plaintiff either (i) be aware of the confinement, or (ii) be harmed by such confinement. The tort of FI does not require a physical restraint upon P, but a situational one can suffice.

Here, it would appear that, as P was trying to leave the stadium, D prevented his exit and held P against his wishes in one location. D in fact took several actions, all with Intent to prevent P from leaving. These include: (i) stepping in front of P "before he reached the exit"; (ii) "as P turned to look for another way out of the gym, D grabbed the whistle", (iii) while P was holding his car keys, "D grabbed the car keys and told P that he could not leave until D was done with him". Last, but not least, the fact pattern indicates that P was "finally able to leave the gym", after another parent intervened, showing that D's actions had indeed resulted in P being prevented from leaving the premises.

The Intent of D is clear from the fact that she mentioned, that her actions, were to prevent P from leaving until D was "done with him". The intent, coupled with P being actually prevented from leaving, and coupled with the awareness of P, should suffice for P to bring a successful claim of FI against D.

D's Defenses to FI

There are really no defenses for D to avail herself of. Again, the loose (and loosing) argument of P was never confined, would most likely be raised, but would also most likely fail, as P was factually, according to the fact Pattern, prevented from leaving.

Intentional Infliction of Emotional Distress (IIED) - GYM and HOME

The tort of IIED is found where a defendant, acting with intent, engages in Extreme and Outrageous conduct that the defendant knows, or should know, will result in the Emotional Distress of the Plaintiff. The Extreme and Outrageous component, is a notion that is decided by

the trier of fact, so there is no set limit as to how low or how extreme the conduct need to be. However, to sustain the claim, Paul would have to show that D's conduct was a outside the ordinary.

Here, the totality of D's actions at the **Gym** alone, could be considered extreme and outrageous conduct. First, she began yelling, then grabbing the whistle on P's person, the pointing her finger at him, then taking his car keys, and then telling him that "you will be sorry for costing my son's team the game". As mentioned above, whether this conduct is Extreme and Outrageous is a decision for the fact finder...however, it heads in that direction.

More importantly however, are the subsequent actions that D may have taken against P, while P was at **home**, when purportedly driving the pickup truck over the curb, and while screaming and honking the horn, would most likely be found to be extreme and outrageous. The actions of D, if indeed the woman driving the pick-up truck was D, at P's home, are also much more likely to satisfy the element of intent to cause emotional distress, as no other purpose can possibly drive a person to behave as D did.

Last, the actions of D with regard to P's employer, may also be seen as extreme and outrageous, and, as for the actions at home, designed to cause emotional distress.

The only element that would still need to be shown by P, is whether or not he suffered emotional distress from the ordeal, but again, that is an element that P will have to show later.

D's Defenses to IIED

D will claim two defenses: (i) that she had no intent with her actions at the gym or with her email to the youth basketball league, to cause emotional distress to P; (ii) that it was not her driving the pick-up truck.

Again, the traditional notions of Consent, Necessity, Discipline, etc would not work.

Tresspass to Chattles - GYM / Home

The tort of Tresspass to chattles, which is in actuality the interference with one's rights to his or her property, is satisfied when the Defendant, acting with volitional intent, interferes with the property rights of Plaintiff. The notion of volitional intent is based on the idea that the defendant need not desire the specific outcome, but rather that the Defendant only desire to engage in the undertaken conduct. So, Defendant need not want to "interfere with the property rights", but rather just touch or take Plaintiff's object.

Here, there are several actions which could be identified as D interfering with P's property rights.

The first instance, and an attenuated one, would be when D grabbed P's whistle. there, D interfered with P's rights to his whistle.

The next instance, would be the grabbing of the car keys: again, D took the keys, and thereby interfered with P's rights to the keys.

The most important one, and by far strongest one, though is found in, if it was D, the damaging of the flower beds by driving over them. By "destroying them", D effectively interfered with P's rights.

Here, P has a good claim of Tresspass to chattles against D.

D's Defenses to Tresspass to chattle

As to the instances at the Gym, D will claim that she did not interfere with P's rights.

As to the instance with the pick up truck, aside from obviously saying it wasn't her, D would say that she didn't have the intent to interfere with his property rights. That perhaps she lost control of the vehicle, and thereby collided with the flower beds. If she lacked completely intent, for

example the car had a malfunction and steered into the property, then this would be a defense to trespass.

Conversion - Home

The tort of conversion is nothing more than a serious Trespass to chattle. In fact, to be found liable for conversion, the defendant must have interfered with the property rights of the plaintiff (as to a possession) as to cause the forced sale of such possession. In other words, where the actions of a defendant cause the Plaintiff from losing all value or use of a particular asset.

Here, the fact pattern is clear. When D drove over the flower beds, she "DESTROYED" them. This is a serious enough interference, whereby P will have to get new flower beds, and therefore D converted the old ones.

D's Defenses to Conversion

as for trespass to chattle, again D could claim in either wasn't her, or that she lacked the requisite intent. However, both of these would fail in this case as she most likely did destroy the flower beds.

Trespass to Property

As for trespass to chattle, hereto the Defendant need only have acted with volitional intent. However, the intent here must have been to enter P's property. Again, D need not need to intend to enter the property as if she knew it was P's property, but rather simply enter the property physically (or through instrument).

Here, when D drove over the curb, she landed in P's front yard, destroying his flower beds. If D is found to have had the intent to drive over the curb, then she will be found liable of trespass to P's property.

D's Defenses to Trespass to Property

The only defense that would save D, is if she lacked the intent to drive on the curb. Again, as above, is the car for example, had a mechanical breakdown and caused to swerve onto the curb. Unlikely defense.

Defamation

to be found liable for defamation the Defendant must have done the following: (i) made a statement of fact, (ii) that is false, (iii) that is published to a third person (aside from P), (iv) that proximately causes damages to Plaintiff, and (v) Plaintiff actually suffers damages. Moreover, Defamation comes in two kinds: SLANDER (spoken) and LIBEL (Written).

For SLANDER, unless it is Slander-Per se (meaning a defamation that goes to P having a loathsome disease, P's course of business, P not being chaste, or P having committed a crime) where damages are presumed, then special damages need to be shown.

For LIBEL, where the defamation is written, damages are presumed.

AT GYM - SLANDER

When D and P were at the gym, and P was trying to leave, D engaged in an "expletive-laden tirade" against P. Before that she also "cursed" at P. Without knowing the content of the statements, it is impossible for us to determine if D's statements amount to defamation or not. Moreover, there is an issue as to the publication of these statements. The fact pattern indicates that P was trying to leave, and there is no indication that anyone else heard the statements of D. While there is reference to another parent intervening, there is no indication in the fact pattern that the other parent heard anything. No publication = No Defamation

P doesn't have a good claim for defamation stemming from the gym instances.

WITH EMAIL TO LEAGUE

When D sent the email to the the League D worked for, she: (i) made a statement of fact "P is a muirdered and a drunk", (ii) the statement was obviously published to a third party (the league guy), (iii) Actually-Caused injury to P (as the email cost him his job), (iv) and P suffered damages.

However, there is an issue as to whetehr the statemetns were false. (see below)

D's Defenses to Defamation

To be defamatory, a statemetn MUST be false. Here, the statements by D, with regard to the drunk and murder, may NOT be false. While P may not have been convicted of murder, he apparently did engage in drinking and driving, and thereby caused the death of another motorist. This could be seen as the statements NOT being false.

However, this defense would most likely fail, because even if P was a "Drunk", and there is no indication that P still drinks, the term Murderer defines one guilty of murder, and the fact that the charges were kicked out of court, would make the statements False.

Conclusion to Defamation

P has a good claim for defamation stemming from D's email to the league, and D's defense as to truth would most likely fail.

Privacy Tort - Publuic Disclosure of Private Facts

A defendant is laible for the tort of public disclosure of private facts, there where the defendant makes a publication to third people (aside from her and the Plaintiff), of facts, the revelation of which would be highly offensive to the reasonable person. Contrary to popular believe, there is no need that the facts disclosed by D be confidential or very private matters. In fact, matters that most don't know about, even if in the public domain at some remote and distant level, may

suffice to find one liable for this tort.

Here, D revealed to the league a term from the past of P. Now, D's defense will be that the matter was public knowledge because of the online newspaper, but the trier of fact would ultimately have to determine if the matter was indeed "private" or not.

Ultimately, the issue will revolve around whether the disclosure of such facts would be highly offensive to the reasonable person. It would appear as though the killing of another motorist, due to drinking, would fall in the realm of highly offensive.

D's Defenses to Public disclosure of Private Facts

D will most likely try and argue that the matter was NOT private, and was already public (hence the online article). This defense may or may not succeed depending on the other facts before the trier of fact as to how public this matter already was.

Tortious Interference with Economic Advantage

the tort of TIEA, requires that the Defendant engage in actions that knowingly affect P's income or economic advantage. It is a tort that is designed to protect people's income and financial well being. To be found liable, D must have, with intent, sought to (and successfully) interfere with P's economic situation

here, when D sent her email to the league, seeking and accomplishing to get P fired, she fulfilled all the elements of TIEA, and accordingly Paul maintains a good claim against D for TIEA.



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- EXAM 1, QUESTION 2 -

JULY 2010

EXAMINATION NO. 1;

QUESTION NO. 2: ANSWER IN RED BOOKLET

Five years ago, Aaron and Becky (husband and wife) started a construction company. The new business was incorporated under the name "ABCON, Inc." They properly filed articles of incorporation with the Nevada Secretary of State naming themselves as directors. The only address listed in the articles was their home address.

Shortly after incorporation, ABCON's one and only corporate meeting was held between Aaron and Becky at a coffee shop. It was decided that Aaron would be the president and Becky would hold the offices of secretary and treasurer. They discussed the need to draft bylaws, issue stock, and obtain a federal tax identification number. However, these tasks were never completed. No meeting minutes were drafted.

ABCON's income was deposited into Aaron and Becky's personal checking account. All expenses, private and corporate, were paid out of this same account. Household and business transactions were recorded in a single check register. Company vehicles were titled and registered in the name of the corporation. Aaron and Becky occasionally drove them for personal use.

Fred has framed buildings for ABCON since its inception. Earlier this year, he was driving from lunch to an ABCON job site in a truck labeled "ABCON, Inc." On the way, he deviated significantly from his normal route. The purpose of the deviation was for Fred to purchase a new drill with personal funds. ABCON paid Fred by the hour, but he was required to supply his own tools.

While driving out of the hardware store parking lot, Fred hit a pedestrian named Patty. After ensuring that Patty received medical attention, Fred continued on to the job site.

Fully discuss who is liable for Fred's negligence and why.

2)

Liability of ABCON- vicarious liability/ respondeat superior

A principal is liable for the acts of its agents committing within the scope of their agency.

Principal -agent relationship

In order to show a principal agent relationship, three elements must exist. First, the parties must mutually assent to the creation of the relationship. Second, the principal must benefit from acts of his agent. Finally, the principal must have some degree of control over the agent (i.e. an ability to supervise the manner of his performance). In this case, ABCON, acting through Aaron and Becky, assented to create such a relationship with Fred. Moreover, they received a benefit from his services as evidenced by the fact that they paid him for his work framing buildings. Finally, they seem to have had the ability to control his conduct. This point is arguable, however, as some of the facts indicate that Fred may have been a mere independent contractor of ABCON's. For example, Fred had to supply his own tools. ABCON may try and argue that he was merely an independent contractor, but its claim will likely fail as there are strong supporting facts that show the existence of a agency relationship (i.e. Fred has worked framing buildings for ABCON since its inception, rather than periodically, and he is paid on an hourly basis rather than on a project basis). Assuming that a valid agency relation is established, ABCON will only be liable for Fred's acts committed while in the scope of that relationship.

Scope of Agency

A principal is liable for the negligence of his agent if the agent committed the negligent act while acting in the scope of his employment. In determining the scope of the relationship, it may be helpful to look at things such as the job description, whether the act occurred on company property or by an instrument/machine belonging to the company. Furthermore, a mere detour or slight departure of an agent from his assigned task does not relieve the principal of liability. On

the other hand, a frolic brought about solely by the agent will generally relieve the principal of liability. In this case, Fred was employed by ABCON for the purpose of framing buildings, which helps us to establish the scope of the agent-principal relationship. He was given a company truck in which to travel to jobsites. The accident in this case occurred when Fred was leaving the hardware store after buying a drill presumably to use on ABCON construction work. The purpose of his trip was essentially to benefit his employer (and following the accident, he returned to the job site), and he was given permission to use the truck and expected to supply his own tools. As a result, his deviation from his normal route is probably considered a detour rather than a frolic. ABCON is therefore liable for the negligence caused by its agent, Fred.

Liability of Aaron and Becky, personally

As a general rule, corporate directors/officers are not personally liable for claims against the corporation. The rule operates to help encourage people to take these positions without fear of subjecting themselves to potentially large amounts of liability. There are, however, exceptions to this general rule. One such exception, in closed corporations, is a judicially created doctrine referred to a "piercing the corporate veil." A court may decide to hold directors personally liable if they believe that individuals are wrongfully exploiting the limited liability advantage that incorporation offers. If the corporation is the mere "alter-ego" of its directors, courts will typically hold the directors personally liable. One factor courts will look at is whether the directors are completely ignoring corporate formalities. In this case, there is significant evidence that lends support to the argument that Aaron and Becky are the alter ego of ABCON. First, the articles of incorporation listed their home address only, rather than a business address. Second, they have had one and only meeting (arguable an organizational meeting), at which they discussed relevant corporate matters. None of these tasks were completed, however, and no minutes were taken.

Moreover, the facts indicate that Aaron and Becky deposited the corporate income into their personal account, and household and corporate transactions were all done using a single check register, strong factors weighing in support of piercing the corporate veil. On the other

hand, the company's vehicles were registered in the company's name, but Aaron and Becky used them for personal use. Based on the above (and because this is a tort action and not contract), a court will likely pierce the corporate veil of ABCON and hold Aaron and Becky personally liable for the negligence of its agent Fred.

Fred

It should also be noted that Fred is obviously liable for personal injuries suffered from his negligence conduct. Fred had a duty to exercise reasonable care to foreseeable plaintiffs. He breached that duty and as a result of his breach, Patty suffered damages. Fred may be entitled to indemnity from ABCON if there were any kind of indemnification clause in the articles or bylaws. From the facts given, it does not appear that indemnification was expressly provided for.



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- EXAM 1, QUESTION 3 -

JULY 2010

EXAMINATION NO. 1;

QUESTION NO. 3: ANSWER IN DARK GREEN BOOKLET

Wendy and Howard started living together two years before their marriage. During that time, Wendy worked as an elementary school teacher to support them while Howard finished college. Six months prior to their marriage, Howard started an accounting practice. He shared office space with his father, who was a successful accountant in Reno. Howard's father referred work to him and, in exchange, Howard paid his father a percentage of the fees generated from the referrals. Wendy continued to teach to help pay the household bills as Howard developed his practice.

Over the years, Howard's father reduced his case load and transferred many of his clients to Howard. He did not require Howard to pay him a percentage of the fees generated from these clients. When his father fully retired, Howard took over his father's remaining clients. The majority of Howard's clients were referred to him directly or indirectly by his father. Howard became very successful. The practice generated income sufficient to allow the family to live an affluent lifestyle including an expensive home, luxury cars and annual overseas vacations.

Wendy stopped teaching when their first daughter, Fran, who is now 19 and in college, was born. Their second daughter, Diane, who was born with Down syndrome, is now 16 and attends the local high school.

During the marriage, Wendy wrote a self-help book designed to assist parents of children with special needs. A publisher has expressed interest in her manuscript. The publisher believes the book will be very successful. However, the publisher told Wendy that she will need to edit the manuscript significantly and that she will have to go on a book tour, speak at conventions and attend other public events to effectively promote the book. Wendy is enthusiastic about doing so.

Wendy recently attended a high school reunion where she reconnected with her high school sweetheart, Sam, who is a successful businessman. Wendy has filed a complaint for divorce. She told Howard that she may live with Sam after the divorce is final. Howard and Wendy have verbally agreed that Diane should live primarily with Wendy after the divorce.

Fully discuss the parties' respective claims, rights and obligations with respect to:

- 1. Howard's accounting practice**
- 2. Wendy's book**
- 3. Alimony**
- 4. Child custody and support**

3)

Day 1 - Question 3

Note: The question does not say whether this takes place in Nevada, but for purposes of the answer, I will assume it is in Nevada.

Nevada is a community property state. Therefore, property acquired before the marriage is presumed to be the separate property of the party. Moreover, property acquired during the marriage by inheritance, gift, personal tort recovery, or income or profits from an item of separate property is presumed to be separate property. Other property acquired during the marriage, including the wages and earnings of a party, are presumed to be community property.

At divorce, the court must make an equal division of all community property. The court may only deviate from an equal division if there is a valid reason and the court sets out that reason. A valid reason would be financial misconduct of a party. Because Nevada is a no fault divorce state, other sorts of fault, such as infidelity, would not be a basis for an unequal division of property.

1. Howard's Accounting Practice

Howard's practice began six months prior to the parties marrying, at a point when the parties were unmarried co-habitants. Therefore, the practice was initially separate property. Once the parties were married, however, Howard's salary was community property, though his interest in the business retained its separate property status.

Howard's practice "developed" over the course of the marriage. Where a separate property business increases in value over the course of the marriage, the community will have an interest in that growth. Courts use one of two formulas to determine the community interest. The Periera formula is used where the primary growth of the business is attributable to the party's personal labor and creativity, which is a community interest. Under this formula the court will determine the separate property interest, which would be the value of the business at marriage, and allow for a fair rate of return each year of the marriage on that initial separate property

investment to be added to the separate property value, and that amount will be the separate property interest, and the rest of the value will belong to the community. The Van Kamp formula is used where the value of the business is attributable to regular industry growth, as opposed to the labors of the party. The court will allow for the initial separate property value as well as determine what a person in the spouse's position would earn each year in that business. They will then subtract from the expected earnings of such an individual, the amount that the spouse actually contributed to the community in wages over the course of the marriage. What is left will be the community interest in the business. The rest will be considered separate property.

Here, Howard began his own practice, but shared office space with his father. We are told that prior to the marriage, and at least for some time into the marriage, Howard's father referred him business and he paid for the referrals with a portion of the fees. We are told that the growth of the business was attributable to Howard's father having transferred clients over to the business, and that the majority of clients were referrals from Howard's father. Howard will argue that because this was passive, and he did not grow the business out of his own initiatives and labors, that the community interest should be based on the Van Kamp formula, which tends to favor separate property interests. Wendy will argue that Howard initially paid for the referrals, with community funds, which indicates that the initial growth of the firm was attributable to the community. Wendy will also argue that the growth was not so much passive, as it was a benefit gained by family connections. Nevada is a community property state, and because the Periera formula favors the community, the court would be more inclined to use Periera to determine the community interest, especially since the business was very new at the time the parties were married (6 months), community funds kept the business afloat initially, and Howard eventually became very successful.

Howard's education/Wendy's support prior to the marriage

Wendy may claim that her support of Howard during his education makes the business community. In dicta the NV Supreme Court has indicated that there might be a community interest in a professional degree, as it is a "career asset." However, Nevada would probably follow the majority of community property states in finding that because an education applies to

future earnings, it is separate property and the spouse has no community interest in their spouse's degree. However, as discussed below, support during education might be a factor in alimony. Moreover, an additional problem here might be that Howard's education was complete before the marriage. Though Wendy might have supported him, at the time they were unmarried co-habitants and there is no evidence here that any promises were made between the two regarding her support of him such to imply some sort of contract.

Good Will of Business: The good will of a business can be considered community property. This is the value of the business beyond its assets and the community labor. The good will of the accounting practice could be determined in a court-approved way and divided between the community. One such method would be the 3 months gross profits method.

2. Wendy's Book

Wendy wrote her book during the marriage, which means she used community labor to earn whatever profits the book will ultimately earn. Some portion of the royalties from the book, even if they are received after marriage, will be community property, to which Howard will be entitled to an equal share. However, monies earned as a result of Wendy's labors after entry of the final decree of divorce would be separate property. If Wendy must edit the book, go on tours and speak at promotional events, revenues earned as a result of that labor, if after the divorce, is separate property.

3. Alimony

In Nevada, courts may award alimony as is just and equitable. Alimony can be either in lump sum or regular payments. The factors determining alimony are the relative earning capacity of the parties after marriage, the relative financial condition of the parties after marriage, including each party's health, age and skill, the separate property holdings of each party, the length of the marriage, any special skills or education earned by the party during the marriage, whether one party was the primary care-taker of the children during the marriage (such that they have been absent from the workplace for an extended period of time), the manner to which the parties are accustomed to living during the marriage, and any other relevant factor, including

financial misconduct of either party.

Here, the court will weigh appropriate factors to determine if alimony is just and equitable, and if so, how much. Wendy will probably claim alimony. Howard has a successful accounting practice and she is a retired elementary school teacher. We are not told how long the parties have been married, but it is more than 19 years, and thus would be a long-term marriage. Wendy retired from teaching school almost 20 years ago, which means it would be difficult to re-enter the workplace. She will argue that they have an affluent life-style and a nice home and that she would go from that lifestyle to being an unemployed teacher, and therefore alimony is just. She may also argue that even though Howard gained his degree before marriage, she worked to support him early on until the business got off the ground, paying community bills in the early part of the marriage.

Howard may argue that alimony is inappropriate, because Wendy is expecting to receive income from her book and she will be living with Sam, a successful businessman, lessening her financial needs. Wendy will claim, however, that she might not end up living with Sam, and might not end up making money off her book, and even if she does, the money might not come in for some time. Given the disparity in the income earning potential between the parties, the fact that Wendy was a home-maker and is long-retired from teaching, the court will probably award alimony to be paid by Howard to Wendy. Howard can always move to modify later on if there are changed circumstances, such as her earning a great deal from her book or living with Sam.

4. Child Custody & Support

Courts must have jurisdiction over the child to make an award. This jurisdiction is based on the child's home state under the Uniform Child Custody Jurisdiction Enforcement Act. Here, we are not presented with any jurisdictional issues, and therefore, the children are appropriately before the court and we will assume Nevada is their home state.

Child custody awards are generally only made for minor children. Therefore, because

Fran is 19 and in college the court will not need to award custody of her to anyone. Diane on the other hand is a minor at age 16.

Courts award custody based on the best interests of the child. This is a multi-factor test that includes the preferences of the child, if they are old enough, the likeliness of one party or another to promote a relationship with the other party, any special needs the child has, the ability of the parent to care for the child, allowing associations with siblings and any other factors. Courts typically award joint physical custody, which means that the child spends nearly equal amounts of time with each parent. This fosters healthy relationships with both parents, which is generally in the best interests of children. However if it is in the best interests of the child for one parent to have primary custody and the other to have visitation, this can be awarded as well.

Here, we are told that the parties have verbally agreed that Diane should live primarily with Wendy. The court will only approve of this if it finds it is in the best interests of Diane. Because Wendy was a stay at home mom and probably spent a significant amount of time with Diane this might be appropriate. Moreover, because Diane has Down syndrome, if Wendy is more familiar with Diane's special needs and can take better care of her, this too might lend itself to such an award. However, Diane is still in high school and Wendy might be soon traveling the country on book tours. If Wendy is going to be away from home traveling frequently, which she is enthusiastic to do, this could weigh against her being the primary physical custodian. Diane would need a parent at home and need to be home to attend school. This might lead the court to arrange for joint physical custody so that Diane can be with her father when Wendy is away for her book promotions.

Support: If the parties end up with joint physical custody, the court will award support for Diane based on the Wright formula, wherein 18% of each party's gross monthly income is calculated and the smaller number is subtracted from the greater number. However, here Wendy is for the meantime unemployed. This means that for now, whether she has joint or primary physical custody of Diane the court will order Howard to pay 18% of his gross monthly income to Wendy for the support of Diane.

Child support awards have a presumptive maximum. Moreover, many factors can be considered to adjust the amount of the support award. These include any special medical, health or educational needs of the child. If Diane lives with Wendy and Wendy must arrange her health and educational costs, this may be a basis for a greater award of child support. Howard may argue that if Wendy ultimately ends up living with Sam, with Diane, this is a basis for a decrease in child support. However, it is not certain that this will happen, and if there is a change in circumstances later based on Sam paying Wendy's living expenses or Wendy earning greater income, or their having joint custody because of her travel, Howard could always move for an adjustment in support.

Moreover, because Diane is disabled, her parents' duties to support her will probably extend past her reaching the age of majority, which means that Howard's obligations to pay support for Diane will probably also extend into her adulthood.

Regarding Fran, because she is in undergraduate school, if the parties have been paying her tuition, the court might consider requiring Howard to continue to pay for her college tuition after the divorce. The court does not have to make such an award, but might consider doing so.

END OF EXAM



**STATE BAR OF NEVADA
JULY 2010 EXAMINATION
APPLICANTS' ANSWERS TO QUESTIONS
OF NEVADA BOARD OF BAR EXAMINERS**

- EXAM 1, QUESTION 4 -

JULY 2010

EXAMINATION NO. 1;

QUESTION NO. 4: ANSWER IN ORANGE BOOKLET

Vegas Joe's Barbeque was a successful business in the Las Vegas area. Vegas Joe's holds a federal trademark registration for the name and mark "Vegas Joe's Barbeque." After Vegas Joe's sales declined, the owner heard from his loyal customers about a website for an Arizona business called Arizona Joe's Barbeque that sells products bearing a mark similar to Vegas Joe's. Arizona Joe's website is accessible to customers in Nevada and other states. It was created by a person physically located in Arizona and the server operating the website is maintained in Arizona. Arizona Joe's ships products to customers in states across the country including Nevada. Arizona Joe's does not advertise.

Vegas Joe's filed a lawsuit against Arizona Joe's with claims for trademark infringement and state law unfair competition in the United States District Court for the District of Nevada. Shortly after the lawsuit was filed and the complaint timely served, Vegas Joe's filed a motion for preliminary injunction asking the Nevada court to enjoin Arizona Joe's from selling products with the similar mark on its website. Arizona Joe's responded with a motion to dismiss, claiming lack of personal jurisdiction.

Without holding a hearing on the matter, the court granted Vegas Joe's motion for preliminary injunction and set the duration of the injunction at one year. The court also ordered Vegas Joe's to post a \$50,000 bond within ten days. The court denied Arizona Joe's motion to dismiss.

Vegas Joe's failed to post bond within the ten days, claiming that it could not afford it. After the ten days had passed, Arizona Joe's appealed to the Ninth Circuit Court of Appeals, claiming that the United States District Court for the District of Nevada had no authority to enter an order against it.

1. Did the United States District Court for the District of Nevada have the authority to enter an order against Arizona Joe's?

2. Was the preliminary injunction valid?

3. Assuming the preliminary injunction is valid, can Vegas Joe's enforce the injunction?

4. Does the Ninth Circuit Court of Appeals have jurisdiction to hear the appeal filed by Arizona Joe's?

Please discuss fully. Do not address substantive trademark infringement issues.

1)

I. Jurisdiction of the United states court for the district of Nevada

Federal courts are courts of limited jurisdiction. In order for a plaintiff to file suit in a federal court the court must have personal jurisdiction over the defendant and the claim must arise from a federal question or diversity jurisdiction.

A. Personal Jurisdiction

In order for a court to have personal jurisdiction over a defendant, there must be a long arm statute that reaches the constitutional minimum requirements necessary for a court to assert jurisdiction over the defendant. In seeking to satisfy the constitutional minimum requirements the court evaluates under International Shoe, whether the defendant had the minimum contacts necessary and whether or not it would be fair to hale the defendant into the forum state.

1. Minimum Contacts

In evaluating minimum contacts the court will look to see if the defendant purposefully availed himself to the jurisdiction of the forum state by making contact with the forum such that it would be foreseeable that the defendant may be haled into court in the forum state.

In this case the facts state that Arizona Joe's barbeque (AJ BBQ) had a website that was accessible to customers in Nevada and other states and that AJ BBQ ships products to customers all over the country including customers in Nevada. These facts indicate that AJ BBQ may have the minimum contacts necessary with Nevada, such that it was foreseeable that he may be haled into court in Nevada. Because if you ship products into a state and are distributing your product into Nevada's stream of commerce, it is likely that you may be haled into court in Nevada.

However, AJ BBQ is located in Arizona and its server is operated in Arizona, there is no mention of any body from the company entering the state except for the product and AJ BBQ does not

advertise to people in Nevada or elsewhere. So these are facts that militate against the court having personal jurisdiction over AJ BBQ.

Furthermore, if the court looks at AJ BBQ's principal place of business (PPB) using the nerve center test, it can be seen that the PPB of AJ BBQ is Arizona and that is where it is a citizen and because it does not advertise in Nevada and only ships products to Nevada then it may not be proper for the court to assert personal jurisdiction over AJ BBQ. However, the facts are silent as to how many products AJ BBQ ships into Nevada and if it is a significant amount then it would indicate that AJ BBQ purposefully availed himself by making minimum contacts with Nevada such that it was foreseeable that he would be haled into court in Nevada (NV).

2. Fairness

The fairness prong of a personal jurisdiction analysis looks at whether it is fair to hale the defendant into the jurisdiction based on the relatedness of the claim to his contact with the forum, the convenience of the Defendant defending himself in the forum and the states interest in giving its citizens a forum.

a. Relatedness

The relatedness of the claim with NV is fairly slight. The claim is for trademark infringement and state law unfair competition. However, AJ BBQ only ships products into NV and does not operate its business in NV. But, because AJ BBQ does not advertise except for its website and it ships products into NV there is the chance of its business infringing on the trademark of a NV company such as Vegas Joe's barbeque (VJ BBQ). And VJ BBQ was claiming a loss of sales from due to AJ BBQ's website who had similar markings to VJ BBQ. Thus, the relatedness element may be satisfied because AJ BBQ's possible trademark infringement could be the reason that VJ BBQ is losing money because customers may be ordering from AJ BBQ on the web thinking that they are ordering from VJ BBQ. Accordingly relatedness is satisfied.

b. Convenience

AJ BBQ is located in Arizona (AZ) which shares a common border with NV. Thus, the states are close and it would not likely be difficult for AJ BBQ to drive into NV to defend itself on this claim. Thus, convenience is satisfied.

c. State Interest

All states have an interest in providing a forum for their citizens to litigate their claims. Thus, NV has an interest in allowing VJ BBQ to litigate its claims against AJ BBQ in state court

B. Federal question jurisdiction

In order for a federal court to hear a case not only must it have personal jurisdiction, but it also must have subject matter jurisdiction. Federal question jurisdiction is a form of subject matter jurisdiction that arises when the plaintiff asserts a claim on the face of their complaint that arises from a federal law or the constitution. Federal question jurisdiction may not be asserted as a defense by the defendant in order to bring a case into federal court and the complaint itself must not merely mention a federal issue but must assert a federal claim.

In this case, VJ BBQ clearly asserted a federal claim for trademark infringement, which falls under federal law and allows the United states district court for the district of Nevada to properly hear the issue concerning the trademark infringement.

1. Supplemental jurisdiction

A plaintiff may assert other claims against a defendant once they are in federal court but the claims must satisfy federal subject matter jurisdiction as well or be brought in under the doctrine of supplemental jurisdiction. Supplemental jurisdiction allows a plaintiff who is already validly in federal court to bring their related state law claims against the defendant if the claims arise

from a common nucleus of operative fact occurring in the same transaction or occurrence.

In this case it is likely that VJ BBQ's related state law claim against AJ BBQ for unfair competition meets the applicable test to be brought in under supplemental jurisdiction. Because the state law claim of unfair competition arises from the same common nucleus of operative fact. Such that if AJ BBQ is violating VJ BBQ's trademark rights then they are likely also violating Unfair competition laws. Thus, the state law claim arises from the same common nucleus of operative fact and the federal court will be allowed to hear this claim along with the trademark infringement claim.

II. Valid Preliminary injunction

Courts may order a preliminary injunction if the plaintiff can prove that they will suffer irreparable injury if the injunction is not ordered and that they have a good chance of succeeding on the merits. Furthermore, a plaintiff must show that there is an inadequate remedy at law if the plaintiff waits for trial, that they have a valid property interest to assert, that it is feasible for the court to enforce the preliminary injunction and that on balance, the plaintiff's interests outweigh the defendant's interests and the defendant has no valid defenses to assert. Motions for temporary preliminary injunctions or restraining orders may be ex parte, but for a preliminary injunction there must be a hearing on the matter.

In this case the preliminary injunction is likely to be invalid for a number of reasons. First, VJ BBQ will not likely be able to show that they will be suffering irreparable harm if the preliminary injunction is enforced. Because, there are no facts that indicate that sales from AJ BBQ are directly impacting sales from VJ BBQ. The companies are in two different states and Barbequed food is not the type of food that is typically ordered over the internet such that it would directly harm an in state business' profit margins in an irreparable way.

Secondly, Although trademarks are a protectable property interest, the facts state that the mark is similar. It does not go into detail about how similar the marks are to each other between the

companies. In showing a likelihood of success on the merits VJ BBQ will have to show that they have over a 50% chance of winning on the merits and with facts this slight "similar mark" they are unlikely to meet the burden.

Third, Feasibility of enforcement will be difficult because AJ BBQ is an out of state defendant and it is typically more difficult to enforce an injunction on an out of state defendant.

Fourth, on balance the interests of both companies are similar they both want to stay in business and the facts do not indicate that AJ BBQ is sufficiently infringing on VJ BBQ's trademark.

Lastly, there should have been a hearing on the matter, and there was not. Furthermore, VJ BBQ did not post the required bond. Thus, it is likely that the preliminary injunction was not validly orderd.

III. Enforcement of the Preliminary injunction

If the injunction was valid, it would not be difficult to enforce. Negative Injunctions are injunctions that require a defendant to stop activity. Mandatory injunctions are injunctions that order a defendant to do something and are disfavored because they amount to voluntary servitude and are difficult to enforce.

The injunction that VJ BBQ is asking for is a negative injunction because it is asking AJ BBQ to stope advertizing with the similar mark on its website and to stop selling products with a similar mark on the website. This is easy to enforce, because the court can monitor the website easily. However, the time (1yr.) and the fact that AJ BBQ is an out of state defendant may make it a little more difficult to enforce the negative injunction. However, if the injunction is valid despite the difficulties of enforcement, it is likely that VJ BBQ can enforce the injunction.

However, because VJ BBQ failed to post the bond requiried by the court within 10 days. It is likely that the order for the injunction will not be legally enforceable because VJ BBQ did not

meet its burden of producing the bond.

IV. 9th Circuit jurisdiction

Because the case is validly in federal district court and raises a federal issue, the 9th cir. will have jurisdiction over final judgments from the district court. The final judgment rule states that a ruling may be appealed if it is a valid final judgment.

In this case the motion to dismiss will not be appealable because motions to dismiss do not constitute valid final judgments. However, rulings on preliminary injunctions do constitute valid final judgments because it is a decision on the merits so the 9th Cir. will have jurisdiction over AJ BBQ's appeal concerning the district courts ruling on granting VJ BBQ's preliminary injunction. At that time, the court may also address whether or not the district court had proper personal jurisdiction over the defendant. Furthermore, AJ BBQ appealed timely within the 30 day

END OF EXAM



**STATE BAR OF NEVADA
JULY 2010 EXAMINATION
APPLICANTS' ANSWERS TO QUESTIONS
OF NEVADA BOARD OF BAR EXAMINERS**

- EXAM 2, QUESTION 1 -

JULY 2010

EXAMINATION NO. 2;

QUESTION NO. 1: ANSWER IN PURPLE BOOKLET

While driving down the interstate, Policeman Paul saw a car with a bumper sticker depicting a marijuana leaf. Noting that the car's brake lights were not operating as required by law, Paul pulled the car over to investigate whether it contained marijuana.

Paul immediately approached the car and saw Amy in the driver's seat. Amy gave Paul her driver's license. As he waited a few minutes for a dispatcher to check Amy's driving record, Paul deployed his narcotics detection dog to sniff the exterior of the car.

Paul's dog, which was trained and nationally certified as reliable to detect the presence of marijuana, immediately detected the odor of marijuana coming from the car.

Within minutes, Paul opened the car's trunk and saw a large bale of green leafy material that he suspected to be marijuana. Paul quickly arrested Amy for the felony crime of marijuana trafficking. As he handcuffed and frisked Amy before taking her to the nearest jail, Paul found a marijuana pipe tucked in her right sock.

At the jail, Amy pleaded for Paul to release her. Amy ignored Paul's order to stop talking, and yelled "Only the pipe is mine! The marijuana belongs to my boyfriend, Bo!"

After booking Amy, Paul drove to her house at the address on her driver's license. From the street, Paul examined the house with an advanced thermal imager available only to law enforcement agencies. Paul determined that the house very likely contained high intensity heat lamps commonly used to grow marijuana.

Within a few hours, Paul applied for a warrant to search Amy's house. In his warrant application, Paul described the events on the interstate and the results of the advanced thermal imager examination.

A magistrate reviewed Paul's warrant application, and issued a search warrant for Amy's house. During the execution of the search warrant, Paul found Bo adjusting multiple high intensity lamps over hundreds of marijuana plants.

Amy and Bo were tried together on a marijuana trafficking charge. Before trial, the presiding judge denied Amy's motion to suppress the lamps and marijuana plants. During the

prosecution's case at the jury trial, the judge permitted Paul to testify about Amy's statement over the objection of both Amy and Bo. Amy did not testify at trial.

1. Fully explain whether the judge committed constitutional error by refusing to suppress the high intensity lamps and marijuana plants.

2. Fully explain whether Amy's constitutional rights were violated when the judge permitted Paul to testify about her statement.

3. Fully explain whether Bo's constitutional rights were violated when the judge permitted Paul to testify about Amy's statement.

1)

1. Fully explain whether the judge committed constitutional error by refusing to suppress the high intensity lamps and marijuana plants.

The fourth amendment to the United States Constitution protects citizens from unlawful searches and seizures. In order to search or seize, law enforcement must either have a warrant or be acting under a judicially excepted exception to the warrant requirement founded in probable cause. Probable cause is the likelihood, to a reasonable degree of certainty, that a search will reveal contraband. The exceptions to the warrant requirement have been adopted and modified through the years by the courts. The United States Supreme Court has defined the federal exceptions. State supreme courts must not permitted searches and seizures beyond the limits set by the United States Supreme Court. However, states can provide citizens with additional protections beyond those guaranteed by the federal constitution based on state constitutional law.

The outcome of the suppression in this case depends on jurisdiction. If this case were considered in light of federal precedent, Paul's actions were constitutionally permitted. If this case were considered in light of Nevada precedent, Paul's actions constituted an unconstitutional invasion of his expectation of privacy when he searched the trunk poisoning his subsequent actions. Due to the unlawful search of the trunk, Paul's subsequent actions poisoned the fruits of the proverbial tree. Therefore under federal law, the motion to suppress ought to have been denied and under Nevada law, the motion ought to have been granted.

Traffic Stop - Motor Vehicle Infraction

The officer conducted a valid traffic stop under both federal and Nevada state laws. Police can stop a vehicle for a motor vehicle violation. In this case, the violation was for inoperable brake lights. The officer had the right to approach the car and demand credentials and issue a summons for the motor vehicle violation. Therefore, the traffic stop was permitted.

Drug Sniffing Dog - Articulate Suspicion/Probable Cause Not Needed

The use of a drug sniffing dog was permissible. Both the federal and Nevada systems limit scope of a permitted search by a citizen's expectation of privacy. Both systems have found that there is no expectation of privacy in the odors emanating from a vehicle on a public street. Drug sniffing dogs are routinely used to sniff the exterior of vehicles and are reliably trained to detect odors of illicit materials. Their reliability has been found sufficient to permit their use. Articulate suspicion is not required, nor is probable cause for a dog's utilization. Any deficiency with the particular dog's reliability is subject to examination but irrelevant to the contemporaneous actions of officer's utilizing the dogs. So even if this dog were found to be unreliable, Paul acting to pursuant to its alert that marijuana was present. Therefore, the use of the dog was permitted.

Opening of Trunk - Different under federal and Nevada systems.

Federal - Probable Cause Sufficient

Paul's search of the trunk did not violate Amy's fourth amendment rights. The automobile exception to the warrant requirement permitted Paul's search of the trunk. The automobile exception is a judicially recognized exception to the warrant requirement. It stands for the proposition that officers need only articulable suspicion to search the inside of a vehicle. Officers need probable cause to search a vehicle's trunk. The trunk is the concern in this case. Given the reliability of the drug sniffing dog, Paul had probable cause to believe the trunk contained marijuana. The existence of a marijuana sticker on the car is probably of no consequence in the probable cause determination. Since Paul had probable cause, utilizing the automobile exception to the warrant requirement, his opening of the trunk was permitted. Therefore, under federal law, the search was permitted.

Nevada - Need Probable Cause AND Exigency

Paul's search of the trunk did violate Amy's Nevada state constitutional rights. As discussed above, state's are permitted to exceed fourth amendment exceptions afforded by the federal system. Nevada has done so with the automobile exception to the warrant requirement. In Nevada, Paul needed to have probable cause and exigency to open the trunk. Otherwise, a search warrant is required. Exigency requires that due to the nature of the contraband or the surrounding circumstances, a seizure must occur immediately in fear of losing the evidence. Exigency did not exist here. Paul had pulled over Amy's vehicle and ordered her out of the vehicle. The loss of evidence due to its nature and surrounding circumstances in this case did not rise to any level of exigency. Therefore, violated Amy's Nevada state constitutional rights when he opened the trunk.

Search Incident to Arrest - Pipe

Although not part of the motion to suppress, the discovery of the pipe under the federal system would be permitted under the federal system as a search incident to a lawful arrest. A search incident to a lawful arrest is a search of the person for weapons or contraband. Unlike a Terry frisk, a search specifically for contraband is permitted. Here Paul discovered the pipe in Amy's sock incident to her arrest for marijuana trafficking. Therefore, its seizure was permitted. However, in Nevada, due to the arrest being unlawful, the pipes seizure was unpermitted.

Thermal Imager

Federal - Use Permitted

Paul's use of the thermal imager was constitutionally permitted. The courts have found that the use of thermal imager's to detect heat emanating from a house is permitted as not violating the occupant's exception of privacy. Therefore, its use was permitted.

Nevada - Normally Permitted, Fruit of the Poisonous Tree Here

Paul's use of the thermal imager was constitutionally permitted under Nevada law. Nevada law utilizes federal precedent in this regard and has not chosen to extend a further state constitutional protection. However, the discovery made by the imager would be considered poisoned by Paul's prior unlawful search of the trunk. The fruit of the poisonous tree doctrine is defined as but for the offending search, would law enforcement by using ordinary methods of investigation, inevitably discovered the contraband. Had Paul not opened the trunk, he would not know the quantity of marijuana giving him the suspicion that Amy was involved in marijuana trafficking. The dog utilized was trained to alert for the presence of marijuana and not its quantity. Not knowing the quantity of the marijuana, it is unlikely that Paul would have taken the initiative to use the thermal imager on the home. It is also unlikely that under these circumstances, the marijuana plants in the home would be inevitably discovered. Therefore, as indicated below, the warrant should not have been approved, and the plants/lamps found in the car/home ought to be suppressed under Nevada law.

Approval of the Warrant

Federal - Probable Cause, Plus Approval by Neutral Magistrate - Warrant Valid

For a search warrant to be valid and approved it must be based on legally obtained probable cause and screened by a neutral magistrate. Under federal law, Paul legally discovered the marijuana in Amy's trunk and legally used a thermal imager to establish probable cause that the house contained marijuana plants in a quantity indicative of trafficking. Therefore, Paul's discoveries acting on that warrant were permitted and the plants/lamps were lawfully seized.

Nevada - Illegal Search of Trunk, Lack of Inevitable Discovery - Warrant Invalid

For a search warrant to be valid in Nevada, the same requirements as the federal system must be met. That is, the warrant must be based on legally obtained probable cause and screened by a neutral magistrate. For the reasons discussed above, the search of the trunk was unconstitutional and the use of thermal imager was a fruit of the poisonous tree. Paul did not

have any legally obtained probable cause sufficient to justify the granting of his warrant application. Therefore, the plants/lamps discovered in home out to be suppressed.

Conclusion

In the federal system the motion to suppress ought to be denied. In the Nevada court system, the motion ought to have been granted.

2. Fully explain whether Amy's constitutional rights were violated when the judge permitted Paul to testify about her statement.

For the reasons discussed below, Amy's constitutional rights were not violated when the judge permitted Paul to testify about her statement.

Miranda Rights

Miranda warnings in this case were not required and the statement was constitutionally obtained. The fifth amendment to the constitution includes a right against self-incrimination. The United States Supreme Court in the landmark case of *Miranda v. Arizona* concluded the right against self-incrimination required that police read a person their rights. Those rights include the right to remain silent, the warning that anything said may be used against them, and the right to an attorney. Courts subsequently ruled that the Miranda warnings were only required in a custodial interrogation. Custodial has been defined as the individual not having the freedom to leave. Interrogation is a statement or question which is likely to elicit an incriminating response.

In this case. Amy was under arrest. She certainly was in a custodial setting. However, she was not the subject of interrogation. Paul did not question her or make a statement likely to elicit an incriminating response. In fact, Paul advised her not to talk. Despite that warning and not in response to any question she made the statement in issue. Therefore, her constitutional rights were not violated in how the statement was obtained.

Hearsay Exception - Statement of Defendant

Paul's testimony was permitted as against Amy under the statement of defendant exception to the hearsay rule. Hearsay is an out of court statement offered for its truth. Thus, there are two requirements, that the statement be made out of court and that the statement be offered for its truth. A statement is offered for its truth when it is offered to prove what was said. The statement taken at face value was made out of court and was offered for its truth. The state is offering the statement to show Amy's knowledge of the marijuana and Bo's ownership of it. Normally this would be excluded. However, the hearsay rule has several exceptions and exclusions. One exception to the hearsay rule is statements of a criminal defendant. Amy is a defendant subject to criminal prosecution. Her statement was not obtained in violation of Miranda. Thus, the statement meets the exception to the hearsay rule and is admissible.

Confrontation

The confrontation clause of the 6th amendment permits a criminal defendant to confront the accused. This means that unless there is a proven exception (and even less so under Crawford v. Washington), the defendant must be able to confront witnesses against him. This is done by cross examination. Here, Amy can confront Paul about her purported statement. Therefore, her 6th amendment right has been protected.

Thus, Amy's constitutional rights were not violated when Paul was permitted to testify about her statement.

3. Fully explain whether Bo's constitutional rights were violated when the judge permitted Paul to testify about Amy's statement.

Bo's constitutional rights were violated by the use of Amy's statement. The confrontation clause of the 6th amendment requires that a defendant be permitted to confront his accused. The

fifth amendment includes a right against self-incrimination. Amy enjoys that right as a defendant in the trial. Bo cannot call Amy to the stand to confront her about the statement. Bo is deprived of his sixth amendment rights and therefore the statement was unconstitutionally used against him. The only cure would have been a severance. Therefore, Bo's constitutional rights were violated when Paul was permitted to testify to the statement.

As an aside, if severed, the statement could be used because this 6th amendment rights would be protected. Furthermore, the statement would meet the hearsay exception of the statement of a co-conspirator.



**STATE BAR OF NEVADA
JULY 2010 EXAMINATION
APPLICANTS' ANSWERS TO QUESTIONS
OF NEVADA BOARD OF BAR EXAMINERS**

- EXAM 2, QUESTION 2 -

JULY 2010

EXAMINATION NO. 2;

QUESTION NO. 2: ANSWER IN YELLOW BOOKLET

Nevada is suffering from the highest unemployment rate in the United States. Some cities and counties have funds, available as a result of a local business sales tax, to use as incentives to private developers who are willing to develop and construct business parks in Nevada. To ensure that these developers use local workers and companies in the development and construction of the business parks, a bill has been proposed to the Nevada Legislature that provides in relevant part:

Any corporation or other business entity that receives of a governmental development incentive must itself be legally formed and physically based in Nevada. In addition, any such corporation or other business entity must ensure that at least fifty percent (50%) of all companies that receive contracts to work on the development are entities that are legally formed and physically based in Nevada.

For the same reasons, another bill has been proposed to the Nevada Legislature that provides in relevant part:

No corporation or other business entity may be awarded a contract as a part of a governmental development incentive program unless more than fifty percent (50%) of the total payroll for the development and construction of the business park is paid to workers who are Nevada residents.

Company A wants to develop a business park for City B under the incentive program. Company A was incorporated in California but has a local branch office in Nevada. Company A intends to subcontract the construction of the business park to entities, including sole proprietorships it has worked with in the past. Fewer than fifty percent (50%) of these entities are legally formed and/or physically based in Nevada, although all of them are licensed by the Nevada State Contractors' Board. Further, Company A knows that less than fifty percent (50%) of its own employees who will be working on the development are Nevada residents.

Identify and discuss the arguments that Company A could make in support of its claim that the provisions quoted above, if passed, are unconstitutional.

Identify and discuss the arguments that Nevada could make that these provisions, if passed, are constitutional.

2)

I. The Provisions Are Unconstitutional - Company A

A. Justiciability

The constitution requires there be a case or controversy which is ripe for resolution for a court to exercise jurisdiction over a claim. A claim must be ripe for review. Where a party makes a request for pre-enforcement review, the claimant must prove that she will suffer irreparable injury if the case is not heard and that the issues are fit for resolution.

Here, the provisions are merely "proposed." There is a chance the provisions will not be enacted, and so resolution of the case is not yet ripe.

Additionally, if Company A were to receive the contract before the law were enacted, Company A would have another constitutional claim against the state. The Contracts Clause of the United States Constitution prohibits states from substantially interfering with existing contracts when passing new laws. Were Nevada to pass the proposed bills and enforce them against Company A after the contract was entered into, this would violate the Contracts Clause.

B. The Privileges and Immunities Clause of Article 4

The Privileges and Immunities Clause of Article 4 ensures that the states will not discriminate against out-of-state citizens in favor of residents of their own state regarding civil and economic liberties, unless necessary to achieve an important government interest.

Companies, as business entities, do not have the right to assert privileges and immunities claims. Thus, Company A will have to assert this claim through its workers who do not live in Nevada. It could argue that third party standing is appropriate here because the workers are unlikely to assert the claims themselves and the Company has sustained a personalized injury as the result of the proposed bills. Company A will face a standing issue.

Assuming Company A can bring the claim, it will argue that the law deprives out-of-state citizens of important economic liberties. Additionally, the company will have suffered its own unique injury. Nevada requires foreign companies (those incorporated out of state) to file with the Nevada government and pay fees. It's likely that some of these fees are going towards funding this program, which the facts state is the product of local business sales tax.

Company A will also argue that the provisions are not narrowly tailored as required under the exception to the rule listed above. A state will be justified where the law at issue is necessary to achieve an important government interest. While combating unemployment is an important interest, the Company could argue that this law is overly protectionist and encroaches on other important rights.

Because combating unemployment could be achieved through more narrowly tailored means, the privileges and immunities claim could prevail if the company may assert it under the analysis above.

Note also that the Privileges and Immunities clause from the 14th Amendment will not apply here, because that right is solely geared toward the right of national citizenship as it relates to interstate travel. This law does not affect that area.

C.. The Dormant Commerce Clause

Congress has the authority, under the United States Constitution, to regulate interstate commerce. Where Congress has not yet legislated in a particular area, courts have applied the doctrine of the "Dormant Commerce Clause" to invalidate some state laws that create an undue burden on interstate commerce, or where state laws are overly protectionist and discriminate against out-of-state citizens.

The same analysis regarding out of state citizens from the Privileges and Immunities discussion

above applies here.

With regard to the undue burden test and the Dormant Commerce clause, states may not unduely burden interstate commerce. Interstate commerce includes regulation of the channels and instrumentalities of commerce as well as the regulation of intrastate activities which, if economic in nature, substantially affect interstate commerce in the aggregate.

The Nevada legislation at issue affects interstate commerce. Although local development, which happens exclusivley intrastate, is arguably outside the channels and instrumentalities of interstate commerce, development (an economic activity) in the aggregate substantially affects interstate commerce. Thus, the commerce clause will apply.

Exceptoins to the Dormant Commerce Clause apply where the state has received the consent of the federal government or where the state is acting as a market participant. Consent exists where the federal government delegates some regulation of interstate commerce to the states - e.g., regulation of intrastate highways. The market participant exception exempts states from dormant commerce clause claims where they are operating government business or programs using taxpayer money.

Here, there is no indication that the federal government has given consent to Nevada to regulate this aspect of interstate commerce. However, Clity B is acting as a market participant throught his program. It has used government funds to create an incentive to private developers who are willing to construct business parks. Because City B is soliciting bids and directly paying the contractors, it is acting as a market participant.

Under the undue burden test, Company A's claim will fail because City B is acting as a market participant.

D. The Supremacy Clause

Federal law is the law of the land and will trump any conflicting state laws under the doctrine of preemption. Preemption applies where the federal government has fully occupied an area of the law (evidence of which may come from the legislative history of various statutes) or where state law conflicts with, or frustrates the purpose of, a federal law.

Although no conflicting federal laws are mentioned in the fact pattern, Company A would be well advised to research the issue to see if there is a contradictory federal law on point which would invalidate the Nevada proposals.

E. The Equal Protection Clause

The equal protection clause, applied to the states through the 14th Amendment and to the federal government through the 5th amendment, protects fundamental rights and suspect classifications. Whether either is at issue, strict scrutiny is applied.

Here, there is no fundamental interest or suspect category at stake. The interest involved is economic, and economic classifications in the post-*Lochner* era are subject to rational basis scrutiny. Under the rational basis, the plaintiff must prove that the law at issue is not rationally related to any conceivable government interest. This test carries a high burden of proof for a plaintiff, and usually results in the government prevailing.

Nevada will cite the purpose of the legislation - combatting unemployment - and will be able to prove that the legislation is rationally related to achieving that purpose. Any equal protection claim will fail.

F. The Due Process Clause

There are two relevant strands of due process - substantive and procedural. Substantive due process protects fundamental rights. Procedural due process requires certain procedures be used where the government has intentionally deprived a plaintiff of life, liberty or property.

The fundamental rights analysis from the equal protection clause discussion applies.

As for procedure, because Company A does not have any vested right in the contract, it will be unable to prove that the government has intentionally stripped it of life, liberty or property. However, as mentioned above in regard to the contracts clause, Company A may have a cause were it awarded the contract and City B subsequently attempted to apply the law against it.

II. The Provisions are Constitutional - Nevada (City B)

Nevada would argue against the claims made by Company B above based on the counter-arguments made in each section above.

Offensively, it would also argue that, based on the 10th Amendment and the principles of federalism, it has properly legislated in this area. The Tenth Amendment reserves to the states power to legislate for the health, welfare and safety of its citizens.

Here, Nevada would claim that the legislation, targeted at combatting unemployment, serves to advance the welfare of its citizenry. A depressed economy harms the health and safety of its citizens, because high unemployment usually leads to an increase in crime.

States also have the right to raise taxes to support the welfare of their citizens. Taxes may not unduly burden interstate commerce, however. A tax will be found constitutional as applied against an entity where there is a nexus between the company and the state, the tax is fairly apportioned, and there is a relationship between the tax and its subsequent benefit conferred on the citizenry.

Here, the tax is on local business sales, and local businesses generally have a nexus with the state. There's no evidence that the tax is unfairly apportioned - it seems to tax only local sales. Finally, there is a relationship between the tax and the benefit conferred - it is a business sales tax

used to construct future business parks.

The tax and legislation are thus appropriate exercises of state power and should be found constitutional under the 10th Amendment.



**STATE BAR OF NEVADA
JULY 2010 EXAMINATION
APPLICANTS' ANSWERS TO QUESTIONS
OF NEVADA BOARD OF BAR EXAMINERS**

- EXAM 2, QUESTION 3 -

JULY 2010

EXAMINATION NO. 2;

QUESTION NO. 3: ANSWER IN DARK BLUE BOOKLET

The Smith Ski Resort is a small ski resort in Nevada owned by Mr. Smith. A large cattle ranch, which is owned by Mr. Smith's longtime neighbor Mr. Jones, is located in Nevada adjacent to the Resort. In March 2009, Mr. Smith visited Mr. Jones to inquire about buying a portion of Mr. Jones's ranch. This portion is ten (10) acres of undeveloped land bordered by the highway on the south, Running Bear Mountain Range on the west, Wind Spirit Creek on the north and the Smith Ski Resort on the east. Mr. Jones agreed to sell the ten (10) acres for one hundred thousand dollars (\$100,000). Mr. Smith tendered a check for ten thousand dollars (\$10,000) as a down payment and agreed to pay the remaining balance, plus interest at an annual rate of five (5) percent, over a period of five (5) years. Mr. Jones wrote a receipt dated March 15, 2009, which stated: "This receipt acknowledges that Mr. Smith gave me a ten thousand dollar (\$10,000) down payment on my land that is located between the boundaries of the highway, Running Bear Mountains, Smith Ski Resort and Wind Spirit Creek. The total price for the property is one hundred thousand dollars (\$100,000)." Mr. Jones signed the receipt and gave it to Mr. Smith.

In May 2009, weather forecasters predicted an unprecedented winter snowfall for the winter of 2009-2010. Smith Ski Resort decided to install a new ski lift on the property of the Resort that is adjacent to Mr. Jones's ranch to provide additional skiing terrain and parking access to the Resort. After receiving multiple responses to its request for proposal, the Resort entered into a written contract in June 2009 with Hightower to install the ski lift towers. The contract stated that "the parties intend this writing to be a complete and final expression of their agreement" and provided that "all obligations under this contract are conditioned on receipt of all required governmental approvals." The contract also provided that the installation work would be completed by October 1, 2009.

In July 2009, Mr. Jones called Mr. Smith and told him that he would not be selling him any of his property. Mr. Smith commenced an action to enforce the agreement.

In August 2009, during the course of installing the ski lift towers, Hightower workers

discovered prehistoric Native American artifacts in the area. Under state law, excavation and preservation of such artifacts was required to be performed under the supervision of the State Preservation Office, which will issue a certificate to the Resort upon completion of the excavation. As a result of the discovery of the artifacts, work on the installation project was delayed. Because of its other installation commitments and the uncertainty of the length of the delay caused by the excavation, Hightower stopped its installation work at the Resort and removed its equipment. Smith Ski Resort immediately sued Hightower for the one million dollar (\$1,000,000) profit it would have made from its expanded operations.

- 1. Discuss the legal rights, obligations and remedies of Mr. Smith and Mr. Jones with respect to the ten (10) acres of land.**

- 2. Discuss the legal rights, obligations and remedies of Smith Ski Resort and Hightower with respect to the installation contract.**

3)

In contract law, the common law of NV or the UCC are applied. The UCC is applied in the sale of goods and the common law is applied to all other contracts.

1. Rights + obligations of Smith (S) and Jones (J)

K Formation

Here, the contract is for the sale of land, and thus the common law will apply. In order to have a valid contract, there must be mutual assent to the terms, as evidenced by offer, acceptance, and consideration.

An offer is a promise, undertaking, or commitment to enter into a contract (K) with certain definite terms communicated by the offeror. An acceptance is the assent and agreement of the terms set forth in the offer, and since under the common law, the "mirror-image" rule applies to acceptance and the material terms of the acceptance must exactly mirror/reflect the material terms of the offer or these are seen as mere proposals. Consideration is a bargained for legal detriment or benefit conveyed by the parties upon each other, each party must give consideration, yet, consideration does not have to be of a reasonable value and thus a "mere peppercorn" of consideration may generally suffice.

Here, S offered to purchase J land. Although the specific offer is not present in our fact pattern, one can deduce an offer was made by S as J agreed to sell the 10 acres for 100,000 dollars. Thus, S must've offered to purchase J's 10 acres for \$100,000, and there is valid acceptance of the offer under the mirror image rule as J assented to S's offer and agreed to sell the 10 acres for \$100,000. The consideration from S here is \$100,000 and the consideration from J is his land, and as such, since there is offer, acceptance, and consideration, there is a valid contract unless there some formation defenses apply.

Under the terms of this installment contract, S is thus obligated to provide the purchase price to J as per the K, and J is obligated to transfer the property to S upon full performance of the K.

Statute of Frauds

Here, as this K is a land sale K, the statute of frauds (SoF) applies and thus there must be a signed writing evidencing the material terms of the contract. Here, if the SoF is not satisfied, there will not be an enforceable contract without substantial performance. Yet, once S tendered his down payment check to J, J wrote and signed a receipt stating the material terms of price (down payment and total price) and also identifies the property with specificity (located between...) As such, since both price and the land to be sold are included in the check receipt and it is signed by J, the SoF is satisfied and there is likely a valid contract.

Revocation of Acceptance

Acceptance may be revoked if done properly and in a timely manner before the K is fully performed. Here, J called S and told him that he would not be selling the land. This is an improper revocation as it was not done timely. The attempted revocation occurred 3 months+ after the down payment check was tendered by S to J and the valid K was entered into. Thus, this is an improper revocation of acceptance and there is a breach by S. As the common law looks to whether a breach is minor or material, this breach is likely to be material since it halts all performance by S. The revocation also serves as an anticipatory repudiation as it unequivocally shows that S will not be performing under the K. Since S has materially breached the K through this anticipatory repudiation, S is in total breach of the K and J may bring suit against S.

Remedies

Here, as this is a land sale contract, and land is always considered unique, J may argue that he can get specific performance from J for the land due to the uniqueness of the property. Specific performance is allowed when there is a valid contract, the Plaintiff (J here) has fully performed on the K, there is a mutuality of remedy by applying specific performance, specific performance is feasible under the circumstances, and money damages are inadequate. Although since dealing with unique property shows that money damages are inadequate, J will nevertheless not be able to get specific performance on the K as he has not fully performed the K. The K is an installment contract and J has only tendered a down payment and not the full K price as agreed upon. As such, since J has not fully performed the contract, he is not entitled to specific performance of the K and thus can only be allowed remedies at law such as money damages.

Money damages are always allowed to a non-breaching party to a K either as nominal or expectation damages. (incidentals and consequential are also allowed under certain circumstances, yet punitive damages are never allowed as contract law does not punish breaching parties though punitive damages.) Here, since as discussed, J has breach the K, and thus, S is entitled to monney damages. Here, since S has provided a down payment, J will likely have to return the down payment as expectation damages and provided S with any incidental damgaes related to J's breach. Thus, S is likely entitled to \$10,000 damages from J plus any incidental damges.

2. Ski Lift Installment

Formation

Here, since a ski lift installation K would be a perosnal servies K, the common law also applies to this contract. Alhouthg there will be some sales of goods under the K (ski lift parts/equipment/goods), as the primary purpose of this K is for installation and not the goods themselves, the primary pupose test will favor the common law and thus common law applies.

As discuesed above, there must be mutaul assent of the parties through offer, accpetance, and considetraton, and the offer and acceptance must be mirror imagres regarding the maerail terms for the K to be valid. Here, S communited an offer to what seems like multiple offerees for contracting to due the installion. HEre, Hightower (H) accepted the offer and the parties entered into a written K. The consideratoin from S here is the money for the installaion and the consideratoin from J is the installation itself. Thus, since there an offer, acceptance and consideratoin, there is a valid contract unless there some formation defenses apply.\

Under the terms ofn the K, S is obligated to pay H as per the K, and H is obligated to fully and properly install the ski lifts wihtin a reaosable time for the specified completion date.

Here, there is a writtnen so the SoF is satisfied and neverthelss would not apply since this personal servies K should be completly perfirmed wihtin 1 year (entred in may, perforamcnce due

in October)

Breach

Under the terms of the written contract, a condition precedent is expressed whereby the K requires governmental approvals. This express provision was included in the K and the K contains a merger clause showing the K to be a "complete and final expression." As such, this condition precedent is part of the bargained for exchange and is a part of the K.

Although probably valid, if the term "governmental approvals" may be understood better from evidence of course of dealing and/or trade usage, and any other evidence not excluded under the parol evidence rule. The parol evidence rule bars any extrinsic evidence of a contemporaneous or earlier bargains if the K is merged and intended to be a complete and final expression unless one of many numerous exceptions applies. Due to the merger clause, the parol evidence rule applies, yet, an exception may still apply to help understand and explain the K. Trade usage is an exception to the parol evidence rule, and as such, trade usage can be used to show what the trade of construction defines "governmental approvals as" so that this terms may not be vague and/or ambiguous.

As governmental approvals is a condition precedent to the K, if the state law regarding the excavation of artifacts is seen to be a governmental approval, it may excuse any delay or breach as a result of the artifacts. As the State preservation office must issue a certificate, this may be a governmental approval and the parol evidence rule would not bar evidence of this as previously explained. As such, H may have a performance defense of impossibility from having to wait for the governmental approval to excavate.

Impossibility occurs when a reasonable person/company would not be able to perform under the K due to something unforeseen that material hinders performance and makes the reasonable company/person unable to perform due to the impossibility. Here, H would argue that impossibility delayed the K due to the unforeseen requirement to get the certificate to excavate the artifacts. Under the circumstances, a reasonable company would be unable to perform

here as they would need their government certificate. Thus, impossibility may be a defense to the delay.

As a result of the delay, H stopped its installation work and removed its equipment. This may be seen as an anticipatory repudiation by H to S, yet, H may still perform here so it is a question whether this is an anticipatory repudiation. Here, S should demand in writing for adequate assurances from H before deeming H to be in breach via anticipatory repudiation. Yet, removing one's equipment is a unequivocal act showing that H likely does not intend to finish the job, and as such, it is likely that H anticipatorily repudiated the K (nevertheless demanding in writing for adequate assurances would definitely clear this up). If there is an anticipatory repudiation, then S is able to sue on the K at this time. Yet, if there is no anticipatory repudiation, S must wait a reasonable time after October 1's performance date to sue on the K as H will have reasonable time after Oct 1 to complete performance. Here, as this contract is regulated by the common law, it is necessary to determine if the breach is minor if the breach is material. Here, as H knows that S needs the Ski lift completed for the winter season, sometime shortly after Oct 1 is likely reasonable and will not be deemed a material breach.

Remedies

Here, S will only be allowed legal remedies as the equitable remedy of specific performance is unavailable regarding services contracts. Here, specific performance would require H to finish working on the ski lift, which Courts have likened akin to involuntary servitude and thus specific performance is not allowed as unconstitutional due to it creating involuntary servitude. As such, S will not be able to use equitable remedies and can only receive money damages as its legal remedy.

Here, S is trying to receive its profit from H. As H may not have anticipatorily repudiated, S may not be able to immediately sue H upon H's removal of its equipment. Nevertheless, S will be entitled to a cause of action for breach of K if H has anticipatorily repudiated or if H fails to complete performance within a reasonable time of October 1. As such, S is entitled to money damages from H for their failure to complete performance, a material breach.

The measure of contract damages is expectancy damages generally, yet incidentals and consequential damages may also be awarded. Here, S is attempting to receive its likely profits as expectation and consequential damages from H. S will argue that H knew that the Ski Lift must be operational by the winter season to meet increased demand and thus consequential damages are valid. S will further argue that the \$1,000,000 figure is not speculative as due to the unprecedented winter snowfall projected. Nevertheless, if the court deems these damages to be too speculative, they may refuse to provide S with this figure. As there is no liquidated damages clause in the K, S is not entitled to liquidated damages.

S should be entitled, however, to damages from H in the amount of whatever price it takes S to find a new construction company to finish the ski lifts ("cover") plus any incidentals related to finding this new company and related to the delay caused by H. This would be proper expectation damages as this would put S in the position he would be in had the K been properly performed without H's breach. As such, S is likely entitled to the "cover" price + incidentals from H, and possibly consequential damages that are not too speculative.



**STATE BAR OF NEVADA
JULY 2010 EXAMINATION
APPLICANTS' ANSWERS TO QUESTIONS
OF NEVADA BOARD OF BAR EXAMINERS**

- EXAM 2, QUESTION 4 -

JULY 2010

EXAMINATION NO. 2;

QUESTION NO. 4: ANSWER IN LIGHT GREEN BOOKLET

Attorney works for Dot Company as General Counsel. Dot Company is a private, closely held corporation in Nevada. A five member board ("the Board"), elected by shareholders, manages Dot Company. The Board hires Dot Company's Chief Executive Officer ("CEO"). The CEO manages Dot Company's day-to-day operations. The CEO hired Attorney, and Attorney reports directly to the CEO. Attorney also has a reporting relationship to the Board.

1. In August, an employee of Dot Company's Human Resources Department ("Employee"), with whom Attorney has worked occasionally over the years, comes to Attorney's office, closes the door and says: "Can you keep a secret?" When Attorney says nothing, Employee tells Attorney he is addicted to pain killers, resulting in significant absences from work. Employee also tells Attorney that he has been paying for his drugs with petty cash from Dot Company.

2. In September, the CEO advises Attorney that he and the Board intend to build a new building. Attorney strongly feels this will put a financial strain on Dot Company. Nevertheless, the Board tells Attorney that it supports this "forward-thinking" approach.

3. In October, the CEO advises Attorney that Dot Company has been sued by a supplier. In addition, the CEO has been named in the lawsuit as an individual defendant. The CEO asks Attorney to represent him as well as Dot Company. The CEO discloses that he has numerous e-mails with the supplier regarding the CEO's thoughts on this case, some of which may be damaging to Dot Company's defense.

4. In November, the Board asks for a litigation update on a separate matter in which one Board member's relative is adverse to Dot Company. Despite Attorney's expressed concern, the Board supports the presence of the entire Board at the litigation update.

5. In December, the CEO approves an all expenses paid trip to Hawaii for a local government official who will select the winning proposal for a large-dollar contract for which Dot Company bid. When Attorney adamantly advises against the proposal, the CEO fires Attorney. The Board has asked Attorney why he was terminated.

Please identify and discuss every ethical rule involved with each month's activity, along with the action such rules require of Attorney.

4)

Competence - all attorneys must have the requisite skill, knowledge, preparation, and expertise to adequately represent a client.

Here, A has been working for D as general counsel. There are no facts to indicate A is unqualified for the position.

Scope of Representation - an attorney who works for a corporation generally represents the corporation's best interests and is sometimes extended to protect the interests of upper echelon employees but generally not lower echelon employees. Thus, the attorney has a duty to make it clear to the client who he is there to represent, and in Nevada the attorney has a duty to ensure that the employee understands the limitations of the representation.

Here, an employee from human resources came into A's office and asked him "can you keep a secret?" At that moment the attorney should have said no and disclosed the scope of his representation within the company. As he did not do so, he has violated the rules of ethics.

Conflict of Interest - all attorneys have a duty not to engage in representation of two clients whose interests are adverse to one another. If this occurs, the attorney must disclose his representation of both clients and have them consent in writing to allow the representation. Even in the event he receives signed consent, the attorney may withdraw if he does not believe he can adequately defend the client given the conflict.

Here, the employee tells A he is addicted to pain killers which has resulted from significant absences from work and he has been stealing from the company's petty cash drawer of the company to pay for his habit. As the employee's absences and the stealing from the petty cash are adverse to the company's interests, A is currently in a conflict of interest situation in which he has a person who believes they have a right to representation because of A's failure to specify otherwise and the best interests of the corporation in being apprised of these facts so as to remedy them.

The best practice would be for A to tell the employee of his limited representation as soon as possible and disclose that he must tell the company about his indiscretions, and advise the employee to hire an attorney.

Confidentiality - once an attorney/client relationship has formed, there is automatically a duty to keep all information learned within the scope of representation a secret.

Here, had an attorney/client relationship formed between A and the employee, he would breach his duty of confidentiality by disclosing to the corporation the actions of employee. However, despite that employee came into the office and requested to speak with A privately, an attorney/client relationship cannot be formed because A is the attorney for the corporation not for the employees. Thus, despite that he did not disclose this information, he is still likely not going to be considered to have formed an attorney/client relationship which requires the duty of confidentiality.

Communication - There is a duty to communicate regularly with the client regarding aspects of their case.

Here, A has information regarding the well being of the corporation and its employees given that the employee just admitted to stealing from the company and describing his significant absences. As such, A must disclose this information to the corporation given the attorney duty to communicate. If A does not do so, he will be in violation of his ethical duties to the corporation.

Communication/Scope of Representation - also extends to the attorney's thoughts regarding a particular course of action the client is going to take. However, the attorney is solely in charge of the tactical decisions regarding a client's case while the client is in charge of making the decisions on the merits of the action.

Here, A does not agree with the proposed course of action that the CEO and the Board intends to take on a business deal. While A may voice his opinions, the merits of engaging in the business transaction or not is up to the company. As such, it is not within A's scope of representation to take any further action regarding the deal with which he disagrees.

Conflict of Interest - a conflict of interest arises when an attorney has two clients whose interests are adverse to one another which he is to represent. Generally, if the attorney reasonably believes he can adequately and zealously represent both clients to the best of his abilities despite the

conflict, he may continue with the representation. However, if the attorney believes he cannot adequately represent them both, he may withdraw from the representation of both, he may disclose the conflict to the parties and get their voluntary and knowing consent to the representation.

Here, when hired by the CEO, A was directed to report directly to the CEO and he also has a reporting relationship with the Board. The Board hired the CEO and thus is higher up the chain of command than the CEO. Accordingly, A represents the corporation and their owners/shareholders, and likely represents the Board given that they manage the corporation, as well as the CEO who is in charge of the day to day operations of the corporation. However, his representation is not clear.

Thus, in this case when the CEO advises A that the company is being sued and he as well has been named in the lawsuit. However, although the CEO and the corporation are both named in the litigation, it is not clear whether their interests are adverse to each other. A should immediately analyze whether he can adequately represent both the corporation and the CEO in this lawsuit. If he cannot, he has a duty to withdraw from the matter or receive the informed written consent of both the clients.

Duty to Withdraw - an attorney has a duty to withdraw when he cannot adequately represent clients due to a conflict.

Here, given that the CEO has recently disclosed to A that he has numerous e-mails regarding the litigation regarding the CEO's thoughts on this case which may be damaging to the corporation, there is a current conflict and A likely cannot represent both parties. Thus, A must disclose the conflict to his clients, both the CEO and the Board as the managers of the corporation, and ask whether they can voluntarily consent to his representation of both of them during the litigation.

As it would likely not be in the best interests of the corporation that A attempt to defend the CEO given his damaging e-mails, A likely cannot adequately represent both the clients and should withdraw from the matter.

Duty of Candor/Fairness/ Expedite Litigation - an attorney has a duty to the court and to

opposing counsel to tell the truth in all aspects of the litigation. Further, the attorney has a duty to expedite the litigation which requires engaging in discovery. Although work product is protected, any information that is merely disclosed to the attorney is not considered work product and is not protected.

As the attorney has knowledge of documents that may be damaging to his case, he cannot hide them or fail to disclose them to opposing counsel throughout the discovery process in an effort to protect his client. As such, if A stays on the case, he must disclose these documents in furtherance of his duty to the court and duty to opposing counsel.

Confidentiality - a duty of absolute confidentiality extends to all clients regarding all information learned during the course of the representation. As A was hired by the corporation and is to report directly to the CEO as well as have a relationship with the Board, he has a duty of confidentiality regarding all of these persons.

Here, A is concerned for the confidentiality of the update given the Board member's involvement in an adverse litigation which is the subject of the update. As such, to disclose information to the Board member would be a possible breach of confidentiality given the likelihood that the Board member will tell his family member.

Thus, it was prudent of the attorney to disclose the possible leak of information and breach of the confidentiality between an attorney and their client. If A would have disclosed the information with knowledge that the Board member would likely disclose the information to a third party whose interests are adverse, it could have been a breach of duty of confidentiality had the attorney known and not disclosed the adverse relationship.

As the holders of the attorney client privilege, the client may waive the privilege. However, here it is unclear whether the true holder of the privilege is actually the corporation itself rather than the individual board members. As the information affects the corporation and not just the board, it may be the corporation's duty to waive the privilege so as to allow the attorney to disclose the information.

However, given that the Board is elected by the shareholders to manage the company, they are likely vested with the power to waive the right to confidentiality in the Board room. Accordingly, A will not likely have breached his duty of confidentiality by giving the board

members an update.

Confidentiality/Candor - as specified previously, the attorney has a duty of confidentiality regarding all information disclosed during the course of representation. However, when it comes to illegal acts which the client will commit and of which the attorney is aware, the attorney's duty to the tribunal outweighs the duty of confidentiality and the attorney has a duty to disclose the illegal act to the tribunal.

Thus, in this case, as the CEO has approved an all expense paid trip for a local government official so as to gain his favor for when he selects a large dollar contract, the CEO has committed bribery. As such, his actions are illegal. If his actions are ever brought before a court, A will have to disclose the illegal acts and cannot keep them secret despite the duty of confidentiality.

Conflict of Interest - against, the CEO's actions are directly adverse to the corporation as he is committing an illegal act on behalf of the corporation.

As the corporation and not the CEO hired him, A's duties likely fall to the corporation first in protecting their best interests. As such, in protecting the best interests of the corporation, he likely can disclose to the Board the CEO's actions without violating the rules of ethics regarding conflicts between existing clients.

However, if A believes he is

Duty of Confidentiality - although A may have had a duty of confidentiality with regard to his representation as a whole of the corporation and the upper echelon employees, when the employees breach their duty to the corporation, A may report up the chain of command to the Board and possibly out to the authorities on the outside if they chose to do so. A will not be held to have violated his ethical duties in breaching confidentiality for disclosing to the corporation the breach of fiduciary duties of the CEO.

END OF EXAM