

No.

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In the  
Supreme Court of the United States

Eric Hasbrouck, JD,  
Petitioner,

v.

State Bar of Nevada  
Respondent.

Review of the Supreme Court of Nevada Re: Bar Admission

**APPENDIX TO PETITION FOR A WRIT OF CERTIORARI**

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**EXHIBIT 1**

Nevada Supreme Court Order Denying Petition for Review

IN THE SUPREME COURT OF THE STATE OF NEVADA

ERIC HASBROUCK,  
Petitioner,  
vs.

STATE BAR OF NEVADA; BRIAN  
KUNZI, DIRECTOR OF ADMISSIONS  
STATE BAR OF NEVADA  
ADMISSIONS DEPARTMENT; AND  
RICHARD M. TRACHOK, II, CHAIR  
BOARD OF BAR EXAMINERS STATE  
BAR OF NEVADA,  
Respondents.

No. 80349

FILED

MAR 23 2020

CLERK OF THE COURT  
BY *R.W.*  
DEPUTY CLERK

*ORDER DENYING PETITION FOR REVIEW/RELIEF RE: BAR  
ADMISSION*

This original pro se petition seeks review/relief regarding the denial of petitioner's admission to the bar after he failed the July 2019 bar examination. Petitioner asserts, among other claims, that the state bar materially and fraudulently misrepresented the scores needed to pass the exam, as well as the grading processes utilized by the bar. We conclude that the express terms of Supreme Court Rule 70 bars this petition (providing that "[t]here shall be no right of appeal or review as to the examination or its results").

Accordingly, we

ORDER the petition DENIED.

*Gibbons*, J.  
Gibbons

*Pickering*, C.J.  
Pickering

*Hardesty*, J.  
Hardesty

*Stiglich*, J.  
Stiglich

*Silver*, J.  
Silver

20-11077

cc: Eric Hasbrouck  
Brian Kunzi  
State Bar of Nevada  
Richard M. Trachok, II

## **EXHIBIT 2**

The essay questions for the Nevada 2019 July Bar Exam

JULY 2019

NEVADA BAR EXAM

**QUESTION NO. 1: ANSWER IN LIGHT BLUE BOOKLET**

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Nancy, a Nevada licensed lawyer, started her own practice after leaving her first law job at Big Law Firm where she worked solely as a probate lawyer. After her departure, Nancy called certain real estate clients of Big Law Firm to tell them she was now on her own and to ask for their business. Nancy offered Sandra, a real estate broker, free space in Nancy's new office if Sandra would help Nancy prepare real estate documents from time to time. Sandra agreed and moved her brokerage company into Nancy's office. Nancy formed a professional corporation for her new practice, and elected herself and Sandra as corporate officers. Nancy placed an advertisement in the local paper saying that her new law practice "offers the best rates in town and specializes in real estate transactions." Nancy was confident she could handle real estate transactions with Sandra's help.

Nancy's first client was Corey, who wanted to engage Nancy to help him purchase a small apartment building in Las Vegas. Corey handed Nancy a draft purchase agreement and told Nancy that the closing must occur in two weeks. Nancy recognized the seller as a former client of Big Law Firm, but noticed that the purchase agreement was drafted by a different law firm. Nancy recalled hearing at Big Law Firm that the apartment building had mold problems. Nancy agreed to take the matter, and requested a \$20,000 retainer. She explained to Corey that half of the retainer was non-refundable and earned upon receipt due to the short timeframe involved. Although more than the customary rate, Corey nonetheless gave Nancy a check for the retainer, half of which she deposited in her operating account and half in her client trust account.

Nancy handed the purchase agreement to Sandra and said, "I will pay you 25% of my fee if you review this by tomorrow and make any necessary changes." Sandra agreed. In addition to Sandra's changes, Nancy added one provision to the purchase agreement that required the seller to indemnify the buyer for any mold problems. Nancy then emailed the revised agreement directly to the seller.

Two weeks passed and Nancy heard nothing further. Corey then called Nancy to ask what happened because the seller just contacted Corey to back out of the sale. Corey demanded his retainer back. Nancy explained she sent out the revised agreement two weeks ago and heard nothing further, but would refund Corey the unused part of the retainer.

**Please fully discuss all issues raised by Nancy's conduct under the Nevada Rules of Professional Conduct.**

JULY 2019

NEVADA BAR EXAM

QUESTION NO. 2: ANSWER IN RED BOOKLET

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Ivan, a Nevada resident, drove to California to attend a sporting event where he drank several beers. On the way home, while still on the freeway in California, Ivan's car approached a commercial truck driven by Dave, a California resident. The truck was owned by Trucking Company, a California corporation that does business in Nevada.

While driving, Ivan was involved in an animated phone call about a lucrative business deal. At the same time, the e-cigarette in the pocket of Dave's pants exploded. As Dave scrambled to remove the e-cigarette from his pocket, he swerved into Ivan's car. Ivan suffered serious injuries when his car careened off the road and rolled over. Dave had purchased the e-cigarette in California that morning. The e-cigarette was manufactured by a company that does business in both Nevada and California.

Ivan was hospitalized in Nevada where he passed away three days later, having regained consciousness only intermittently for short periods of time. Ivan's medical bills were \$200,000, all but \$25,000 of which were paid by his health insurance policy.

Following Ivan's funeral, his twenty-year-old son, Carlos, suffered from nightmares and could not stop thinking about his father's injuries and death. He lost sleep, his grades plummeted, and he lost his scholarship to the Nevada university he attended. Carlos also lost his part-time job, could no longer support himself, and had to move in with his mother.

Ivan's estate and Carlos jointly filed a wrongful death suit in Nevada state court: (1) against the e-cigarette manufacturer for strict products liability; and (2) against Trucking

Company and Dave for negligence and negligent infliction of emotional distress. They sought general and special damages, including but not limited to the profits they claim Ivan would have made from the lucrative business deal. Assume that at the time of this accident the laws of Nevada were more favorable to the plaintiffs than the laws of California, and that Nevada has personal jurisdiction over all parties.

**Please fully discuss:**

- 1. Whether the laws of Nevada or California will govern the various parties' claims and defenses.**
- 2. For purposes of this Question 2 only, assume Nevada law applies:**
  - A. Whether the plaintiffs have a viable claim for strict products liability in torts against the e-cigarette manufacturer and the potential defenses or offsets the manufacturer may have, if any, to this claim.**
  - B. The damages that would potentially be recoverable in the wrongful death action by the personal representative of Ivan's estate and by Carlos, and the potential defenses or offsets the defendants may have, if any, to such damage awards.**

JULY 2019

NEVADA BAR EXAM

QUESTION NO. 3: ANSWER IN DARK GREEN BOOKLET

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Barbara, an art trader located in Reno, Nevada, visited Samuel's art gallery in Las Vegas, Nevada on July 1, 2019. She noticed the following items for sale: an Ansel Adams original photograph of Yosemite, an abstract painting by the famous artist Calypso, and a sculpture of a sleeping cat. Samuel's gallery had just one abstract Calypso painting and one sculpture of a sleeping cat. It had several original Ansel Adams landscape photographs. Only the Ansel Adams Yosemite photograph was displayed in the gallery. The other Ansel Adams photographs were stored in the gallery's back room. When she returned to Reno on July 2<sup>nd</sup>, Barbara emailed Samuel:

Thanks, Samuel, for talking with me today. As we discussed, I really liked the Calypso, the sleeping cat sculpture, and the Ansel Adams Yosemite photograph. How about \$10,000 for all three pieces, delivery no later than July 15<sup>th</sup>, FOB my gallery?

Samuel received Barbara's email the same day and quickly responded:

I can only sell the Ansel Adams, the cat sculpture, and the Calypso painting, for a total of \$11,000, F.O.B. my gallery. You can pick up any time.

Barbara immediately responded by email with the following:

\$11,000 is too much, but I don't have any choice, as I am planning on a show at my gallery centered on Yosemite on July 26<sup>th</sup>. Must insist on delivery, no later

than July 25<sup>th</sup> FOB my gallery in Reno. All disputes to be settled by arbitration located in Reno.

Barbara heard nothing further from Samuel. Samuel shipped the Calypso, the cat sculpture, and an Ansel Adams original photograph of Mt. Rainier on July 16<sup>th</sup>, and it arrived at Barbara's gallery on July 25<sup>th</sup>. Barbara was furious when she opened the crate and noticed that the wrong Ansel Adams had been shipped and the tail on the cat sculpture had been broken off and was sitting in the crate.

Barbara has come to you and asked your advice. She said she could not go forward with the Yosemite show because it was centered on the original Ansel Adams Yosemite photograph. Barbara is out of pocket for \$20,000 for the costs and lost profits from the show. She would like to return all three items to Samuel and commence arbitration proceedings in Reno immediately.

**What is your advice on the following?**

- 1. Is there a contract and if so, what are the terms?**
- 2. Who is responsible for the damage to the cat sculpture? Please explain.**
- 3. Is Barbara entitled to return all the items? Please explain.**
- 4. May Barbara commence arbitration proceedings in Reno, Nevada? Please explain.**
- 5. Is Barbara entitled to recover the \$20,000 out of pocket costs and lost profits for the cancellation of the show? Please explain.**

JULY 2019

NEVADA BAR EXAM

**QUESTION NO. 4: ANSWER IN ORANGE BOOKLET**

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Amy owns Parcel A, which is located in Mesquite, Nevada. Bob owns Parcel B, which is located in Nevada immediately adjacent to Parcel A. Parcels A and B both have frontage on Main Street, a public road. Parcels A and B do not have any other access to a public road. In January 2012, Amy divided Parcel A into two separate parcels: Parcel A-1, where Amy's house and driveway are located, and Parcel A-2, which is vacant and located entirely behind Parcel A-1. Parcel A-2 does not have independent access to Main Street or any other public road. Amy did not create an express access easement over Parcel A-1 to Main Street for the benefit of Parcel A-2.

In June 2012, Amy conveyed Parcel A-2 to Carla. Immediately upon receiving title to Parcel A-2, Carla commenced construction of a house on Parcel A-2 and started using Amy's driveway on Parcel A-1 for general access to and from Main Street. Carla moved into her house on Parcel A-2 in June 2013 and started also occasionally using Bob's driveway on Parcel B for access to Main Street from Parcel A-2. Amy and Bob were aware of Carla's use of their driveways.

In January 2014, Amy and Bob each sent Carla a written letter demanding that Carla immediately stop using their driveways for access to Main Street. Carla ignored the letters and continued using Amy's and Bob's driveways for access to Main Street.

In June 2014, Carla conveyed Parcel A-2 to Darlene. Carla did not tell Darlene about the demand letters from Amy and Bob. Darlene continued using the driveways on Parcel A-1 and Parcel B for access to Main Street in the same manner as Carla had used the driveways.

In June 2018, Amy and Bob visited Darlene and told her that she was trespassing and must immediately stop using their driveways. Darlene told Amy and Bob she was unaware that she was not permitted to use their driveways. Amy and Bob each demanded \$25,000 from Darlene to acquire access easements over their driveways. Darlene only has enough money to acquire an access easement from either Amy or Bob, but not both.

**Under Nevada law, please fully discuss the following:**

**1. What legal right, if any, does Darlene have to use the driveway on Parcel A-1 for access from Parcel A-2 to Main Street? What defenses, if any, does Amy have to stop Darlene's use?**

**2. What legal right, if any, does Darlene have to use the driveway on Parcel B for access from Parcel A-2 to Main Street? What defenses, if any, does Bob have to stop Darlene's use?**

**3. What advice would you give Darlene as to all of her options pertaining to access over Parcel A-1 and Parcel B and why?**

JULY 2019

NEVADA BAR EXAM

QUESTION NO. 5: ANSWER IN PURPLE BOOKLET

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NVents is a Delaware corporation with its principal place of business in Dallas, Texas, that specializes in promotion of world-class sporting events. Kicks Inc. is a Nevada corporation with its principal place of business in Las Vegas that produces soccer matches across the globe. For many months, NVents and Kicks discussed bringing an international soccer match to Las Vegas. Because of the sensitive nature of the information being discussed, including dynamic ticket pricing and sponsorship leads, the parties signed a non-disclosure agreement.

In early 2019, Kicks abruptly terminated discussions and notified NVents that it was moving forward with an international soccer match in Arizona, scheduled for May of 2019. After seeing promotional materials for the Arizona event that included a logo NVents had shared with Kicks during their discussions, NVents sued Kicks in Nevada state court. NVents' complaint included claims: (1) under the federal Defend Trade Secrets Act; (2) for trademark infringement; (3) for state law trade secret violations; and (4) for breach of the non-disclosure agreement. The complaint sought damages in excess of one million dollars and injunctive relief. At the time the complaint was filed, several thousand tickets for the Arizona event had been sold.

NVents served Kicks with a summons and copy of the complaint and motion for preliminary injunction seeking to: (1) enjoin use of the information covered by the non-disclosure agreement; (2) enjoin use of the logo; and (3) prevent the Arizona event from going forward. Ten days later, Kicks filed a notice of removal of the action to the United States District

Court for the District of Nevada. After removal, NVents filed a motion to remand the action to Nevada state court.

Following removal, AZ Soccer, the entity producing the Arizona event, filed a motion to intervene and to transfer venue to Arizona. In its motion, AZ Soccer indicated it had already entered into several contracts for the Arizona event, including one with Kicks, and claimed it would be harmed if the event were delayed or canceled. It also noted that the majority of people involved with the event were located in Arizona.

After the motion for preliminary injunction was fully briefed, the federal district court denied the motion as well as the motion to remand. NVents promptly filed an appeal of the order on both motions to the Ninth Circuit Court of Appeals.

**Please fully discuss the following:**

- 1. Was the action properly removed to the United States District Court?**
- 2. Did the court correctly rule on the motion to remand?**
- 3. Did the court correctly rule on the motion for injunctive relief?**
- 4. How should the court rule on the motion to intervene?**
- 5. How should the court rule on the motion to transfer?**
- 6. Should the federal court of appeals entertain NVents' appeal?**

JULY 2019

NEVADA BAR EXAM

**QUESTION NO. 6: ANSWER IN YELLOW BOOKLET**

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After numerous reports of injuries and unsanitary conditions at several gyms in the state, the State of Nevada passed legislation, known as the Gym Act, requiring licensure of all operators of gyms in Nevada. To qualify for a license, the Gym Act mandates that applicants meet stringent requirements relating to safety, sanitation and instructor certification. The annual fee for obtaining a license under the Act is \$1,000 for a gym operated by an in-state company. For a gym operated by an out-of-state company, the annual fee is \$5,000. When the Gym Act was proposed, state representatives testified that this higher fee was based on the additional time and expense required to verify out-of-state companies' safety, sanitation and instructor certification records.

The State of Nevada owns several gyms as part of a wellness program for state employees. The State periodically awards a contract to a private entity for the operation of these gyms. Pursuant to state purchasing regulations, only in-state companies are eligible to bid. One provision of the Gym Act terminated "any contract concerning the operation of state-owned gyms to which the State is a party on the effective date of the Act." As a result, the contract of the current operator, Inside Nevada Gym Company, ended on the effective date of the Act. Subsequently, the State of Nevada issued a request for bids for a new contract based on the more stringent requirements of the Gym Act. Outside Nevada Gym Company, which is an out-of-state company that was issued a license to operate gyms in Nevada under the Gym Act, also

submitted a bid on the contract to operate the state-owned gyms. Outside Nevada Gym Company's bid was rejected because it is an out-of-state company.

Bruce, who is a lawful permanent resident of the United States, but not a citizen, applied for a position as a fitness instructor at one of the state-owned gyms. His application was denied because of a Nevada statute that limits employment with the State of Nevada to United States citizens.

**Please discuss fully the constitutional issues raised by:**

- 1. The termination of Inside Nevada Gym Company's contract;**
- 2. The fee charged to Outside Nevada Gym Company for the issuance of its license to operate gyms in Nevada;**
- 3. The rejection of Outside Nevada Gym Company's bid on the contract to operate the state-owned gyms; and**
- 4. The denial of Bruce's application for employment with a state-owned gym.**

JULY 2019

NEVADA BAR EXAM

QUESTION NO. 7: ANSWER IN DARK BLUE BOOKLET

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Adam talked a reluctant Bill into shoplifting cigarettes from Carl's convenience store in Pahrump, Nevada. After watching the store for a few minutes, Adam and Bill decided to make their move. When they entered the store, Adam yelled, "Nobody move, and nobody gets hurt!" Bill was shocked to see Adam show Carl a gun tucked in Adam's waistband. Bill told Adam, "I didn't sign up for this. I'm out of here!" Before Bill could leave the store, Carl appeared to reach for something under the counter. Adam, wanting to show Carl he was serious, fired his gun into the ceiling, and shouted, "I said nobody move!" Unbeknownst to Adam, his bullet went through the store's ceiling and struck Tenant, who lived upstairs, killing her instantly.

Immediately thereafter, Adam and Bill heard police sirens and fled the store. They were arrested a mile away, handcuffed, and placed into a patrol car. While in the patrol car, Bill noticed a small video camera near the rear-view mirror. Hoping the camera was recording, Bill said, "Adam, I can't believe you did this, I thought you were just going to buy some cigarettes." Adam and Bill are tried together for their crimes in Nevada state district court. The prosecution seeks to admit Bill's recorded statement from the patrol car to prove Adam and Bill were present at the store during the commission of the crimes.

Please fully discuss:

1. The criminal liability of Adam;
2. The criminal liability of Bill;

3. Whether Bill's recorded statement is constitutionally admissible at trial against Bill if Bill does not testify at trial; and
4. Whether Bill's recorded statement is constitutionally admissible at trial against Adam if Bill does not testify at trial.

JULY 2019

NEVADA BAR EXAM

**QUESTION NO. 8: ANSWER IN LIGHT GREEN BOOKLET**

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Liam negotiated with Gemma to sell his ranch in Eureka County, Nevada (“Ranch”).

During their negotiations about the Ranch, Liam stated it included approximately 1,000 healthy head of cattle and “enough stream water for the whole operation.” Gemma agreed to sign a Purchase and Sale Agreement (“PSA”).

Gemma then contacted Niles to see if he would sell his small adjoining parcel (“Small Parcel”). Gemma and Niles met at the Small Parcel where Niles showed Gemma what he believed to be the boundaries. Niles offered to sell the Small Parcel to Gemma for \$10,000 on terms to be agreed upon. Gemma and Niles later exchanged several emails stating the various terms of the proposed sale.

Liam and Gemma signed the PSA, and the transaction closed ninety days later. After the closing, Gemma told Niles she was ready to purchase the Small Parcel, to which he replied, “I’m going to keep that land. I didn’t sign a contract.” Gemma pointed out that each of his emails contained a digital signature.

Upon commencement of her new ranching operation, Gemma was shocked and disappointed to discover a malnourished herd numbering approximately 500 cattle. Additionally, there was very little water flowing through the stream. Gemma filed separate actions for breach of contract against both Liam and Niles in Nevada state district court.

**Over Liam's timely objection, Gemma attempted to introduce the following evidence in her case-in-chief against Liam concerning the Ranch:**

1. A photocopy of the PSA together with Gemma's testimony that she had misplaced the original.
2. Testimony from the Ranch foreman that, after the PSA was signed, he was instructed by Liam to stop providing supplemental feed to the grazing cattle.
3. Testimony and documents from Liam's ex-wife purporting to show several instances of tax evasion wherein Liam misrepresented his inventory of cattle.
4. A copy of a recorded deed showing Liam sold water rights to an upstream user after signing the PSA.
5. Testimony from Gemma's accountant regarding lost profits due to the number and condition of the cattle.

**Over Niles' timely objection, Gemma attempted to introduce the following evidence in her case-in-chief against Niles concerning the Small Parcel:**

6. Printouts of the emails between Gemma and Niles regarding the Small Parcel.
7. Testimony from a real estate developer that, after the emails with Gemma, Niles called the developer's office and told the receptionist he would sell the Small Parcel for \$20,000.
8. A satellite photograph of the Small Parcel obtained from the county website.

**Please fully discuss how the court should rule on each objection to the evidentiary offers described above.**

**EXHIBIT 3**

Petitioner's answers to the essay questions

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

### Solicitation

According to the Rules of Professional Conduct (Rules), a lawyer may not generally solicit business when pecuniary gain is reasonably expected. The exceptions are when there is a prior or familial relationship. Any solicitations must be done under certain circumstances. Generally, a lawyer may not solicit in person, or over the telephone.

Here, Nancy may claim that she had a prior relationship with the clients. However, Nancy was not the one with the relationship, rather that relation belonged to the firm. Additionally, Nancy has a duty to her former firm, to not independently solicit clients of the firm. There may be an exception if Nancy knew the clients before she worked at the firm, and she brought the clients to the firm, or if Nancy was related to the clients. Here it does not seem that either of these exceptions would apply, and Nancy's solicitation of Big L's clients is improper.

### Professional Corporation Formation

Nancy created a professional corporation (PC). A PC is type of corporation that allows certain protections to those practicing specialized skills, such as doctors, lawyers, etc. Additionally, the PC may not conduct business outside of the particular profession, and all the members must be qualified or licensed in a particular field. Here, Nancy appoints Sandra as a corporate officer, but Sandra is not a licensed attorney. Additionally, Sandra's brokerage company is in the same office, this indicates that multiple business is taking in place in the same office, not related to the PC, is also potentially misleading to clients, etc.

### Duty of confidentiality/conflict of interest

Sharing the same office with this business creates a situation where confidential information may be disclosed to Sandra, and she may have conflicting interests to her brokerage company. Sharing the same office means that she may have access to, or be privy to confidential communications, meetings, documents, etc. This would violate an attorney's duty of care and due diligence in ensuring that all client information is kept confidential. Additionally, having a brokerage, especially in the same field, while being part of the law firm, could certainly create a conflict of interest where the brokerage is dealing with clients that may be adverse to the law firm, and the law firm to the brokerage. Sandra and Nancy are thus engaging in a business practice where the likelihood that conflicts of interest would

inherently arise, and the very nature of the relationship raised ethical issues on these grounds. Additionally, it does not seem that any vetting has

#### Advertisement

According to the rules regarding advertisements. Advertisements must not be misleading, and must disclose certain information. Additionally, a lawyer cannot hold themselves out as specializing in a particular field without having sufficient experience, or requisites in that particular field.

Here, Nancy never practiced real estate, she solely worked as a probate lawyer. Therefore she certainly would not have the requisite qualifications to hold herself out as specializing in real estate transactions. Although, she may have had some experience with these transactions related to her probate work, the facts clearly indicate that she is relying on the help of a nonlawyer to help her navigate this area of practice. Thus, she cannot claim to be specializing in this field. The statements that her firm offers the best rates in town, is most likely not factually accurate, as such statements would logically be hard to factually prove. She could argue that the word best is subjective, but the average person, and a reasonable person would conclude that this wording is significantly misleading, and intending to give the observer the impression that she offers the best prices.

#### Duty of Communication/Conflict of interest

Lawyer has a duty to disclose any relevant information to a client that may impact their representation. Nancy recognizes Corey from Big L. Nancy should disclose to Corey that she worked at Big L, and that she recognized him. Also, a lawyer must disclose any material interest that may be relevant or adverse to a client. Here, Nancy simply relies on the drafting of the agreement and assumes that Corey is not working with Big L. It is necessary that Nancy inquire with Corey about his current relationship with Big L, as there may be a conflict between her and Big L. She should also contact Big L and do due diligence to ensure that there is not a conflict of interest between Corey and her do to her relationship with Big L. A single practitioner is generally not impudiated for when a former client was at a firm, especially if they have no particular information or knowledge related to the client, or the case at hand, but the Lawyer must act accordingly and do the proper vetting. Here Nancy does have specific knowledge of the case, regarding the mold in the building. Therefore, she would disqualified from being able to represent Corey.

#### Fees

Fees must be reasonable. Fee agreements should be put into writing, the details of the fee structure should be disclosed to the client. Upon conclusion of services, an accounting of fees should be presented to client. The reasonableness of fees should be determined based on the experience and qualifications of the attorney, time involved, any time constraints, issues and difficulties with the representation, earning potential of attorney passing up other work to take the case, amount at stake in the case, and fees that usually charged for such services, etc. Here, 20k retainer to draft a purchase agreement seems extremely unreasonable. Nancy has no experience in this field, this is her first client. She is not even drafting the PA, she is reviewing it. She only has one client, and 2 weeks to review a draft of a purchase agreement is not a significant time constraint. She is not losing any other work at this point, and she is misrepresenting the work involved and the time constraint to the client, which she also uses the justification of earning the retainer upon receipt. There is no indication that an agreement was stipulated in writing, and detailed as required. Additional, it is fairly clear that the details she does provide regarding the agreement would not be adequate for a reasonable fee structure.

#### Maintaining client funds

Lawyers have a duty to maintain client funds including retainers in separate accounts. Just because she stipulated an agreement that the funds would be non-refundable, and earned upon receipt, does not mean that she can automatically take the retainer into her own account. She must maintain the retainer in a separate account until the litigation is completed.

#### Sharing fee

A lawyer may share fees with other lawyers when it is disclosed to clients, and clients approve. The arrangement with Sandra is not a fee sharing arrangement that would be approved by the rules.

#### Duty to Communicate

Lawyer must take all necessary and reasonable steps to communicate any material facts to a client, and client approval on any issues regarding representation, and allow client to make all relevant and material decisions in the various stages of representation. Nancy did not communicate the changes that she made to the agreement before sending it to the seller. Additionally, she used her prior, disqualifying knowledge to advantage her client, which is another violation conduct that is further sanctionable, and against her duties related to good faith and fair dealing her profession.

#### Returning of funds

when representation is concluded, a client shall be provided with a detailed breakdown of all the expenses related to the representation. Here, simply telling Corey that the fees will be returned that were unused is insufficient.

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

**\*\*\*\*\* Question 2 STARTS HERE \*\*\*\*\*****California/Nevada Law for claims**

Since the accident happened in Cali, Cali law would govern the accident, as this is the relevant law that had jurisdiction over the accident. Therefore, the negligence claim against the trucking company, and Dave would be under California law. Since Carlos, and Ivan's estate are domiciled in Nevada, and that is where Carlos is suffering his injuries and damages. Nevada law would govern the negligent infliction of emotional distress. The strict product liability claim would be governed under both cali and Nevada law. Meaning that the proximate cause of the injury analysis for determining damages in the strict liability would be done under california law, but the award for damages and the law for strict liability applied after the proximate cause of the injury established from the accident would be based on Nevada law.

**E cigarette-Proximate cause**

The claim for strict products liability is based on the fact that a product violated a warranty of fitness, and in doing so caused injury. A product may be held to the standard of strict liability if it violates an express or implied warranty. Here, there is no information regarding the and express warranty. An implied warranty is the warranty that a product is suitable for its intended purpose, and reasonably foreseeable applications related to that intended purpose. Here, it seems reasonable that it is foreseeable that someone would put an e cigarette in their pocket, and doing so would fall under an implied warranty of fitness for the products intended use. It is further implied that by putting the cig in ones pocket, it should not explode.

To establish proximate cause Nevada applies the reasonable foreseeability standard. Proximate cause analysis consists of cause in fact, and cause in law. In order to establish proximate cause in fact, the but for analysis should be applied. Here, the cause of Ivan's death was the result of the accident with Dave, which was the result of Dave reacting to the exploding cig. If not but for the exploding cig, Dave never would have swerved and crashed into Ivan, creating the accident and causing his death. Cause in law is established by reasonable foreseeability, this is usually proven by potentially foreseeable plaintiffs and whether there was an interruption in the chain of events that led to the injuries. It is reasonably foreseeable that a person would put an e cig in their pocket and potentially drive a car, thus an accident stemming from an exploding cig, is a reasonably foreseeable outcome.

Cig company could claim that the cig was used improperly, perhaps contrary to stated warnings and instructions. If such warnings and instructions were provided. Additionally, they could claim that Dave's actions relating to the issue were an intervening act, and a person using reasonable due care would not have swerved and caused the accident as a result of the exploding cig. However, both of these defenses would likely fail. Cig company may also argue that Dave should share a percentage of the fault for the accident, however this will also likely fail, as further discussed below. Additionally, they may argue that Ivan was at fault for talking on his phone. In Cali it is illegal to talk on the phone and drive, this could make Dave strictly liable for the accident, perhaps if he was not on the phone, he would have reacted and been able to avoid the accident, since he was distracted and driving this significantly contributed to the cause of the accident, exceeding the 49% threshold established by Nevada's contributory negligence standard. This argument is fairly strong since they could show that the conversation was animated, and potentially of significant importance, thus further distracting Ivan from the hazards of the road. However, Ivan's actions did not cause the accident.

#### Damages for Ivan and Carlo's

General and special damages are normally damages related to breach of contract claims. General damages are damages for basic losses associated with a breach of contract, such as costs, and losses etc. Special damages are damages extending beyond typical expectancy damages, and typically require that the breaching party is aware or reasonably should foresee that such expenses could exist. Here there is no indication that Dave, or the cig company had any reason to be informed of specific information related to Ivan's contract. Typically in a case like this lost earning will be awarded. If Ivan's estate can show that potential earnings were lost that reasonably were likely to be realized they may incorporate this into the damages award. However, significant proof is required to meet the standard for such an award. A party must show that this was normal earning, with past earning, and show significant proof of the contract, and the likelihood of earning from the contract. In this case a simple phone call by itself is sufficient proof to show lost earnings as damages for this particular contract.

The estate may be able to recover the 25k medical expenses that were not covered by the insurance company.

Carlos would not be able to recover for negligent infliction of emotional distress, because NEID is only recoverable in these types of cases when a plaintiff is present at the scene of the accident. Where the observation of the accident was the cause of the emotional distress.

The estate, and possibly Carlos would be able to gain some further damages for the death, and the ramifications of the death, such as lost earnings, support, pain and suffering, etc. Additionally, punitive damages may be awarded against the manufacturer.

Dave and the trucking company may have significant defenses to any fault in the accident. Company may exclude themselves from vicarious liability depending on what Dave was doing at the time, whether he was on a frolic, etc. Additionally, may claim a defense that he was not negligent, and the accident occurred because of the explosion, which

is similar to the case, where a woman was deemed to not be negligent in an accident because a bee was in her car, like the explosion, ergo creating a hazardous situation which he had no control of.

Add, even so, the manufacturer could argue that carlos is not a foreseeable plaintiff, which would likely fail.

\*\*\*\*\* Question 2 FINDS HPRF \*\*\*\*\*

**\*\*\*\*\* Question 3 STARTS HERE \*\*\*\*\*****Formation of Contract**

Contracts require that there is an offer, acceptance, and consideration. The statute of frauds requires that certain contracts be in writing. Additionally, the UCC section 2 applies to contracts for the sale of goods. Here there is a contract and it is for the sale of art goods. The statute of frauds requires that contracts for goods over \$500 dollars be in writing. Here the amount is 11k, so the statute of frauds applies. The UCC allows contracts for the sale of goods to satisfy the statute of frauds, through various types of communication, such as exchange of email, or conduct that reasonably infers a contract etc. Here the email communication and conduct satisfy the statute of frauds requirement. According to the UCC when merchants deal separate terms are applied. It is treated slightly different to the common law mirror image rule, and the knock rule applied to non-merchants. When merchants contract an offer and counter offer are treated slightly differently. If the acceptance does not mirror the offer, it is treated as part of the contract, unless the terms are denied in a reasonable period of time. They are both art dealers, and would both be treated as merchants. Thus, Barbara made the initial offer, and Sam accepted the offer with slight modifications. He raised the price. Then, Barb negotiated regarding the terms of delivery pick up, and specified a time is of the essence for delivery on July 25th at her gallery, and all disputes in Reno, Sam did not deny these conditions, and shipped thus his conduct makes these terms enforceable as the contract.

**Damages to the Cat**

Since the terms of the contract were FOB, the purchaser is usually liable for damages that occur in transit. FOB means that the seller is liable up to the time the shipment is transferred to the shipping agent. Buyer and shipping agent then take responsibility for costs and damages. When the damage to the cat occurred is relevant, if it occurred prior to receipt by the shipping agent, then seller is responsible. If it occurred in transit, shipper and buyer may be responsible for damage. Since the tail was in the crate it seems to indicate that the damage occurred in transit. Buyer may have a claim against shipping agent. However, there may be a claim against seller if damage was a result of negligent handling and packaging of the goods. FOB usually require that the goods, when delivered for shipment in a container are not negligently packaged for safe transport. Barb may claim that since she did not arrange for delivery the intent was to make this a CIF contract, thus certainly making the seller liable for the cost, insurance, and freight, however, this cannot be inferred from the facts. Typically, in FOB the buyer arranges for pick up and shipping costs, and seller just arranges

for delivery to buyer's shipper. Since Sam did not respond, to allow Barb to arrange for shipping, it may be deemed that this was a new term and Sam made the contract CIF, by shipping. According to UCC when seller ships goods they come with a warranty of merchantability, that the goods will arrive intact for their intended use or purpose.

#### Duty to inspect

A buyer must inspect all goods in a reasonable time, promptly let seller know of nonconforming goods, and give seller time to remedy any nonconforming goods. Since Barb specifically referenced what photograph specifically in her offer, and the cat was not conforming due to the damage. Therefore Barb may indicate that goods are nonconforming. However, seller may contend that the broken cat was conforming, and since contract was FOB she cannot return this item she accepted the risks involved with shipment. Additionally, she may be able to return the photograph, but typically she would have to allow seller to send the right photo. Here it was clear that this contract was time is of the essence contract, and seller was reasonably made aware of this fact, therefore seller would likely not be able to cure the defect, and he would have to accept return of the photo. Further Barb could claim that since the contract was time is of the essence, and the photo was a necessary part of the show, even if the cat was not broken, the show would have been cancelled, thus defeating the purpose of the contract. Additionally, Sam should have sent the goods in time for inspection and curing, instead of waiting until the last possible minute to have the goods delivered. The order and contract was established on July 2nd, 24 days to ship from LV to Reno, was something that Sam took upon himself. The contract also originally stated that delivery was to be on the 15, then modified to the 15.

#### Arbitration

Barbara may commence arbitration as per the contract. The arbitration clause of the contract was not denied by the UCC articles applying to the contract between merchants for the sale of goods. Meaning that the term was not denied in a reasonable amount of time by the other party, thus it is incorporated into the contract. Additionally, the terms of the contract have been breached, and cannot be remedied. Thus the contract has suffered a material breach, allowing the non-breaching party to initiate a breach of contract proceedings for damages.

#### General/Specific Damages and Expectancy damages

Barb may be entitled to recover expectancy damages, ie lost profits from the breach of contract. Barb may also be entitled to recover costs associated with the reliance on the contractual terms. expectancy damages can be awarded when a defendant reasonably should have known or been aware of the costs associated with a breach. Here, Barb

specifically told Sam about the show, thus Sam was aware of the potential for lost profits as a result of his material breach. Additionally, this makes Sam aware of any expenses associated with preparing the show etc., which are somewhat beyond what a purchaser would typically have in a contract for sale. Barb relied on Sam's good faith performance in the contract to her detriment, and communicated the reliance of his performance in the contract to his effect. Thus if it is determined that Sam materially breached the contract, Sam meets the criteria for being liable and on notice for all associated damages with losses concerning costs and profits that Barb suffered.

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

## \*\*\*\*\* Question 4 STARTS HERE \*\*\*\*\*

Right of Darlene (D) to access A-1.

Darlene was a bona fide purchaser. She purchased the property without any knowledge of any encumbrances regarding the road access. Although road access can be apparent from the positioning of the land, Darlene may reasonably assume that since a house was built on A-2, and there were driveways that there was access to the road, upon her inspection of the property, thus an easement could have seemed apparently implied.

A seller of real property must disclose any latent defects that are known, or should be reasonably known. Here, since Carla did not tell D about the issues over easement this is a material issue in the sale, and something that could be deemed latent to Carla at the time of purchase. Therefore, Carla would be under a duty to disclose this easement contention defect that comes with the property. D may also seek remedies from Carla in this regard.

When an easement is established through conduct, it is usually considered an implied easement. Since Amy sold the property to Carla, without disclosing the fact that she would not be able to use parcel A for access, the same argument could be made regarding this sale. One could reasonably assume that a necessity access of this kind, where seller of the property has access, is impliedly granting access, without expressly denying access. It was a year and a half after the sale when Amy decided to give notice to Amy that she could no longer use A-1 for access. Therefore, this right of access was implied through Amy's conduct. It could further be argued that this implied right of access that was established based on the prior sale, and Amy, and Carla's conduct is attached to the property and continues to attach with the sale to D. Therefore, D would be able to exercise Carla's rights under the easement.

D could also claim that this is an easement of necessity. Since A-2 is landlocked, and there is no other way for D to access the public roadway, provided there is no other reasonable means, it is inferred based on the facts that there is not, D can claim an easement of necessity. When there is an easement of necessity it means that a landlocked parcel of land, can be granted an easement to use another's land for access to public roadways, this may entail using another's driveway, such as the case here, or being able to pave their own driveway on another's land. As long as the easement does not unreasonably interfere with another's use and enjoyment of their property.

Amy can claim that she never intended to allow the owner of A-2 to have an easement on her land, and this was undiscovered, but she communicated this to Carla when she discovered her use of A-1. Amy could claim that it is a trespass on her property, but a driveway is generally a place that is somewhat connected to the public, and may be

utilitized from time to time, there is no indications that she has any trespassing signs posted, to support the fact that there was notice that her property should not be accessed in this case. Amy could also claim that there is damage to her property or that her property value is being diminished in some way. Amy does have the right to prevent anyone from using or trespassing on her property in a regular manner like this, and force the determination of a court. She is further giving an option to have the easement granted for an exchange of value, which may also be considered fair and reasonable under the circumstances.

D's use of Bob's driveway for access.

D has less of a right to access B's property, because Carla's use of the Bob's property was established for a shorter period of time.

D's arguments for a right to an easement out of necessity are limited to access. Once access is established there is no longer a right to access through another's land. Here, since the easement was first developed through access via P-A, it would seem that an argument for access on another property out of necessity would fail. Especially, since she was not barred from using P-A at the time that she began using P-B. Therefore, Bob would be able to argue that the necessity requirement for a landlocked parcel is fulfilled with the access through P-A, and there is no longer a necessity, nor was there a necessity when use of his parcel began. Additionally, he could argue that the use of his parcel was not continuous and over the period of time required to grant an implied easement, so there was no prior implied easement to pass with the sale. Bob may also indicate the sale issues with the parcel and the fact that the parcel was originally one parcel and then divided, so the easement should attach through Parcel A. Under this scenario Bob would have a strong argument to prevent D from accessing his land, and providing that D provide the compensation of 25k to purchase an easement on his land.

Advice to D

D should not pay any money at this time. She should discontinue use of Parcel B, as Bob has a stronger argument to exclude D as a trespasser, with potentially no easement of necessity rights. However, since D is being denied access now, the need for an easement of necessity is renewed. D's argument for an implied easement, and an easement of necessity through P-A is much stronger. Therefore, it may be possible to end up with access via P-A, with out the need to pay anything, or significant compensation, much less the 25k being demanded. Amy should be contacted, so that the merits of the case and the necessity of the situation can be conveyed, so that she understands that access needs to continue, until the situation is resolved. Thorough research should also be conducted to determine whether or not D's land is completely landlocked, and if there are any public easements that exist on the land, such as waterways etc. This

She should do a thorough research of the details of the surrounding properties, to see if there may some other way for D to gain access. If there are no other possible ways then D is totally landlocked, and the only way for her to gain access would be an easement of necessity. D should then file an easement proceeding to get an official easement granted by a court. D should also try to obtain some form of temporary injunction, so that she will not be treated as a trespasser and be denied access to her home or the public. She can argue that she has no other reasonable means of access as her property is landlocked. Therefore, easement should be granted for her to access. It may be that a court may find alternative ways for D to access, but it is also possible that a court will enforce the easement of necessity on these grounds. Furthermore, a court may consider the other aspects of the sale, prior use, and implied easement, when determining whether or not to grant D the easement on P's V. This could also be used to further negotiate with Amy, so that the parties may be able to reach a reasonable agreement regarding the easement.

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

**\*\*\*\*\* Question 5 STARTS HERE \*\*\*\*\*****Removal to Federal District Court**

In order to remove an action to federal district court, the district court needs to have subject matter jurisdiction, over the claims, and personal jurisdiction over the parties. These jurisdictional questions can be satisfied in a number of ways. If parties to a case are diverse, meaning they are from different states, and the amount in controversy is over 75k, the court may exercise diversity jurisdiction, as the subject matter jurisdiction. Another way that the court may exercise subject matter jurisdiction is through matters that are raising issues on federal law. In order to satisfy the personal jurisdiction defendants need to have certain minimum contacts with the forum state, personal jurisdiction may also be consented to by the parties. Certain minimum contract include purposeful availment to the forum state, putting goods into the stream of commerce in the forum state, having certain minimum contacts with the forum state, utilizing forum state for benefits, reasonably expecting availment with the forum state, advertising, soliciting, and contracting with parties in the forum state, may be some of the considerations for the district court in the forum state to exercise personal jurisdiction over a party.

In this case the action was properly removed to the district court. Diversity jurisdiction is satisfied, because the amount in controversy at the time of removal was 1 million dollars, and NVents is a Delaware corp. with its principle place of business in Texas, and Kicks is a Nevada corp. with its principle place of business in LV. Additionally, subject matter exists as claims 1 and 2 are dealing entirely with issues of federal law. Personal jurisdiction also appears to be satisfied in this case. The Kicks is a Nevada corp. solely in Nevada, so they satisfy personal jurisdiction, plus they are the ones filing, so they granting the court personal jurisdiction in respect to kicks. It also appears that the Nevada district court has personal jurisdiction over the Delaware corp. Firstly, the Delaware corp. seems to be availing themselves to the state, as they filed a suit in Nevada state court, which may be considered purposeful availment to the forum state, and they arguing now that the case should be removed to Nevada state court. Also, based on the contract and agreements created in this case, and perhaps other unknown business. It seems that the criteria is sufficient. Many months were spent on this large contract, and the NDA was created, etc. The event being considered was to take place in Nevada. Organizing such an event, negotiating, and contracting within the forum state, could easily satisfy the minimum requirements for the connections with the forum state, so that the forum state may exercise personal jurisdiction over the Delaware corp. in this case.

#### Motion to remand

There does not appear any compelling interest or undue hardship, unfairness to a party, or any significant legal reason as to why this case should be remanded to the state court. As the analysis above indicates that the district court is most likely a more appropriate forum, especially considering the federal issues raised. In addition another party has been added to the case. It appears that this party is also an Arizona company, so diversity is maintained in regards to this party. It seems that AZ has a contract with kicks for an event in Arizona. It is not clear what law governs this contract, but since there are diverse parties, a number of claims based solely on federal law, and complex interstate interactions, it seems that the district court would be in the best position to apply the Erie doctrine, and sort out all of the complex legal issues in this case. Additionally, based on the information provided it is not entirely clear if personal jurisdiction is satisfied in regards to AZ soccer. However, based on the analysis above, it could be argued that the contract for the event with kicks is enough to avail them to Nevada, in addition to whatever business they have connected with the state of Nevada. Being that the states are so closely connected geographically, there is a high potential that there is other activity that suffices that minimum contacts and activity test as well. In this case it does not seem like there is a compelling reason for why the state court would be a better forum to hear this case, conversely the district court seems to be the ideal forum, and it seems like the Delaware corp. is just forum shopping.

#### Motion for Injunctive Relief

Injunctive relief can be granted by a court to prevent further harm or damages by a party's wrongful misconduct. This misconduct has to clear, as well as the harm. In regards to issue one it seems that the court considered the issue properly. Issues that are in the nondisclosure agreement as part of the case are seemingly complex, and depending on the provisions, significant argument should be heard before making significant judicial action that could potentially be improper to a party, such as even determining what information is covered by the NDA, and how the NDA terms should be treated if they are violated, hearing both parties arguments and interpretations etc. Regarding the logo, it is a bit more tricky. The logo is a distinctive mark, and can easily be looked up and factually verified, unauthorized use of the trademarked logo, is in of itself an issue, however, the terms of this agreement may raise issues regarding any authorizations or permissions to use the logo. With the impending event, any improper action by the court could present significant harm to the parties. Nothing indicates that the court should prevent the Arizona event from moving forward. The Nevada corp. and the AZ company are permitted to engage in contractual activity, and if NVents has valid claims, they may be able to obtain compensation. There does not seem to be any compelling interest in this case for an injunction to be granted, such as an immediate and irreparable harm.

#### Motion to intervene

The court should deny the motion to intervene. Since the court denied the injunction, there is no threat to the interests of the AZ corp. of the event being delayed or cancelled.

#### The motion to transfer

The motion to transfer should be denied. It is not clear that AZ would have personal jurisdiction over the D corp. Additionally, if the motion to intervene is denied, the issue becomes mute. The AZ corp. arguments are also not compelling reasons for removal considering if the motion to intervene was granted.

#### Appeal

The appeals court can hear the appeal on the injunction, but not on the remand. Injunction are an exception to the normal rule of a final decision in the case being issued, in order for the case to be appealable, because of the interest of immediacy in preventing a significant, irreparable harm. However, the final decision of the lower court is required for the appeals court to consider an appeal regarding the motion to remand.

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

**\*\*\*\*\* Question 6 STARTS HERE \*\*\*\*\*****Termination of Inside Nevada Gym**

Some of the details and context appear to be missing here. As the language of the statute is not entirely clear as to whether it applies to Inside Nevada Gym, as in whether Inside is a state owned entity. Assuming it is not, and the language of the statute means that the contract the state has with any other company, which can be inferred by some of the information, then this statute would seem to violate laws concerning contract rights. As such a statute would potentially breach contracts creating damages, and the state is trying to pass a statute to void these contracts, whereas the state could use less intrusive, and more reasonable means, by giving Inside the opportunity and time to comply with the Act, like a grace period for complying, would be considerably less intrusive on the other contract laws and granted by the laws. Additionally, this is a retroactive law, making contracts that were legal when formed not illegal.

**Fee for License Issuance to Out of State**

Generally, states may not discriminate against out of state entities and business, as part of the Dormant Commerce Clause. States may generally not interfere or burden interstate commerce, unless there is a compelling local interest that is satisfied with the least reasonable burden on interstate commerce. Here the fee is substantially higher for out of state companies. It is not clear why out of state companies would create such need for the higher fee, as most of the documents and verification, would probably not create such a considerable need for more time and expense than in state companies. It appears that in this case the higher fee is unduly discriminatory against out of state companies, as the higher fees should not be justified such a high expense, and difference in cost, as the rational connection to more time and expenses for out of state and in state gym is not apparent. If there are in fact additional time and expenses that can be shown, there may be a way that out of state companies can mitigate these expenses, by bearing the burdens associated with those costs and requirements. Not enough information is presented to satisfy the requirement that this discrimination of out of state companies with the difference in fee is justified, and it seems to unduly burden interstate commerce.

**Denial of Out of state's bid**

Additionally, the Dormant Commerce Clause prevents states from this type of discrimination as well. States may not unduly favor in state companies over out of state companies, as doing so would be considered an interference with

It is also illegal to discriminate on the basis of ethnicity, especially the Commerce Clause. In order for a state to set a law that discriminates and not violate the document's commerce clause, the statement has to discuss the state's interests, the state's compelling government interest, and the effect on interstate commerce. The state's purpose is to discriminate on the awarding of contracts. This is a state's right to discriminate on the basis of race, but to benefit business, not to discriminate on the basis of race. This certainly does not meet the standard of a legitimate and compelling state interest. More would be required. To show any additional factors to meet this standard. Additionally, the state's right to discriminate on the basis of race seems like it is an extreme interference with interstate commerce. However, there have been some cases that uphold similar discriminatory restriction, i.e. admissions to schools in NY, and various measures with local economic attributes such as local growers and farmers, etc. Where there are specific public interests involved.

Brace's Note:

The practice of denying employment to non-citizens is facially discriminatory on the basis of national origin. It discriminates against non-citizens for employment. Discrimination on the basis of national origin is a fundamental right. The question for the level of scrutiny to be applied is whether the basis of the discrimination constitutes discrimination against a protected class. Here, it is not entirely clear whether foreign citizens could constitute a protected class. In order to be considered as a protected class, it is usually discrimination stemming from a group that has a history of discrimination, etc. such as racial discrimination. If it is determined that it is discrimination against a protected class, then strict scrutiny would be applied to the discrimination. However, here discrimination on the basis of national origin is not being based on a specific nation, just foreigners in general, is probably too general to meet the requirements of a protected class. When the discrimination is based on a fundamental right, but not a protected class, intermediate scrutiny is applied. This is the scrutiny applied to more general classes such as discrimination on the basis of sex. Intermediate scrutiny is the level of scrutiny, between rational basis, and strict scrutiny. In intermediate scrutiny the test is whether the discrimination is rationally related to a compelling state interest, and there is no less restrictive alternative available for meeting the compelling interest. Certain governmental positions may require security clearances and citizenship as a condition of employment. Governmental entities may have interests in safeguarding potential vulnerabilities to potential foreign interests, as foreign interests may seek to infiltrate various levels of government. There seems to be an interest here that is satisfied. The next question is whether the means used are the least restrictive available. A statute that limits employment on the basis of citizenship, seems to be a broad and encompassing means to meet the govt. interest. Governmental entities could simply specify citizenship requirements for specific offices and positions, throughout many levels of the hierarchy. It seems like the interests in this case could be satisfied with lessor restrictive available alternative methods. Therefore, it is likely that the state will not survive this.

scrutiny analysis, however the test could still fail in regards to this position. Working at the gym could be a place where the interest attaches.

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

**\*\*\*\*\* Question 7 STARTS HERE \*\*\*\*\*****Criminal liability of Adam**

Adam is criminally liable for robbery, common law felony murder, assault, and conspiracy. Robbery is when one engages in conduct to take something, with the apparent threat of force. Here, Adam went into the store to rob it, he to take something of value, he threatened people in the store with harm, by saying no body move, no body gets hurt, he further displayed a firearm, and fired it into the ceiling. Since there was injury as a result of the attempt the fact that the robbery was unsuccessful allows is immaterial in considering the demarcation between a robbery and attempted robbery, additionally with the threats of violence, and the display and firing of the firearm. Felony murder is when someone is killed during the commission of a felony, by an act that is a result of the commission of the felony. Here, since Adam was engaged in the commission of a felony, to which his firing a round in the ceiling was a part of the commission of those felonies, resulting in the death of the tenant. Therefore, he is liable for common law felony murder. Assault is when one places another in apprehension of fear of imminent harm. Here, the verbal threats, the displaying of the firearm and the firing of the round constitute assault on all the occupants in the store. Conspiracy is when one conspires with another to commit a felony. It only requires that the agreement is made in Nevada. Here, Adam conspired with Bill to rob the store, and then followed through on that conspiracy.

**Criminal liability of Bill**

Bill may be criminally liable for conspiracy, attempted robbery, robbery, assault, and common law felony murder. In order to be liable for a crime generally there is a requirement of mens rea, or intent to commit the criminal conduct. In Nevada conspiracy on the agreement of criminal conduct is sufficient to sustain a conviction. Since Bill agreed to engage in the felonious conduct he is liable for conspiracy. There is a provision that allows one to abandon a conspiracy, but in Nevada this would generally not apply, as the standard to not require an additional overt act, and then the abandonment of the furtherance of the conspiracy as many jurisdictions do. Attempted robbery is when one attempts to commit a robbery, but is unable to fulfill the requirements. Bill may also be liable for robbery depending on whether there is significant evidence supporting a determination based on the facts. The reason why Bill may be either liable for attempted robbery, or robbery, is because it is not clear what their exact plan was, how they were going to exact their plan etc. If the robbery failed, and no threats of violence existed, or there was no injuries, it is possible that he would only be guilty of attempt. Since the robbery was unsuccessful, there seems to be a lack of mens rea or intent.

on the party of Bill, as he attempted to abandon the criminal conduct when he realized that it was a robbery. However, he did not abandon the conduct. He could argue that he thought he was in danger, and was under duress to continue after the firing of the shot. It seems unlikely that a jury would find on these issues, and he would be held liable for robbery, as one could reasonably assume the likely conduct involved with a commission of a crime of this type. Thus, his intention to go along with this plan was sufficient to meet the intent, and mens rea requirement. The same consideration should be applied to the assault. It is likely that the assault would be deemed sufficiently inherent in the nature of the activity as well, but the same arguments could be made for his intent, or mens rea to commit assault, simply by engaging in the criminal conduct that could reasonably result in an assault, especially, as the occurrence of an injury during the commission of a robbery is enough for assault. Additionally, they had no clear plan of action to avoid an assault, they just walked into the store, one could reasonably infer his mens rea to engage in the initial conduct, resulting in these consequences. Although, Bill may argue that he was unaware of the weapon, and he tried to abandon when he realized what was happening, this is also likely to fail for the aforementioned reasons. Bill would be liable for common law felony murder, as he was in the process of committing a felony, engaged in a criminal enterprise with his accomplice whose action were the direct cause of the tenant's death during the commission of that felony.

#### Recorded statement

Statements made after arrest have certain protections, such as the right to counsel, and to be notified of this right through a Miranda warning. Generally, Miranda is required to be given before any custodial interrogation, that results in information sought to be admitted at trial. It is not entirely clear from the facts whether a Miranda warning was issued, in this case, but based on the facts it is reasonably inferred that one was not. However, the issuance of a Miranda in this case is not necessarily relevant. Although, being in a police car is generally considered to be a custodial setting, where any information elicited requires a prior Miranda warning, the statements offered here were not the result of an interrogation. The statements were unprovoked voluntary statements made by the defendant. However, in this case the statements were not self-incriminating. They were against another. Typically statements have to be against self-incriminating statements to be admitted at trial, simply based on records. Bill's statements are not clear, and their truth is not inferred, thus these statements would be considered hearsay, if admitted without testifying, and they do not fall into an exception to hearsay. If the statement was against Bill's interest then they could qualify as an exception, but here they do not. Although, the evidence could potentially be used against Bill in his trial, as he is the one who voluntarily offered the statement, the state would probably not want to bring this statement in. Bill would be barred from bringing the statement in without testifying, because of the 6th Amendment's confrontation clause, which requires parties have the opportunity to confront adverse witnesses. Since this does not fit under a hearsay exception it would not be admissible without testimony for Bill, and cross examination from the prosecution. The statements would also not be admissible against Adam as they would also be a violation of Adam's right to confront the witness, and cross examine regarding the statements. A confession, or statements made against one's interest are generally assumed to have a degree of

truthfulness, so they may be admitted as an exception to this general principal, but here there is nothing that Bill stated that seems to be against his own interest, thus this truthfulness element is lacking.

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

**\*\*\*\*\* Question 8 STARTS HERE \*\*\*\*\***

Claim against Liam

Photocopy

The photocopy can be admitted, under the best evidence rule. Since she misplaced the original the photocopy is sufficient documentary evidence to be presented, as it is the best available evidence for the signed PSA between the parties.

Testimony from Ranch Foreman

The testimony should be admitted. Hearsay is when one offers an out of court statement to prove the truth of the matter asserted. Here, the testimony to stop feeding the cattle, goes directly to supporting the liability of Liam in the breach of contract claim, and is being offered to prove that the agent was in fact instructed to stop feeding the cattle. Therefore it is an out of court statement being offered for the truth of the matter asserted. Since this is testimony it does not have to be considered in light of the unavailable declarant exceptions, as the declarant is available and testifying. Ergo, it must be considered in light of the available declarant exceptions to the hearsay rule. Two exceptions would apply here. This is a statement made during the course of a business operation and agency relationship. Therefore, it could be admitted as a statement made in the course of regularly conducted business to an agent carryout his duties in that business. Another, and the main exception to this rule would be that that this is a statement offered by the party opponent against his own interests. When a party makes statements against their own interests there is an indicia of truth inferred, and such statements meet the requirements of a hearsay exception for party admissions against their own interest.

Ex-wife testimony and documents

Generally character evidence is inadmissible in a civil trial, unless it is the subject at issue in the trial. Spousal privilege allows for a party to prevent testimony, on the grounds that is barred due to spousal privilege. The privilege includes statements made during the course of a marriage, even after the marriage has ended. Neither spouse may be compelled to testify against the other. This privilege applies to criminal and civil proceedings. However, this privilege may not extend to voluntary statements. Additionally, the evidence of the law, evidence, and the misrepresentation of inventory. Are not really relevant to the case at hand. Relevancy is determined by whether the evidence is probative of proving the likelihood of a material fact at issue, regarding direct and circumstantial evidence.

The fact that Liam misrepresented his inventory in committing tax evasion is not related in any way to this breach of contract claim, it does not tend to prove, or offer any relevant fact of evidence in this case at issue. Furthermore, evidence cannot be admitted if its probative value is outweighed by its potential to prejudice the party it is offered against. Here the evidence seems to be more prejudicial than probative, because, even though it may be considered evidence of his character for lying, especially in regard to his cattle, it would not be admissible for character evidence, and the potential of it prejudicing Liam is very high. It could be argued that this evidence should be admitted for habit, that Liam always lies about his cattle on his taxes, it is still not really relevant to show the type of habit that would be admissible under these grounds, such as a person was at a particular place at a particular time, because the person is always at a particular place at a particular time. Lying on taxes, is substantially unrelated to other aspects, simply because Liam is a habitual tax evader does not necessarily mean that he breached this particular contract. Thus it should not be admitted, but may be admitted later to impeach perhaps.

#### Recorded deed showing water rights sold after PSA

This document would be admissible, because it is an official document maintained by the government. Such documents are considered valid, public records, and are typically only inadmissible, if there are issues with the documents concerning classified information/issues of national security. In such cases documents may be inadmissible, redacted, or subject to closed hearings. None of these exceptions would apply here.

#### Testimony from the account

Testimony from the accountant may be admissible in theory, however, such testimony would be unnecessary. Gemma could show lost profits without testimony from her accountant, simply based on the facts of the case, and conditions in the market etc. Lost profits could be accurately and reasonably inferred without the need for testimony, thus this testimony would be viewed as repetitive, unnecessary, and an inefficient waste of the courts time. Typically awards in contracts of this kind, since Liam was not aware of any specific reliance or activities that would cause the lost profits to exceed market rates, would be based on market rate, so testimony of this kind would not be admissible.

#### Claim against Niles

##### Emails

The emails would be admissible, because they constitute the best available evidence of the agreement, under the best evidence rule. They are the most reliable, documented, objective evidence of the agreement between the parties.

**Testimony from the real estate developer**

This testimony is hearsay, additionally it is not really relevant to the issues in this case, so it may not be admitted. The hearsay is not covered by any exceptions, as discussed above. Also, it does not tend to make a fact at issue in this case more or less likely. The issue in this case is whether there is a breach of contract between Niles and Gemma. Whether or not he called the real estate developer and made these statements is not in any way related to the question of whether or not there was a valid contract between G and N. Whether this happened or not does not tend to prove or offer any circumstantial evidence in this case. N denied the contract. The only issue here is whether he had the ability to deny the contract, or whether there was valid enforceable contract against N, for which he would owe damages for reliance, or maybe even specific performance.

**Satellite photo**

This photo could potentially be admissible. Although, its relevancy is also suspect. It is not relevant in any way to prove the case of whether or not there was an enforceable contract between G and N, however evidence of this type may be admissible as an aesthetic to be used during trial, or to reference the boundaries of the land, the geography of the land, and how based on the location of the property it was to be used by G, and influence her damages claim. Furthermore, it is a public document, maintained by the county, that it would be considered a valid representation of the land, which could be validated by the parties as to whether or not it is, depending on the age of the photo, often satellite images may be dated, and the land may have gone through modifications since, but there is nothing indicating that this is the case here. Thus, it could be concluded that this photo may have some reasonable use in the case, and its admission would prejudice a party, but potentially assist in presenting arguments in the course of the litigation.

\*\*\*\*\* Question 8 ENDS HERE \*\*\*\*\*

## EXHIBIT 4

The "model/best" answers to the essay questions according to the Nevada Bar



**JULY 2019  
EXAMINATION ANSWERS**

**APPLICANT'S ANSWERS TO QUESTIONS  
NEVADA BOARD OF BAR EXAMINERS**

**QUESTION 1**

### **Exam Information**

Exam Date: 7/2019

Exam Name: Question 1

**\*\*\*\*\* Question 1 STARTS HERE \*\*\*\*\******Competence***

A lawyer has a duty of competence to be skillful, knowledgeable, and thorough. If a lawyer is not competent in a matter, she must take steps to become competent. These steps can include things such as research or working with another attorney (with a client's consent).

Here, Nancy is a Nevada licensed lawyer, however, she has only had one law job at a Big Law Firm where she practiced solely as a probate lawyer. She has since opened her own law firm and has reached out to real estate clients--clients with whom she has no prior experience. Although Nancy has partnered with Sandra, a real estate broker (which has its own problems, discussed below), the facts only indicate that Nancy was confident she could handle real estate transactions with Sandra's help, rather than being confident on her own.

Nancy has breached her duty of competence by taking on her first client Corey if she has not taken any other steps other than working with Sandra to become competent in real estate law.

***Solicitation***

A lawyer may not solicit clients. solicitation includes reaching out directly to a potential client and offering to work for the client without clearly indicating that the communication is an advertisement. A lawyer may solicit business from clients with whom the attorney has had a previous lawyer-client relationship.

Here, Nancy has breached the Nevada Rules of Professional Conduct (RPC) by reaching out to certain real estate clients of Big Law Firm to ask for their business. Although Nancy previously worked for the law firm that represented these real estate clients, because she worked in probate, she did not herself represent these clients, making her solicitation of their business improper. Nancy did nothing to indicate that she was merely advertising. Rather she reached out to these individuals directly over the phone.

Nancy has breached the RPC by soliciting clients.

***Going in to business with non-lawyers***

A lawyer may not go into business with a nonlawyer unless the lawyer advises the nonlawyer to get separate representation and the lawyer explains all the risks in going into business. The lawyer must also get the nonlawyer's consent, confirmed in writing to go into the business. The terms must be fair and clearly written out such that the nonlawyer can understand them.

Here, Nancy has gone into business with Sandra, offering her a free space in Nancy's new office in exchange for Sandra helping Nancy prepare real estate documents. Nancy formed a professional corporation with Sandra and elected themselves as corporate officers (discussed below). Although this might be a fair exchange, there is no indication that Nancy requested that Sandra get her own representation or that Nancy spelled out the terms in a document (other than perhaps the articles of incorporation). Nancy did not explain the risks of going into business nor did she obtain Sandra's informed consent.

Nancy has breached the RPC by going into business with a nonlawyer without following the steps of obtaining informed consent.

***Corporations***

Professional corporations are particular corporations reserved for professionals such as lawyers. Nevada requires that these corporations register with the secretary of state and include at least one party's name in the company name and an indication (such as "PC") that the corporation is a professional corporation. These corporations limit liability for the partners, although the partners remain liable for their own torts and the corporation is liable for the malpractice of the professionals. A lawyer may not form a professional corporation with a nonlawyer. Lawyers and nonlawyers may not split fees.

Here, Nancy has created a professional corporation with a non-lawyer. Not only is this impermissible under the RPC, this is misleading because most individuals expect law firms to be comprised of lawyers, rather than lawyer and nonlawyer partners. By electing both of them as corporate officers, Nancy has breached the RPC by doing business with a nonlawyer and creating a corporation where fees will be split between a lawyer and a nonlawyer (discussed in more depth later).

#### *Advertisements/specializations*

Advertisements must be truthful and must not be misleading. Advertisements must follow strict requirements and must be approved by the state bar. If an advertisement includes a specialization, the attorney must actually be certified in that specialization by the state bar or the certifying agency. Any claims made in the advertisement must be verifiable. Advertisements must be clearly marked as such.

Here, Nancy has advertised in the local paper, stating that her new practice offers the best rates in town and specializes in real estate transactions. Nancy does not specialize in real estate and her association with Sandra does not create a specialization. She has no training in the practice and has worked solely as a probate lawyer for her entire legal career. Stating that her law firm offers the best rates in town is also likely not verifiable because rates depend on so many factors and can vary widely. Finally, there is no indication that her advertisement was marked with the required indicators such as red ink or a large font.

Nancy has violated the RPC by advertising falsely and in a misleading manner.

#### *Forming the lawyer client relationship*

A lawyer client relationship is formed when the client indicates her desire to enter into a lawyer client relationship and the lawyer consents or fails to tell the client that there is not a lawyer client relationship, but knows or should know that the client is relying on the attorney.

Here, Corey engaged Nancy to help him purchase a small apartment building in Las Vegas. Corey gave Nancy a draft purchase agreement, told her that the closing would be in two weeks, and Nancy agreed to take the matter.

Nancy and Corey have formed a lawyer client relationship.

#### *Former client conflicts*

A lawyer may not represent a client who is adverse to a former client in a same or substantially related matter unless the lawyer receives informed consent confirmed in writing from the former client and the lawyer does not use any information gained during the representation to disadvantage the former client. A lawyer must only take on a representation with a conflict if she reasonably believes that the conflict will not materially impact her representation.

Here, the seller of the apartment building is a former client of Big Law Firm, the law firm from which Nancy moved. Although the purchase agreement was drafted by a different law firm, Nancy still has information regarding the client from her time at Big Law Firm. Although Nancy did not practice in the real estate division in her probate practice, she likely had some exposure to the practice because

probate involves real estate and she obviously recognized the client. It is unclear whether this is a 'substantially related matter' to one which Nancy worked on, however it could very likely be because she remembers that the apartment had mold problems. Nancy cannot work on the case unless she receives informed consent confirmed in writing from the seller and does not use her knowledge of the mold problems against the seller. However it is unlikely that she will not be able to use that information. Thus she could have told Corey that she could not represent him upon recognizing the conflict. It is not reasonable to believe her knowledge of the former client will not impact her representation. Finally, Nancy has violated the RPC by using her knowledge to disadvantage the former client. She knew, by virtue of working at BB Law firm that there were mold problems with the apartment. She used that knowledge to include an indemnification clause in the agreement, using the information against the seller, who may or may not have known about the mold issues. The inclusion of the indemnification agreement in the contract is also what likely led to the contract falling through, causing harm to Nancy's own client.

Nancy has violated the RPC by taking Corey on as a client.

#### ***Fees***

Fees must be reasonable. Factors of reasonableness include the skill required, the time required, the reputation and skill of the attorney, and the typical fees charged for similar work in the field, amongst other things. A retainer fee is permissible so long as the attorney explains what the fee will be used for (either as an account the attorney will draw her fees from or as a holding fee to reserve the attorney's services).

Here, Nancy requested a \$20,000 retainer from Corey. The facts indicate that this was more than the customary rate, but that Corey nonetheless gave her a check for the retainer. This fee is unreasonable because it is higher than normal and Nancy has no experience in the field of real estate law. The fee is also unreasonable because half of it (\$10,000) was non-refundable and to be used for the work completed in a short time frame. But Nancy only added one provision to the agreement that Sandra drafted and only agreed to give Sandra 25% of the fee for her work (splitting fees with nonlawyers discussed below). \$10,000 is unreasonable for such a small amount of work. Although Nancy properly explained to Corey how half of the retainer would be used (half non-refundable for the immediate work), she did not explain how she would use the other half.

Nancy's fee is unreasonable and she has violated the RPC by charging such a high rate and not informing her client thoroughly of how it would be used.

#### ***Managing client funds/disputed funds***

A lawyer has a fiduciary duty towards her clients. A lawyer must keep client trust accounts and the firm operating accounts separate at all times. A lawyer can place her own funds into the client trust account *only* for the purpose of paying bank fees. A lawyer violates the RPC when she commingles funds. If funds are in dispute, the attorney may take out the nondisputed amount to pay her fee, but must keep the disputed amount in the client trust fund.

Here, Nancy placed half of the retainer, \$10,000 in the operating account and half in the client trust fund. This was proper because Nancy had "earned" the \$10,000 immediately pursuant to her agreement with Corey. When Corey demanded his retainer back, it is unclear whether he meant the entire retainer or the portion that was not non-refundable. Because there was no closing, Corey likely meant the entire retainer. Nancy should have taken the entire \$20,000 and kept it in the client trust account until she solved the dispute with Corey. Here, the facts state that she refunded the unused part of the retainer. Had Corey demanded the entire amount, refunding the \$10,000

was permissible because those funds were not in dispute between the parties. However, unless Nancy moved the other \$10,000 into the client trust account, she has violated the RPC.

Nancy has violated the RPC by not holding disputed client funds in the client trust account.

#### ***Splitting fees with non-lawyers***

A lawyer may not split fees with non-lawyers. A lawyer may refer a client to a nonlawyer or may work with a nonlawyer to perform non-legal work, however they must never split fees. Additionally, a lawyer must ask a client before working with another party and receive the client's informed consent.

Here, Nancy has breached the RPC by splitting fees with Sandra, a non-lawyer. This is particularly true because it appears that Nancy has taken advantage of Sandra by giving her only 25% of the \$10,000 nonrefundable fee for Sandra doing all of the work. Sandra reviewed the agreement in a day and made all of the necessary changes. Nancy only added one provision. Moreover Nancy also did not get consent from Corey to work with Sandra or to split fees with her.

Nancy violated the RPC by splitting fees with a nonlawyer.

#### ***Duty to communicate***

A lawyer has a duty to communicate with her client about important changes in the case and to keep her client informed. A lawyer must respond promptly to requests for information.

Here, two weeks passed without Nancy communicating anything with Corey. Corey had to call and ask Nancy what happened, to which Nancy responded that she did not know, although Nancy promptly responded to Corey's request for information. Nancy had not been diligently pursuing the case to give him a response.

Nancy violated her duty of communication.

#### ***Duty of diligence***

A lawyer has a duty to diligently represent her client and to pursue her clients objectives.

Here, Nancy did not pursue her client's objectives because the extent of her communication with the seller was her email of the revised agreement directly to the seller. Nancy made no efforts to follow up with the seller or to find anything out about the closing.

Nancy violated her duty of diligence.

#### ***Communication with represented parties***

A lawyer may not communicate directly with parties that the lawyer knows are represented by counsel. The lawyer must contact the party's counsel rather than speaking with the party directly.

Here, Nancy sent the seller the revised purchase agreement directly, rather than sending the agreement to the seller's lawyer. Nancy had no reason to believe that the seller was not represented because she noticed that the purchase agreement had been drafted by a different law firm and likely saw that firm's letterhead on the agreement.

Nancy violated the RPC by sending the agreement directly to the seller.

***Unauthorized practice of law***

An attorney may not encourage or fail to stop the unauthorized practice of law by a nonlawyer.

Here, Nancy handed the purchase agreement to Sandra--a nonlawyer--and asked her to review it and make any necessary changes.

Although Sandra is likely well versed in purchase agreements as she is a real estate broker, Corey contacted Nancy--a lawyer--to review the agreement and ensure that it complied with the applicable laws. Corey contacted Nancy to get legal advice.

By asking Sandra to review the document and make any changes, Nancy has encouraged Sandra to engage in the unauthorized practice of law.

***Responsibility for non-lawyer and subordinates***

A lawyer is responsible for the violations of nonlawyer staff and subordinates if she knows about the conduct and ratifies it, encourages it, or fails to fix it.

Here, Nancy will be liable for Sandra's unauthorized practice of law because she encouraged the behavior and ratified it.

Nancy has violated the RPC by encouraging Sandra's unauthorized practice of law.

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



**JULY 2019  
EXAMINATION ANSWERS**

**APPLICANT'S ANSWERS TO QUESTIONS  
NEVADA BOARD OF BAR EXAMINERS**

**QUESTION 2**

### Exam Information

Exam Date: 7/2019

Exam Name: Question 2

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

1. The laws of Nevada will likely govern this case.

The issue is whether in this case which was filed in Nevada State Court will choose Nevada laws or California laws in this conflict of law decision.

Under conflict of laws principles, typically a state will use its own procedural laws and chose substantive laws based on its choice of laws rules. Nevada typically uses Second Restatement, most substantial relationship approach in analyzing choice of law issues. Here this is a torts claim in Nevada State Court.

There are three main approaches in choice of law analysis.

The vested interests approach of the First Restatement will typically choose the location of the injury as its choice of law. This does not always provide reasonable results, and there was a need to revisit this approach after there was a case where 2 New York residents were involved in a car accident in Canada and it did not seem just to apply Canada law.

The second restatement -most substantial relationship approach, takes a variety of factors into account including citizenship of parties, location of injury, interests of the forum state as well as the state of injury or occurrence, ease of application of laws, and general principles of fairness to parties.

The government interest approach weighs the policy interests of the states involved either by citizenship or place of injury. If there is no conflict, (false conflict) the state laws which has the interest applies. If there is true conflict, the interests are weighed but often will go with the forum state.

In some cases the substantive laws are split between state laws, referred to as depegage.

Here, in this case, the case was filed in Nevada State Court, therefore Nevada will decide which substantive State laws to apply based on the most substantial relationship approach of the second restatement.

In this case Ivan, the plaintiff, is a Nevada resident, this will weigh heavily in the analysis as this provides a very substantial relationship to Nevada, and Nevada is interested in protecting and governing its citizens with its own choice of law. Additionally, Carlos the co-plaintiff to Ivan's estate, is also a Nevada resident and Carlos' injuries are related to Nevada as far as his job and university. The fact that Ivan was drinking would also factor into Nevada relationship as he is a Nevada resident potentially driving under the influence of alcohol.

The defendants are California citizens, Dave is a California citizen and his truck was owned by a California corporation with potential vicarious liability. The e-cigarette was purchased in California, but the company does business in both Nevada and California. The fact that Ivan was driving possibly under the influence of alcohol in California would be an important relationship to California. Therefore California has relationships to this case as well.

The plaintiff was hospitalized in Nevada, and the death occurred in Nevada. The medical bills are Nevada bills paid for with Nevada health insurance.

Finally in the analysis, the fact that Nevada has more favorable laws is important in deciding which state has the most substantial relationship. There is a reason that Nevada wants to protect its citizens in such tort cases with favorable laws. These laws will be clearly applied with the purpose of the laws applied to the citizens that the laws were designed to protect. While this last element is also consistent with the government interest approach, it is part of the analysis of the most substantial relationship approach.

In analyzing the most substantial relationship, the facts are analyzed in view of the claims. This is a case in torts, with a strict product liability claim and a negligence claim. While both states have substantial relationships to this case, Nevada has the most substantial relationship to this case and will apply. The plaintiff is a Nevada citizen injured by a product which is also in distribution in Nevada. Ivan died in Nevada, and Carlos also a Nevada resident has his life affected in Nevada.

Therefore, Nevada has the most substantial relationship and the Nevada Court will apply substantive Nevada law to this case.

2A. The plaintiffs have a viable claim for strict products liability against the e-cigarette manufacturer, and will not have many defenses available.

The issue is whether the plaintiff has met the criteria for a *prima facie* case for strict products liability against the e-cigarette company under Nevada law.

Under Nevada law, for a *prima facie* case for strict products liability, a plaintiff needs to show that the defendant set out into the chain of commerce a dangerously defective product, that the defendant knew or reasonably should have known of this risk and that the plaintiff was injured because of this danger. The plaintiff injured does not need to be in any privity with the defendant. The defendant owes a duty to anyone harmed by a dangerously defective product. It doesn't matter how careful the defendant was, in strict liability duty and breach of duty are not factors.

A product is dangerously defective from one of three theories. (1) Design defect is when there is an alternative safer reasonable and financially practicable design available. This is judged either by the consumer expectation analysis where a reasonable consumer would expect a safer design or the risk-benefit analysis where the risk of the product outweighs the benefit. (2) Manufacturing defect where the product as manufactured differs from its original design causing the risk, and (3) failure to warn where, the risk is not obvious, the manufacturer knew or should have known of the risk, and there was no warning.

In Nevada, unlike some other states, it is not presumed that the plaintiff would have heeded the warning if it was there. So a plaintiff needs to prove that he or she would have heeded the warning, which makes the case slightly harder for the plaintiff on that point.

Here, in this case, the e-cigarette exploded in Dave's pants pocket. While we do not know why it exploded, e-cigarettes should not explode in someone's pocket. Therefore the e-cigarette was a dangerously defective product that was put out in commercial circulation. The company produced a product that they should have known has the risk of exploding and Ivan was injured because of the dangerously defective e-cigarette.

Causation is clear in this case, there is actual causation, if it were not for the explosion of the e-cigarette, Dave would not have hit Ivan, and there is proximate causation, it is foreseeable that if an e-cigarette explodes in someone's pocket while driving, there could be a car accident.

While the exact cause of the dangerously defective e cigarette is not known at the time of filing the case, negligence is not an issue in strict product liability. For the negligence case, Ivan's estate and Carlos can rely on the principle of Res ipsa loquitur to survive any attempt at motion for summary judgment on the part of the defendant. The e-cigarette was in sole control of the defendant when put out into the stream of commerce, this is the type of injury that only occurs with defendant's fault. Nevada does not apply defendant's fault to res ipsa with strict products liability.

#### Defenses

There are not viable defenses or offsets here for the strict liability claim.

Under Nevada law, the defenses to strict liability are assumption of risk and consent, and possibly contributory negligence. However, Nevada modified comparative negligence statute does not specify strict product liability and therefore likely does not apply.

Here Ivan was negligent in driving after drinking several beers. This is not a defense to strict product liability. It is unclear that this negligence had anything contribution to the injury and Nevada does not apply its modified comparative negligence model to strict liability.

Assumption of risk does not apply to Ivan or Carlos and would be a weak defense against Dave because he likely was not aware of the risk of e cigarette explosion.

If there was a warning that was clear and not heeded that could be a defense to failure to warn. If there was a warning that putting the e cigarette in your pocket on a hot day could cause an explosion may be a defense, but the facts do not say that and that is still unreasonably dangerous, although then assumption of risk might be raised.

If the e cigarette was altered in a way that was unforeseeable and the company did not realize the product in a dangerously defective way, that would be a defense but the facts don't show that.

In Nevada, insurance payments of hospital bills do not offset damages, but the insurance company may be indemnified by the plaintiff.

2B. The damages that are recoverable would be personal injury damages, economic damages, and punitive damages. Defendants have defenses that Carlos did not meet the prima facie case and offsets that the insurance paid for the hospital bills and the earnings from the lucrative business deal are speculative.

Under Nevada law, damages in a tort claim include personal injury damages, economic damages, pain and suffering, loss of consortium, punitive damages and all damages that result from the injury. Special damages are calculable like lost wages, and general damages are not calculable like pain and suffering.

In strict product liability economic damages alone are not recoverable, but here there is also personal injury, pain and suffering, etc.

Dave and the trucking company have a defense against Carlos that he does not meet the prima facie case for negligent infliction of emotional distress (NIED). For NIED, the plaintiff needs to be in the zone of injury. Here that was not the case. For relational NIED, the plaintiff needs to be a close relation which Carlos is, but also needs to have witnessed the injury which Carlos did not.

To prove negligence there must be duty, breach of duty, causation, actual and proximate and damages. There is a *prima facie* case of negligence against Dave and against the trucking company, potentially *respondeat superior*, or *vicarious liability* through the employer-employee relationship. If Dave was an independent contractor, liability to the trucking company may turn on the degree of control that the trucking company had over him. The fact that it was their truck will weigh to *vicarious liability*. Driving a truck may also be a non-delegable duty where the trucking company has liability even with an independent contractor.

In this case while there is a claim for negligence and the damages that flow from it. There is not a good case for *NIED*. Carlos was not in the zone of injury and he didn't see his father get injured. Carlos seeing his father in the hospital does not qualify for *NIED*. He may try a loss of consortium claim, but that is primarily reserved for the spousal relationship.

There is a comparative negligence defense for the negligence claim because Dave did drink several beers before driving. In order for this to be a viable defense, Dave and the trucking company would need to show that this negligence contributed to the injury. In Nevada, under the modified comparative negligence defense, if the plaintiff is more than 50% negligent there is no recovery in a negligence claim. If the plaintiff is less than 50% negligent, the plaintiff can still recover but the award may be reduced in the amount of his negligence.

The wrongful death action, especially against the e-cigarette may result in punitive damages. The hospital bills are all specific damages that are recoverable, the full \$200,000, not just the \$25,000 that the insurance did not pay. The pain and suffering would be potentially awarded, because Ivan was hospitalized 3 days sometimes conscious, he was likely in pain and suffering those 3 days.

The expectancy damages of the lucrative business are less likely to be recoverable. Recovery on that lucrative business deal may depend on how much if any was invested and how sure returns on that deal was, whether the deal was lost due to Ivan's death or if the possibly for Carlos to continue that deal remains. However a defense to the expectation damages on the lucrative business deal is that any profits were speculative.

Similar to the discussion above, the payments of medical bills by the medical insurer would not be offset.

If Nevada has more favorable laws and precedent to recovery of damages, many of the issues that are questionable, like the certainty of profits in the lucrative business deal may weigh in Ivan and Carlos' favor.

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



**JULY 2019  
EXAMINATION ANSWERS**

**APPLICANT'S ANSWERS TO QUESTIONS  
NEVADA BOARD OF BAR EXAMINERS**

**QUESTION 3**

### **Exam Information**

Exam Date: 7/2019

Exam Name: Question 3

**\*\*\*\*\* Question 3 STARTS HERE \*\*\*\*\*****1. Is there a contract? What are the terms?**

Applicable Law - The applicable law for the sale of goods is the Uniform Commercial Code (UCC).

Here, the contract is for the sale of art products, and those are goods, therefore the UCC applies.

Merchants - Merchants are those parties that operate in the sale or purchase of the goods considered in the contract.

Here, Barbara is an art trader and Samuel has an art gallery. They sell and purchase art as part of their livelihood. They are merchants.

Bi-lateral/Unilateral Contracts - A bi-lateral contract may be accepted by promise or performance. A unilateral contract may only be accepted by performance. Yet, part performance makes a unilateral contract non-revocable until the performing party is provided a reasonable amount of time to complete performance of the contract.

Offer - An offer is a present manifestation with specific terms to enter into an agreement. The offer is considered from the reasonable perspective of the offeree. The offeror is the master of the offer and may revoke, unless it's a valid option contract, at any time. The revocation removes the offeree's right to accept the offer.

Here, there was no revocation. The offer and acceptance are analyzed below.

Acceptance - Acceptance is a present manifestation to agree to the offer and enter into an agreement with the offeror. The acceptance requires sufficiently unequivocal terms.

Here, the analysis for offer and acceptance is below. The final email from Barbara is likely an acceptance of a counter-offer. Yet, Samuel's delivery may be considered the acceptance of Barbara's counter-offer final email, albeit a non-conforming acceptance and therefore a counter-offer under the UCC. Further analysis is below as well.

Consideration - Consideration is the bargained for exchange in a contract. The bargained for exchange should be a legal detriment. The legal detriment occurs when a person agrees to do or agrees something did not have to do before or to refrain from doing something for which they had a legal right to do.

Here, the consideration is good. Barbara offered to pay and Samuel agreed to sell his goods.

Statute of Frauds (SoF) - Under the SoF, a UCC contract must be in writing if it is \$500 or more and must contain the material term. The only material term is quantity. All other terms may be inferred with gap-fillers.

Here, there are several communications that need to be analyzed. The first email on July 2, constitutes an offer from Barbara. She had sufficient terms and a reasonable person in Samuel's perspective would be able to accept and create a contract.

Yet, Samuel responded with different terms and was not an acceptance on the same day. Samuel did not have the present manifestation to accept the terms. In fact, Samuel's email constituted a counter-offer because he provided different terms and did not provide an unequivocal acceptance of Barbara's email.

Barbara's immediate response was the final written out communication. This final email constitutes a final expression of acceptance from Barbara of Samuel's counter-offer. She said she did not have a choice and needed the art. She insisted on delivery terms and agreed to the price and she also expected the items originally mentioned in her first email. This constitutes an acceptance because it is sufficiently unequivocal, despite her language about not having another choice.

Even if Barbara's response was not an acceptance, Samuel sent the delivery. The sending of the items that were considered in the contract can be considered acceptance if they are conforming. If they are non-conforming, then delivery is considered a counter-offer. Here, the delivery was non-conforming and that would constitute a counter-offer. In that event Barbara has several options such as accept, reject, or accept the conforming part and the non-conforming part. Yet, nonetheless there was offer and acceptance and consideration.

The SoF is met because of the emails. The emails contained the material term of the items/quantity sold, and were in writing. Emails consummate the writing necessary under the SoF, despite an official signature, because the party being held accountable can be determined to have sent the email.

UCC 2-207 - Battle of the Forms - Under the UCC, the acceptance between merchants of a contract constitutes the terms of the contract. Except, where the acceptance provides additional terms, the additional terms are a part of the contract unless they are considered a material alteration of the contract or are directly argued to by the other party. The adding of a settlement arbitration is considered material. If the acceptance has different/ contradictory terms, then the different/contradictory terms will cancel out and the court will use a gap-filler.

Here, the terms are different. Barbara's acceptance of Samuel's counter-offer had additional and different terms. First, the additional terms were the arbitration clause and the time is of the essence clause. The time is of the essence clause is important, because that is not normally assumed in contracts and changes the need for time and cure remedies for a breaching party. Yet, it is not material and will be added to the contract. The arbitration clause is likely material because it sets a location and mandatory arbitration in the event of breach. This will be stricken from the final contract. The different terms are the place of delivery and the type of contract. The FOB my gallery from Samuel means a seller's shipment contract. The FOB my gallery from Barbara is a buyer's shipment contract. This means the liability changes. These terms are cancelled out and the gap filler used.

The gap filler used for place of delivery, if the contract does not specify, is the seller's place of delivery. Yet, in this case, Samuel did ship the goods according to the terms sent by Barbara and therefore he likely accepted that term. FOB Samuel's gallery, as he wanted, means Samuel need only provide the goods to a common carrier and notify Barbara of their being at the common carrier. At that point, the risk of loss shifts to Barbara. Yet, the FOB Barbara's gallery in Reno means that Samuel must get the goods to Barbara and tender delivery to her and make them available before the risk of loss shifts to Barbara. Because Samuel sent the goods to Barbara's gallery in Reno, that can be considered an implied acceptance of the terms of her contract.

Terms- The following terms result from the contract:

Price: \$11,000 - Date: July 25 - Place of delivery: FOB Barbara's gallery in Reno - Items: Calypso painting, sleeping cat sculpture, Ansel Adams Yosemite photograph - Time is of the Essence Clause: No later than July 25 because of the showing on July 26

**Defenses**

Mistake - A mutual mistake of a term in the contract may undermine the validity of the contract. A mutual mistake means that both parties were mistaken as to the terms of the contract, and neither party had knowledge of the mistake, and neither party knew of the other party's mistake.

Here, Samuel will likely argue mistake. He will say that he wrote Ansel Adams in the terms of his counter-offer. Barbara will argue that his mistake is not reasonable because she made her original offer sufficiently clear by specifying the Yosemite painting from Ansel Adams. Additionally Barbara will argue that the painting was the only Ansel Adams painting on the floor and that she specified that the discussion they had on the gallery floor that day. She will say that it is not reasonable to mistake the Ansel Adams paintings in the gallery's back room with the Ansel Adams painting on the gallery floor. Barbara is likely to win on this matter.

No Acceptance - see above analysis regarding Samuel's delivery constituting a counter-offer and Barbara's rights under that counter-offer.

**2. Who is responsible for the damage to the cat sculpture? Explain**

Shipment Contracts - The risk of loss depends on how the court reads the FOB terms and Samuel's delivery. FOB Reno means that Samuel must get the goods to Reno in order to shift the burden as discussed above in the terms.

It is likely that Samuel is responsible for the damage to the cat sculpture. Samuel impliedly accepted the different term of Barbara's email by shipping the goods to her gallery in Reno. Had he rejected that term and wanted to accept through performance, then Samuel could have provided the goods to a common carrier in his gallery and then notified Barbara that the goods were available for her to pick up. Yet, Samuel decided to ship the goods to Barbara's gallery. Therefore, it is likely he accepted.

The two terms, if Samuel didn't accept, will cancel out according to UCC 2-207. The gap filler for a place of delivery is the Seller's location. Therefore, once Samuel set the items aside, and made the goods available to Barbara, then Barbara would have accepted risk of loss. Yet, this only supports Barbara's claims. Samuel didn't even notify Barbara that he was sending the goods or making them available. Therefore, Samuel is likely responsible for the damage to the cat sculpture.

**3. Barbara entitled to return all the items? Explain**

Perfect Tender Rule - The UCC requires a perfect tender. The delivery of the goods must be perfectly conforming to the contract. If they are not a perfect tender, then the non-breaching party may accept, reject, or accept the conforming part and reject the non-conforming part. A non-breaching party may not reject after accepting if they had a reasonable opportunity to inspect the goods for conformity. The non-breaching party may accept if they act with dominion over the goods.

Here, Samuel did not perfectly tender. Therefore, Barbara is entitled to reject the goods in total. She did not act with dominion over the goods. She did not accept the goods. She even had to cancel her show because the goods were non-conforming. It is Barbara's right to completely reject the goods on either the grounds that she accepted his counter-offer email or under the grounds that his delivery was a counter-offer of her return email with the added terms. Either way Barbara may return all items.

**4. Barbara commence arbitration proceedings in Reno, NV? Explain**

UCC 2-207 - See the law above.

As discussed above, the arbitration term is a material addition to the contract. Therefore, her acceptance of the contract does not includ this addition. It is material because it substantially alters the rights and liabilities of the people in the contract. Here, having the right to call for arbirtation in your home town may place Samuel at a disadvantage, especially if he didn't know it was in the contract. Yet, the term is knocked out of the contract. Barbara may not commence arbitration proceedings in Reno.

**5. Barbara entitled to recover \$20,000 out of pocket costs and lost profits for cancellation of show. Explain**

Remedies/ Damages- A non-breaching buyer may obtain expectation damages, consequential damages, and incidental damages. Contract law does not impose punitive damages.

Expectaiton Damagse- Expectation damages place the non-breaching party in the same position as if the contract had been perofrmed.. Under the UCC this is the cost of the original contract minus the fair market value at the time of the breach or the original contract minus cover.

Here, the contract is not likely to be enforced so there are no damages. Barbara did not pay. Because of Samuel's breach she is discharged from her duties.

Reliance Damages- Reliance damages may be obtained if the breaching party represented they would conform with the contract, and the non-breaching party relied on that representation by changing their circumstances. They may rely by spending money on the representation that was made. The reliance must be reasonable.

Here, Barbara is likley to receive the \$20,000. She relied on Samuel's representations in their emails. She paid for her gallery and showing because of the emails they had. Yet, Samuel will argue that he did not represent anything before she relied because he did not actually send an email accepting the counter-offer she made. Yet, Barbara will argue in return that Samuel's email was a counter-offer and she accepted with her final response and that she reasonable relied. It is likely the court will find that Barbara reasonably relied on the words of a merchant in a contract and relied on his representations that he would deliver the goods at the agreed upon price and in the time frame.

Lost Profits for Volume seller- A non-breaching party may obtain thier lost profits if they can show they have an infinite source of the products, they can show that they would have sold the goods but for the breaching parties breach of the contract. The non-breaching party cannot argue speculative profits.

Here, Barbara is not likley to receive the lost profits from the cancellation of the show. She will not be able to show that she had an infinite source of goods from which she could have sold. The art is specific and unique. Additionally, the profits are speculative. Barbara cannot show with any specificity, based on the facts stated, that she was actually guaranteed a sell at her gallery. Therefore, absent other facts she is not likley to obtain lost profits because those damages are too speculative.

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



**JULY 2019  
EXAMINATION ANSWERS**

**APPLICANT'S ANSWERS TO QUESTIONS  
NEVADA BOARD OF BAR EXAMINERS**

**QUESTION 4**

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

### DARLENE'S RIGHTS TO EASEMENT OVER PARCEL A1

an easement is an interest in the use of land. an easement may be created expressly or implicitly. An easement, as it is an interest in land, must be in SOF, *unless* it is an implied easement and it has already been performed.

one easement created implicitly is one of necessity. under necessity, the land must have been under common ownership at some point, and when the land was severed into two parcels, one parcel was *landlocked*. an easement by necessity is created because it is necessary that the parcel that is landlocked have access to a public road.

here, D has a easement created by necessity. prior to D, C had the easement when A conveyed parcel A-2 to her. it is irrelevant whether A was aware or approved of the easement, or whether it was expressly created because when A conveyed parcel A-2 to C, C's parcel was landlocked and C did not have any access to the public road. Main street was only accessible through the remainder of A's land, as such, C appropriately retained an easement over A-1's parcel.

an easement that is created implicitly and thus silent on the terms, is presumed to be for a reasonable use and it is presumed to be perpetual. an easement by necessity, however, terminates as soon as there is no longer a necessity.

thus, D's easement of necessity is deemed to be perpetual, and any reasonable use related to accessing the public road. here, the necessity is still present, as D still does not have access to a public road. D's parcel remains landlocked, thus the necessity still exists. as such, the easement by necessity has not terminated.

### TRANSFER OF EASEMENT

there are two kinds of easements: easement appurtenant and easement in gross. an easement appurtenant involves two parcels of land, that is the dominant parcel, the parcel benefiting from the easement and the servient parcel, that is the parcel that is burdened by the easement.

here, the dominant parcel is C/D's because this is the parcel that is benefiting from the easement, by having accessibility to a public road. as such, the servient parcel is A's because she is burdened by C/D's use of the easement, as they have to walk/drive across her parcel to get to the public road.

## TRANSFER

An easement appurtenant transfers automatically with the dominant estate, regardless if it is stated in the deed of conveyance. the easement appurtenant may not be transferred separately from the dominant estate. further, it is also transferred automatically with the servient estate unless the successor did not have notice, either record, actual or inquiry notice (the successor is charged with whatever a reasonable inspection of the land would reveal).

here, the facts are not clear as to the conveyance of the deed between A and C and later C and D. but that is immaterial here, because as an easement appurtenant by necessity was created, the easement transferred *automatically* between C and D. the fact that C did not tell D about the easement, does not terminate the easement or fail to transfer the easement—it is irrelevant because the easement transferred automatically. in such a case, issues are only presented with the conveyance of the servient estate, when the successor in interest does not have notice, but that is not at issue here.

THEREFORE, the conveyance from D to C successfully transferred the easement.

## DEFENSES

A may argue that the easement is terminated because there is no longer a necessity as she is using parcel B. however, this argument will fail because D's arguments to use parcel B to access the main road are weak, at best. A's parcel is the best way for D to access the public road, as such A's argument that it has terminated the easement will fail.

license

A may also argue that she has not created an easement to C but rather a license to C and thus D does not have a license to use her property. a license is a privilege to use land for a specified use. it is not a property interest, and thus it is revocable at any time.

A will argue that she created a license between her and C and thus the license, as it is personal, does not transfer to D. thus the license terminated when C conveyed the property to D. however, this argument fails because C and D needed

to use A's parcel to get access to the public road, a strict necessity, the court will likely find that A had created a license because if A were allowed to revoke it, C/D would be landlocked, thus preventing them from the enjoyment of their property.

even if the license agreement were entertained, it would fail because it is likely that C and D may support the argument that they reasonably relied on the "license continuing" thus making the license irrevocable. an easement by estoppel is any license may become a easement by estoppel if the party in reasonable reliance on the license invested substantial money and labor on the license continuing. further fact development would be required to support this argument, to show that C or D or both have invested substantial money or labor in reliance, such as making repairs, etc.

A has no other defenses to the easement as the parties have not made any representations that they are abandoning the easement, and A has not relied on such statements; the land has not been destroyed, the land has not been condemned, there is no written release by C or D releasing A of the easement, and C and D have continued to use the easement. as such there is no evidence to support a finding that the easement has terminated because the necessity still exists.

therefore, any of A's defenses fail.

### **DARLENE'S RIGHTS AS TO EASEMENT OVER B**

#### **EXPRESS EASEMENT**

D does not have an express easement because B has expressly, either words or writing, created an easement. thus, she has no express easement.

#### **EASEMENT BY NECESSITY**

Darlene has no interest in the use of land over parcel B. D may argue that as she has an interest in parcel A1 by necessity because she is landlocked, she similarly has an interest in B. however, this argument fails because although her parcel remains landlocked, D has access to the public road through A1 and D would be unable to prove an easement by necessity because her parcels- parcel A2 and B were never under common ownership. thus she fails to satisfy one of the elements.

## EASEMENT BY PRIOR USE

D may succeed in claiming that she has an easement by prior use. An easement by prior use may arise if the (1) parcels were once under common ownership; (2) the owner had a similar use of the parcels at the time; (3) the party claiming the easement has made such a similar use of the parcel at this time, and (3) the easement is necessary for the enjoyment of the dominant parcel.

here, again, D's claim fails because D does not meet the first element of the prior use. Parcel A1 and B have never been under common ownership and thus D may not obtain an easement by prior use.

## EASEMENT BY PRESCRIPTION

an easement by prescription is created when the use of the land is (1) hostile, against the owners consent; (2) Lasting, that is that the use be for the statutory period, which is 5 years in NV, (3) Uninterrupted for the statutory period (4) visible and (5) actual. there is no requirement that the use be exclusive.

Here, D's best argument is that she has an easement over B's parcel by prescription because there is no requirement that her parcel and B's be under common ownership at some point.

**hostile:** Here, D and C have both been using B's property to access the main road without his permission, thus hostile use of the land.

**Lasting:** D has been using B's land as an access road since the land was conveyed to her in 2014. if we are in 2019 she has been using the land for 5 years and thus satisfies the statutory period. if however, we are in 2018 for example, D may tack on the period of C's use since she was the prior owner and similarly used the land to satisfy the statutory 5 year period. as such, both parties have been using the land for 6 years (assuming we are in 2019). as such the statutory 5 year period is satisfied.

B may argue that the 5 year period has not been met by D, as argued below, because the time period has been interrupted and she may not tack on C's prior use. D on her own has not used the land for entirely 5 years assuring that she has also only used it occassionally.

**Uninterrupted:** to satisfy the statutory period, the party making a claim may tack on the years of prior successors in interest. as such, D may tack on the periods that C used the land. as such, since C started using the land in 2013, and

assuming it is 2019, the parties together, satisfy the statutory 5 year period. because C and D are combining their periods in the use of the land, the period has been uninterrupted as there are no gaps.

B may argue that the period has not been uninterrupted because C only used the land *occasionally*: the key question here, is whether such use was reasonable considering the nature of the land, and if a true owner would make such occasional use. B may succeed in this argument if he may find further facts to support that the use was rare, unlike that of a true owner, thus creating gaps. this may be inferred because C had access to A's land to access the main street and thus there were days when B's land was untouched. as such, B may likely succeed in arguing that the uninterrupted element is not met.

**Visible:** Visible requires that the use be open and notorious. here the facts support a finding that C and D use has been open and notorious because both A nad B were aware and even sent C demand letters. further, B demanded 25k from D, thus showing that her use of the land was visible.

**Actual:** this element requires actual possession. here, this is supported because C and D actually crossed B's land to access the road. thus they were physically on the land when they were using it. thus the actual element is satisfied.

## TRANSFER

any easement that C had transfers automatically with the dominant estate when C conveyed the land to D.

THEREFORE, D may succeed in arguing that she has an easement by prescription on B's land, but her argument will be weakened if B successfully argues that the "uninterrupted" element was not met.

## ADVICE TO DARLENE

I would advice darlene to pursue the easement from A becasue she is more likely to succeed on that claim because that easement arose from a strict necessity and the policy behind the law supports finding in her favor.

further, she is unlikely to succeed against B because B may successfully argue that the elements for prescriptive easement are not met, as C only occasionally used the land, and it is likely that D also did not use it as frequently as a normal owner would because C and D both had access to the A1 parcel to access main street. again, the issue here is what is normal use of the land? Still, B's arguments would require further support, and B's argument would only succeed if we are assuming that the occasional use is not normal use of the land.

if D has facts to support a finding that she did use B's land for 5 years uninterrupted, or such occasional use is normal use of such land. i would advise her to come back to my office so that i may reanalyze the facts. Having an easement on B's land may be beneficial, because once the necessity terminates (once she is no longer landlocked) the easement D has over A's land will automatically expire. if however, D were to succeed in a claim against B, she may retain an easement in B and still have access to main street through parcel B.

I would also advise D that she may get a license to use B's land. this is personal to her and thus may not be transferred once she conveys her land. B may be willing to allow her to use the land for the specific use because now D is asking rather than simply using without his consent. D will not, however, be able to rely on the continuation of the license because B may revoke it at any time.

THEREFORE, it is in D's best interest to seek the easement against A for necessity.

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



**JULY 2019  
EXAMINATION ANSWERS**

**APPLICANT'S ANSWERS TO QUESTIONS  
NEVADA BOARD OF BAR EXAMINERS**

**QUESTION 5**

## Exam Information

Exam Date: 7/2019

Exam Name: Question 5

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

This case was originally filed in Nevada state court, but most of the issues below involve the Federal District Court for the District of Nevada. Therefore, the Federal Rules of Civil Procedure apply (FRCP).

**1. The defendant properly removed the action to Federal District Court.***Rules -*

A defendant sued in state court may remove a case to the Federal District Court which encompasses the state court that the suit was originally filed in. Only a defendant may remove. A defendant may remove if the action could have originally been filed in Federal District Court. To file a case in Federal District Court, the federal court must have subject matter jurisdiction over the action.

Subject matter jurisdiction is obtained in two ways. First, diversity jurisdiction. Diversity jurisdiction arises when there is complete diversity of citizenship between all plaintiffs and all defendants. Corporations are citizens of both the state in which they are incorporated as well as the state in which they have their principal place of business. An action heard in diversity must have a complaint valued at more than 75,000 dollars. Second, a federal court will have original jurisdiction over a matter if it entails a federal question, this is known as federal question jurisdiction. For federal question jurisdiction to exist, the complaint itself must allege a cause of action under a treaty, federal law, or the Constitution of the United States.

Once the court has subject matter jurisdiction, other claims arising from the same transaction or occurrence may also be heard by the federal court. This is known as supplemental jurisdiction. In other words, the federal court may hear claims that would not otherwise be available to be heard in federal court so long as they arise from the same transaction or occurrence.

To remove, a defendant should file a notice of removal in the federal district court, notify opposing parties about said removal, and subsequently notify the state court of its intent to remove. A case may be removed as a matter of right by the Defendant if the requisite elements are met, and it does not need permission of the state court.

*Application -***A. Diversity (Not available)**

Here, NVEvents (Plaintiff) is a citizen of both Delaware and a citizen of Texas. Kicks (Defendant) is a citizen of Nevada. Therefore, this is complete diversity. The cause of action alleges 1 million dollars in damages, so the amount in controversy is satisfied as well. Plaintiff has brought suit against Defendant on three causes of action. First, it alleges a violation of the federal law Defendant Trade Secrets Act; it has also brought actions under three state law causes of action. On this basis, there would be diversity jurisdiction EXCEPT for the fact that the FRCP states that when a federal court hears a case in diversity, the defendant, if sued in its home state court, cannot remove the action to the federal court.

Here, the case was brought in Nevada state court. Kicks is a Nevada citizen. Therefore, Kicks may not remove to federal district court as Defendant is a citizen and has "home state advantage." Thus, diversity of citizenship is unavailable here.

**B. Federal Question (Available)**

However, removal was nevertheless proper because there is federal question jurisdiction. The case was brought under a federal law, the previously mentioned Defend Trade Secrets Act. Thus, diversity of citizenship is not required and the court may hear the federal claim.

#### C. Supplemental Jurisdiction (Available)

The remaining three state law claims may be heard via supplemental jurisdiction. All three claims arise from the same transaction or occurrence as the action underlying the federal question. The issue here is that Plaintiff and Defendant entered into a valid NDA and Defendant violated that agreement. The Defendant notified Plaintiff of its breach and its intention to move forward with a soccer match elsewhere in the country, namely Arizona. Plaintiff discovered that Defendant was using promotional materials that it owned or purported to own. In short, the violation underlying the claim is the breach of the NDA between the parties. The causes of action here relate to that violation.

#### D. Removal Procedure (Proper)

Here, Defendant filed a notice of removal in the Federal court encompassing the state court (The District of Nevada). Moreover, one has 30 days from receiving notice that a case is removable to remove a case to federal court. Here, the removal occurred 10 days after notice, so it was timely. This was the proper way to remove the case.

#### E. Personal Jurisdiction (Available/Satisfied)

A federal court must have personal jurisdiction. A court will have PJ over a plaintiff because the plaintiff has brought the case to the court. There are several ways to have PJ, including domicile and personal service over the defendant in the forum. At a constitutional level, to have PJ over a defendant there must be minimum contacts. Minimum contacts is defined as (1) contacts with the forum that are related to the claim, (2) a foreseeability that the suit would've been brought against them, and (3) in specific JX cases, where there is fairness. However, as mentioned, a court will have general jurisdiction over a defendant that is domiciled in the state.

Here, Kicks is the defendant and is domiciled in Nevada. The case was brought in Nevada and removed to Nevada federal court. Because Kicks is the defendant and is domiciled in the forum, the court has general personal jurisdiction via domicile and there is no personal jurisdiction issue.

With respect to the 3P, there is no personal jurisdiction issue because PJ may be waived by voluntary appearance. 3P voluntarily appeared in the case, so it has availed itself to the forum state.

#### *Conclusion -*

The case was properly removed for the reasons stated above.

#### II. The court correctly ruled on the motion to remand

##### *Rules -*

Once a case has been remanded, the federal court may issue a remand to the state court if it determines that removal was improper. Removal is improper where the court does not have subject matter jurisdiction over the case. As mentioned above, a matter may be removed to a federal court so long as the federal court could originally have heard the case. The court could have originally heard the case for the reasons mentioned above, namely, that there was original federal question jurisdiction in existence and supplemental jurisdiction over the remaining claims.

A court must maintain subject matter jurisdiction over a case at all times. If a court loses subject matter jurisdiction, it must dismiss or transfer to a court that has proper SMJ over the case. Here, the matter was removed. After removal, a third party intervened. The court must have SMJ over this case as well.

*Application -*

AZ Soccer (3P) is an Arizona citizen. There is still complete diversity, but as mentioned, diversity did not allow the court to hear the matter in the first place. Thus, federal question jurisdiction and supplemental jurisdiction must still be satisfied. Since there is federal question jurisdiction here, the question is whether supplemental jurisdiction over the additional claims exists.

3P has moved to intervene because it has entered into several contracts with Defendant as a result of Defendant's breach with Plaintiff, and that it would be harmed if the event was enjoined by the Court. As such, the action that 3P wishes to bring arises from the same transaction or occurrence as the original claim and thus the court still has supplemental jurisdiction over the matter.

*Conclusion -*

The court correctly ruled on the motion to remand because it was properly removed and the court did not lose jurisdiction over the case when 3P joined.

**III. The court incorrectly ruled on the preliminary injunction**

*Rule -*

Plaintiff has sought a preliminary injunction seeking to enjoin use of the information covered by the NDA: enjoin use of its logo; and prevent the Arizona event from going forward. To obtain a preliminary injunction, several requirements must be met. First, the elements of a preliminary injunction must be met. Those elements are (a) danger of irreparable injury and (b) likelihood of success on the merits. When moving for a preliminary injunction, the plaintiff is generally required to post a bond and must give notice to the opposing party. The court may not issue a preliminary injunction *ex parte*, meaning without notice to opposing party.

*Application -*

*A. Danger of Irreparable Injury*

The first element of a preliminary injunction is danger of irreparable injury. Irreparable injury is found where the legal remedy (i.e. money damages) is inadequate. A typical scenario where irreparable injury exists is where the item is unique or the injury so great that no amount of money will compensate for the harm thereto.

*a. Plaintiff's Position*

Here, the cause of action alleges that Plaintiff's logo has been usurped by Defendant. Defendant stands to gain significant amounts of money in its use of the logo, as the facts indicate that thousands of tickets have already been sold. If the event goes forward, Defendant stands to earn money off the use of the logo once the event occurs. Plaintiff may also allege that the use of its logo will result in damage to its brand that will not be taken back, as the world will now associate the logo with someone other than itself. There is some merit to this position, as once the world discovers that the logo belongs to another company, it may have significant impacts on the Plaintiff's brand.

*b. Defendant's Position*

On the other hand, Defendant will argue that an injunction is not called for because there is no showing of irreparable injury. Primarily, Defendant will likely argue that the harm that occurred from its breach can be remedied by money damages, namely, the money made off of the event that is to take place in Arizona. Any money that is made might be recovered by Plaintiff in the future, thus Defendant will argue that money damages are adequate. This is a fairly strong argument, but Defendant may not have a rebuttal argument for the position that use of the logo will irreparably damage Plaintiff's reputation in the world.

#### B. Likelihood of success on the merits

Plaintiff is likely to succeed on the merits, which are the breach of NDA and the use of the logo. NDAs are generally valid so long as they, like any contract, are not unconscionable. There are no facts to indicate that the contract was unconscionable. Thus, the NDA is likely valid. The trademark appears to be owned by Plaintiff, and there are no facts to indicate that Defendant has a defense for its breach. Thus, this prong of the preliminary injunction seems to weigh heavily in favor of the Plaintiff.

#### C. Bond

No facts indicate whether a bond was posted. A bond is not always required, depending on the facts and circumstances of the parties, so it is possible that the court declined this requirement.

#### D. Notice

The facts indicate that notice was properly given to Defendant. Thus, this is satisfied.

#### Conclusion -

Based on the foregoing, the court should have granted the preliminary injunction to Plaintiff since, although money damages can make up for the money gained by Defendant via the event which is to take place, the damage to Plaintiff's reputation via the use of its logo may be irreparable because, once the world associates it with another organization, Plaintiff will be unable to meaningfully address that problem. The court should have issued the injunction requested.

### IV. The court should grant 3P's request to intervene



#### Rules -

A federal court may grant a third party the right to intervene in a case. There are two types of joinder, permissive and mandatory. Permissive joinder is allowed when the party alleges an issue stemming from the same transaction or occurrence, here meaning that there is a common question of law or fact at issue. Mandatory joinder of parties (i.e. a necessary party) is required where the party seeking to intervene runs the risk of substantial legal harm if their issue is not adjudicated by the party. A court, when deciding on mandatory joinder, must decide whether a party should and can be joined.

#### Application -

##### A. Should the 3P be joined?

Based on these facts, the 3P is at risk of substantial legal harm if it is not allowed to defend its position in this case. Should Plaintiff prevail here, 3P's event will be enjoined. Surely, 3P has invested significant amounts of time and money into the event, has a great expectation of profit from it, and has contracted with Defendant in furtherance of that event. As such, if the event is canceled, they will be substantially and adversely impacted. The 3P should be joined.

**B. Can the 3P be joined?**

Here, the issue is whether there is SMJ to join 3P. The answer is yes. Again, there is original federal question jurisdiction present here, so 3P must show that the court has supplemental jurisdiction over its claim in order for SMJ to be sustained. 3P's allegation, that its event, supported by its contract with Defendant, will be canceled if it does not represent itself, arises from the same transaction or occurrence as the original federal claim, namely, the breach by Defendant with respect to Plaintiff's NDA and use of its logo. Therefore, as the claim arises from the same transaction or occurrence, 3P should be joined as there is supplemental jurisdiction present in this case.

*Conclusion -*

The court should permit AZ Soccer to intervene for the reasons discussed above.

**V. The court should decline to transfer venue.***Rule -*

Venue is proper where (1) any defendant resides, so long as all defendants reside in the same forum or (2) anywhere a substantial part of the cause of action arose. Alternatively, if neither are met, anywhere PJ exists is also allowed as a fall back. When venue is originally proper - meaning the court in which the case was originally filed in was proper for venue - the court may elect to transfer venue for convenience reasons, but does not have to do so. When original venue is improper, the court must transfer or dismiss.

*Application -***A. Original venue**

Venue was originally proper. As mentioned, venue is proper anywhere any defendant resides if all defendants are from the same forum, or anywhere a substantial part of the breach occurred. Not all defendants reside in the same forum here, so the second prong must be satisfied for venue to be proper. Here, the case was originally heard in Nevada. Thus, venue in Nevada must be proper. The Defendant is from Nevada. One of the central factual issues at stake here - the soccer match planned for Las Vegas - underlies Defendant's breach. The logo at issue and Defendant's violation of the NDA also arose from events taking place in Nevada. Although Plaintiff is not a Nevada citizen, for the reasons mentioned above, venue was originally proper in Nevada. Thus, the court may but is not required to transfer the case.

**B. Transfer**

The court may transfer for convenience sake. The case is already being heard in Nevada between the parties at issue, and the primary defendant is a Nevada citizen. Since Plaintiff has purposefully availed to Nevada, there is no indication that hearing the case there is inconvenient. Although 3P may wish to hear the case in Arizona, at most this is only convenient for 3P. 3P will argue that the planned event is to take place in Arizona and as such it is more convenient to hear the case there. However, as mentioned, venue was originally proper and the court should only transfer if it is more convenient elsewhere. On balance, two of the three parties likely feel that Nevada is sufficiently convenient for the case, so the case should remain in Nevada.

*Conclusion -*

The Court should decline to transfer venue in this case.

**VI. The federal court of appeal may hear Plaintiff's appeals**

*Rule -*

Normally, appeals are not ripe until there is a final judgment in the case. A final judgment is typically considered a ruling following a meaningfully hearing on the matter. In certain cases, the appellate court may hear so-called interlocutory injunctions, or those that are allowed to be heard before final judgment has been issued by the lower court.

*Application -*

Plaintiff has appealed on two issues: (a) the preliminary injunction and (b) the motion to remand. Under the federal rules, both are immediately appealable to the proper appellate court (that encompassing the District Court). Each may be heard by the 9th Circuit here, since that is the appellate court which encompasses the District Court for Nevada on these facts.

*Conclusion -*

The court may entertain the appeal brought by Plaintiff as to both motions.

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



**JULY 2019  
EXAMINATION ANSWERS**

**APPLICANT'S ANSWERS TO QUESTIONS  
NEVADA BOARD OF BAR EXAMINERS**

**QUESTION 6**

## Exam Information

Exam Date: 7/2019

Exam Name: Question 6

**\*\*\*\*\* Question 6 STARTS HERE \*\*\*\*\***1. Termination of Inside NV Gym Contract:

Generally for a claim to be brought under the U.S. constitution there must be state action. Here the state enacted legislation and thus this requirement is met.

Under the Contract Clause of the U.S. constitution, a state may not enact legislation that would substantially impair a parties previously executed contracts absent proper justification. If the states legislation would interfere with private contracts the court will apply a form of intermediate scrutiny. If the states legislation would interfere with public contracts to which the state is a party, the legislation will be analyzed using strict scrutiny.

Here the state is a party to the contracts which the legislation interferes with, thus strict scrutiny will be applied and the state must show that the legislation advances some compelling government interest and the legislation was narrowly tailored to meet that interest, meaning there were no less burdensome alternatives to achieve the interest. Generally saving money or budgetary issues are not sufficient compelling interest for the state to use. Here the states interest is in promoting gym safety and sanitation as a result of the complaints they received regarding injuries and unsanitary conditions. The state enacted legislation that would promote sanitation and safety and thus has an interest in complying with its own statutes. They are promoting the health, welfare, and safety of its citizens.

Here the termination of Inside NV contract in order to accept new bids with the new safety regulations in mind is promoting that compelling interest and is doing so in a way that is narrowly tailored to meet that interest. NV inside gym can still submit a bid after they have shown that they have complied with the new safety regulations, they are not precluded from doing so. We are also unsure of when their contract was set to end originally, and it may be that they do not have a legitimate expectancy in that contract continuing and thus the interference would be slight.

Inside NV will argue that they expected for the contract to continue and that they should be allowed to meet the new standards without having to terminate the contract and re-submit a new bid.

The state can argue that the contract was never meant to continue and the issuance of new state-owned gym licenses only happens periodically, so there is not substantial interference.

Because there is a compelling interest in the health and safety of the citizens and in complying with new safety standards. And because Inside NV will be permitted to submit a bid again, the court will likely find that this interference meets strict scrutiny and is thus constitutional.

The Inside NV gym could potentially also argue that they were denied procedural Due Process when their rights under the contract were taken away, if they could show that they had a legitimate expectancy interest in the contract continuing. To show a violation of due process they could argue that they should have had notice of the termination and should have been afforded a hearing and an opportunity to be heard on the issue. It is unlikely however that the gym can show that they had a legitimate expectancy interest in the contract under these facts, and thus a procedural due process argument would likely fail.

2. Fee Charged to Outside NV Gym for license

The fee charged to Outside Gym for a license is likely constitutional as well. Outside gym will argue that the fee is a violation of Privileges and Immunities clause which provides that states cannot discriminate against out-of-state residents in regards to substantial economic interests such as the right to earn a living, and other fundamental rights absent proper justification. However the privileges and immunities clause only applies to individual citizens and not business entities and thus Outside Gym would not be able to bring this claim on their own. However the owners of Outside Gym could bring the claim in their individual capacity. The individual owner would argue that charging such a high fee infringes on their right to earn a living. The state must then show that there is a substantially important government interest in charging a higher fee for non-resident licenses and that the fee charged is proportional to furthering that interest. As discussed below the important interest would be to protect the health and safety of the citizens of the state. The state will argue that the fee charged is necessary to further that interest because the costs of approving out-of-state licenses is that much higher because of the extra time and resources expended. The owner of the out of state gym could argue that the fee is disproportional to the extra work that actually needs to be done, and may be able to prove that the fee is not reasonable given the actual cost. We dont have these facts, but this could be a winning argument for the out of state licensee. However under the facts that we are given the fee seems to be necessary the the interest furthered is substantially important enough. Thus the fee is likely constitutional under the Privileges and Immunities Clause.

The company could also argue that the fee charged unduly burdens interstate commerce by making it more difficult for out of state commercial entity's to operate in the state. If a statute unduly burdens interstate commerce then Congress can regulate it under the Dormant Commerce Clause. To show that the regulation is constitutional the state must show that the benefits of the legislation outweigh the burden on interstate commerce. Here the state will argue that the burden of paying a higher fee is outweighed by the benefits and substantial interest in the health and safety of the citizens of the state. They will also argue that the fee is proportional to the work that needs to be done to verify whether the out-of-state company meets the safety, sanitation, and instructor certification requirements of the state, because these things take extra time and resources from the state. They can also argue that the companies are not prohibited from operating in the state and charging a licensing fee that is 5x the amount of the state licensing fee is not unduly burdensome.

### 3. Rejection of Outside NV Gym bid to operate state-owned Gyms:

The Rejection of Outside Gyms bid to operate a state-owned gym on the basis that they are an out of state resident is likely constitutional because the state is acting as a market participant. Congress has the ability to regulate interstate commerce under its commerce clause power. The states are allowed to regulate local commerce as long as the regulations do not discriminate against out of state commerce or unduly burden interstate commerce. Here the legislation expressly discriminates against interstate commerce by not allowing out of state gyms to operate state owned gyms within the state. If the legislation discriminates on its face then the state must show that the legislation furthers an important noneconomic government interest and is narrowly tailored to further that interest.

Additionally where the state is acting as a market participant they are permitted to discriminate against out-of-state business in favor of local business. Here the state is operating as a market participant because it is issuing contracts to private entities to operate gyms that are owned and subsidized by the state. Thus, they will argue that although their practice discriminates against out of state companies, they are permitted to do so as a market participant.

Therefore the practice of affording licenses to in state applicants only is likely constitutional.

4. Denial of Bruce's Application for employment with State-Owend Gym.

The Denial of Bruce's application for employment with the state owned gym was likely unconstitutional and a violation of Bruce's rights under the Equal Protection clause of the 14th amendment. Under the equal protection clause the states may not discriminate against classes of people based on their class, absent the appropriate justification.

Here Bruce is an alien, although he is a lawful permanent resident. Generally the states may not discriminate against people based on their alienage and any discrimination based on alienage is subject to strict scrutiny (state must show a compelling interest and no reasonable less discriminatory alternative). However there are exceptions to the strict scrutiny requirement when the state is discriminating against aliens in the context of employment with the state that directly affects the democratic process. The Supreme Court has held that States are able to discriminate against non-u.s. citizens if they are applying for jobs with a direct and substantial relationship to the democratic process such as police officers, public officials, and school teachers. The state may not broadly deny Aliens opportunities for employment with the state government where the jobs do not involve the democratic process.

Here Bruce is applying for a job with the state to work at a gym. This job does not have any effect on the democratic process and thus the denial of a job to Bruce would fall under strict scrutiny. The state would need to show that they have a compelling interest in denying non citizens public employment and that there is not reasonable alternative to furthering that interest that is less discriminatory. Here there is no compelling interest in keeping a state job at a gym from non-citizens. This is not like teaching where the state is afraid that the non-citizen beliefs will be transferred and taught to young americans, affecting how they view the democratic process. This is a job as a fitness instructor where there is no substantial risk of influence because generally the people that the instructor would be training are adults (not malleable children).

Thus, the denial of the job to Bruce likely violated the Equal Protection clause and the Nevada statute that limits employment with the State to U.S. citizens is likely unconstitutional because it is overly broad.

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



**JULY 2019  
EXAMINATION ANSWERS**

**APPLICANT'S ANSWERS TO QUESTIONS  
NEVADA BOARD OF BAR EXAMINERS**

**QUESTION 7**

## **Exam Information**

Exam Date: 7/2019

Exam Name: Question 7

## \*\*\*\*\* Question 7 STARTS HERE \*\*\*\*\*

Answer to Question 1 and 2

Under the Doctrine of Accomplice Liability, co-conspirators in the course of the crime are held liable for the actions of the other conspirators. As such Adam and Bill will both be held liable for the actions committed by either of them during their commission of the crime.

Conspiracy- (specific intent crime) A conspiracy occurs when two or more people communicate the intent to commit an unlawful act. In Nevada, an overt act is not required. Solicitation is the crime of attempting to induce another to commit an unlawful act. Here, Adam was soliciting Bill into shoplifting. Upon Bill's acceptance to go along with unlawful act of shoplifting, Adams solicitation merged into a conspiracy, and both would be criminally liable for conspiracy because they both communicated an intent to commit the unlawful act of shoplifting.

Burglary- (specific intent crime) Common law defines burglary as the trespassory breaking and entering, into the dwelling home of another, at night, with the intent to commit a felony. NV is distinct from common law, in that under NRS burglary is defined as the trespassory breaking and entering into the dwelling, or protected structure of another with intent to commit a felony, grand or petty larceny, or any unlawful act. NV removed the element of night and extended the scope to include commercial structures. Here, the element of breaking and entering may be contested because Adam and Bill entered a convenience store which was open to the public including Adam and Bill. Thus, it would indicate that there was no need to break into the store, but the statute speaks to the barrier of the premise and the trespass intent to cross pass that barrier. As such, on counterargument, the defendant's intentions to commit a crime within would suffice to evidence that their ill intent was unconsented and therefore, by entering the building with such intent they were trespassing and satisfied the first element. Next, in NV, the entry had to be into a protected structure. Here, the store would be considered a protected structure. Lastly, there is a requirement of intent to commit one of the mentioned crimes. Adam specifically stated that the intent was to shoplift cigarettes. This is considered petty larceny as cigarettes are worth \$650 or less. Therefore, both Adam and Bill would be criminally liable for burglary.

Aggravated Assault- (specific intent crime) Aggravated assault in NV, is defined as the intentional placement of another in fear or apprehension of imminent harm with a deadly weapon; or attempted battery with a deadly weapon. Here, Adam upon entering the store, yelled out "No body move and no body gets hurt" as he pulled out his gun. For assault to be evident, the victim must actually be able to witness the threat. Here Carl, saw the two enter and it's reasonable to confirm that he heard the statement as he began reaching for something under the desk and stopped when Adam threatened him once more. As such Adam would be criminally liable for aggravated assault, and Bill would be as well under the doctrine of accomplice liability.

Attempted Robbery- (General Intent) Attempt (specific intent) is the steps taken in furtherance in the commission of a crime, mere preparation is not enough. Robbery is the trespassory taking of property, from another, with the threat of physical force to the person. Here, Adam took the steps to further his commission of a robbery by entering the store, yelling at Clark not to move, and brandishing a gun. Robbery did not occur though, as the facts do not indicate that either Adam or Bill were successful at taking any property with them as they ran away at the first sign of police. Therefore, Adam would be criminally liable for the attempted robbery, and Bill would be as well under the doctrine of accomplice liability.



**JULY 2019  
EXAMINATION ANSWERS**

**APPLICANT'S ANSWERS TO QUESTIONS  
NEVADA BOARD OF BAR EXAMINERS**

**QUESTION 8**

## Exam Information

Exam Date: 7/2019

Exam Name: Question 8

**\*\*\*\*\* Question 8 STARTS HERE \*\*\*\*\***

As this action is before Nevada state district court, the nevada rules of evidence govern.

Overarching to each of these offered pieces of evidence is whether they are relevant, which is defined as being probative and material. Probative evidence tends to make the purpose for which it is asserted more true than absent the evidence, while material evidence means it is of consequence in the case. Just because evidence is relevant, however, does not mean it is admissible. As a general rule, its probative value must also not be substantially outweighed by its prejudicial effect.

#### 1. Photocopy

At issue is whether the photocopy of the PSA is admissible. The PSA is at issue in this action and therefore relevant. Moreover, there is nothing prejudicial about it.

A PSA is a form of documentary evidence and therefore must be properly authenticated in order to be admissible under the nevada evidence rules. A document can be authenticated in numerous manner depending on the type of document. As a contractual agreement, the document's authenticity may be satisfied by testimony by a person with personal knowledge of the document. Gemma, as a party to the contract, would be able to thus authenticate it.

Here, however, the concern is that the document is not the original but rather a photocopy. This conceivably can raise concerns both for authentication, as well as the "best evidence rule," which requires the original document to be produced when testimony is relying on the contents of the document, or else the document's contents are reasonably in question. Photocopies as a mechanically produced an reliable duplicate constitute the original document for the purposes of these rules. Whether Gemma "misplaced" the original would only come into play to the extent Liam challenged the accuracy of the photocopy (e.g. was it tampered with, is it a different contract altogether, etc.). Moreover, the mere act of misplacing the original does not diminish the legal effect of the underlying document. In this case, there are no facts indicating Liam disputes the contents of the duplicate of the PSA. Liam's objection should therefore be denied.

#### 2. Testimony from the Ranch Foreman

At issue is whether the Ranch foreman's testimony is admissible. Gemma seeks to introduce evidence that, after the PSA was signed, Liam instructed the Ranch foreman to stop providing supplemental feed to the grazing cattle. This testimony is relevant to whether Gemma obtained the bargained for promise, and it is not prohibitively prejudicial.

The larger concern is whether it is admissible under hearsay. Hearsay is an out of court statement by a declarant offered to prove the truth of the matter asserted. In order to protect the judicial efficacy of trial, nevada law (and elsewhere) typically prevents hearsay statements from being admissible. There are exceptions to this general rule, however.

Here, the Ranch foreman's testimony would not fall under hearsay because Liam's instruction is a party opponent admission. Under the party opponent admission rule (which is categorized as not a hearsay statement), courts may admit statements made by the opposing party to the instant action. These statements can either be express or adoptive depending on the circumstances. Per the facts, Liam was the one directing the foreman to stop feeding the cattle. This would therefore be a party opponent admission and admissible. Liam's objection should therefore be denied.

Even to the extent party opponent admission did not apply, however, Gemma could argue that the statement constitutes a statement against interest because it is a statement made that a reasonable person would not make unless it were true because of the implicating criminality of the statement. In Nevada, these statements also extend to those that would be demeaning or publicly ridiculed. As not feeding cattle might implicate some criminal liability for animal abuse, this statement might facially fit the exception. Statements against interest are only admissible if the declarant is unavailable at trial, however, and there is no indication that is the case here.

### 3. Testimony/Documents re: tax evasion

Prior acts are inadmissible to show that a person acted in accordance with those prior acts. If Gemma were to offer these as "propensity," then the court should sustain the objection in favor of Liam. Prior acts may only be admissible if they go to an essential element of the claim or are offered for non-propensity purposes (e.g. motive, intent, absence of mistake, identify, common plan). Here, instances of tax evasion cannot come in to show that Liam broke the contract agreements here.

They may be able to come in, however, as impeachment evidence to impeach the credibility of the witness. In Nevada, evidence of prior crimes concerning fraud or deceit are admissible for impeachment purposes subject to the standard probative value test. The problem with Gemma's evidence is that it is not a conviction, but rather Liam's ex-wife's own testimony/documents regarding purported tax evasion. Admissibility must be shown by a preponderance of the evidence to the judge, and that is not satisfied here.

The documents do contain relative and probative material regarding Liam's misrepresenting of the inventory of cattle, however. As this is a central issue in the case, this portion of the documents (without the tax evasion) could be potentially admissible. Liam may object under the rule of completeness if in fairness the documents should be considered in their full context, but that does not seem at issue here. Regardless, for the purposes currently offered, the judge should sustain Liam's objection.

One final wrinkle is that Liam could argue his ex-wife cannot testify against him because of privileges. There are two privileges in Nevada regarding spouses -- spousal privilege and marital privilege. For both, the statements must have been made and concerning the period of marriage. Here, it does not say when the purported tax evasion occurred, but that fact could be dispositive of privilege.

Additionally, the testifying spouse holds the privilege and therefore Liam cannot prevent his spouse from testifying. With respect to marital communications, the tax evasion documents are unlikely to be considered statements made "in the sanctity of marriage."

### 4. Recorded Deed

The recorded deed is relevant to this case because it shows that Liam sold upstream water rights that then resulted in "very little water" flow for Gemma despite Liam's prior representation. Additionally, nothing about the evidence is innately probative.

As to admissibility, recorded deeds are self-authenticating official documents and therefore may be admitted even absent additional foundation. As discussed above, as a copy, it will be treated like the original absent additional contesting. To the extent any foundation is required, a statement by the record clerk would authenticate. The deed additionally falls under the public records hearsay exception. Liam's objection should therefore be denied.

### 5. Gemma's Accountant Testimony

Gemma seeks to introduce testimony from her accountant regarding lost profits due to the number and condition of cattle. Nevada recognizes a client-accountant privileged relationship. As Gemma holds the privilege, however, she is entitled to have her accountant testify in that respect.

As to the contents regarding lost profits, such testimony would appear to implicate skill beyond mere observation of a lay person. Thus, the accountant would need to be admitted as an expert in order to testify. To determine expert qualification, the judge looks to (i) the experience, skill, education, specialized knowledge, etc. of the witness; (ii) whether they relied on sufficient data; (iii) whether they used scientifically recognized methods and principles; and (iv) whether they applied those principles to the facts of the case. This determination is made by the judge and must be shown by a preponderance.

Here, the accountant likely meets all these requirements as a professional in his field. Notably, the facts indicate that he relied on the data (lost profits/condition of cattle) in calculating the damage. Liam could argue that the lost profits are too speculative, but that would be unlikely to prevent admission of the evidence on direct. Liam's objection should therefore be denied.

#### 6. Email Printouts

These emails are relevant to show that Niles breached the contract and are not probative. Email printouts are documentary evidence. As documentary evidence, they must be authenticated. Mechanically printed out copies of the emails will be treated as appropriate duplicates (and thus as originals). Moreover, Gemma may testify as to their authenticity. Also, the emails contain Niles' digital signature and therefore are self-authenticating. Niles may argue the printouts are barred by parole evidence, but evidence of contract formation is not prevented under this theory. Niles' objection should therefore be denied.

#### 7. Offer to sell to another for 20k

Testimony from the real estate developer regarding Niles' purported offer to sell the small pond for 20k is likely inadmissible. Although the statement to the receptionist would be a party opponent admission, the receptionist is not the one being offered to testify. Rather, the real estate developer is the one testifying. Each layer of hearsay must fall into an appropriate exception. In this case, the real estate developer relaying what his secretary told him would not fall into an exception, unless he observed/heard the statements personally.

Moreover, it is questionable whether the evidence is relevant. At issue is the breach of the agreement with Gemma. Niles argues that there is no contract because no agreement was signed in accordance with the statute of frauds for the sale of real property. The fact that Niles offered to sell the property to someone else for 20k later thus does not inherently show that Gemma breached.

Gemma can argue, however, that the 20k shows a motive for Niles to repudiate the contract (because of the better price). This is a strong argument, as prior acts are admissible to show a party's motive. Absent the hearsay issues, this evidence could come in. As is, the objection should be granted.

#### 8. Satellite Photo

The satellite photo is documentary evidence and therefore must be authenticated. It is relevant because it shows the at-issue property, and is not prejudicial. The satellite photo came from the county website. A court may take judicial notice of facts whose truth is not in question and can be readily verified. Courts in Nevada have extended this to documents. Thus, the court may (on its own or upon request) take judicial notice that the satellite images come from the official county website and therefore are proper adjudicative facts to take notice of. In addition, the photo may be authenticated using the internet time-capsule preserver, which has been recognized for producing admissible forms of internet pages. If Niles has the photograph itself, then this may be authenticated by anyone with personal knowledge that it is what it purports to be. Niles' objection should therefore be denied as to this evidence.

\*\*\*\*\* Question 8 ENDS HERE \*\*\*\*\*

**EXHIBIT 5**

A scientifically rigorous comparative analysis between the model answers and Petitioner's answers in relation to the questions.

Submission of this evidence is pending, as Petitioner is pressured for time to submit this filing, and such an analysis takes time to compose. Petitioner requires more time to submit this evidence. Typically, this is the type of evidence that can be presented by expert witnesses at trial, and litigants have an entire discovery process, and case proceedings to compile such evidence, as such an analysis has a heavy burden of production. Here, Petitioner is given a very small and limited amount of time to prepare this filing, so it is impossible to include such evidence in the same time as this initial filing.