

FEBRUARY 2016

EXAMINATION DAY 3;

QUESTION NO. 1: ANSWER IN PURPLE BOOKLET

During its most recent session, the Nevada Legislature passed the following bills that were signed by the Governor:

1. Assembly Bill 1 requires state agencies to purchase computer software only from companies whose technical support services are located in Nevada. During budget hearings, legislative committee members heard extensive testimony from state officials about problems with their agencies' computer programs. The officials testified that because most of the software was purchased from out-of-state companies, there were lengthy delays before the companies addressed the problems. The delays disrupted the work of agency personnel and were inconvenient to Nevada residents who interacted with the agencies.

2. Assembly Bill 2 amended the qualifications for certification of court reporters working in Nevada to require that each applicant: (1) be a United States citizen, and (2) successfully pass an examination that tests the applicant's knowledge of legal terminology.

3. Assembly Bill 3 provides students in Nevada public schools with the option of attending a half-hour of instruction each week in yoga poses and silent meditation as part of the school district's prescribed physical education curriculum. There was extensive testimony from bill supporters regarding the spiritual aspects of yoga and its benefits in combatting childhood obesity, calming aggressive children, and reducing injuries by increasing flexibility.

Fully discuss the arguments that may be raised with respect to the validity of each law under the United States Constitution.

Exam Day 3, Q1

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1)

Question 1 Con Law

States may pass laws that do not interfere with the peoples' rights under the United States Constitution, or its own constitution. When states pass laws, they are subject to review under different levels of scrutiny depending on what type of law or restrictions are passed and who or what right is affected. The levels of scrutiny are strict scrutiny, intermediate scrutiny, and rational basis, and each has a different way of reviewing the suspect laws.

1. Assembly Bill 1

Standard of Review

States are not allowed to pass laws that prohibit or demean interstate commerce. This is known as the dormant commerce clause when states interfere with interstate commerce when they pass laws that restrict purchases to vendors from within the state. The law will be reviewed under intermediate scrutiny, which means the law must be substantially related to an important state interest.

Analysis

The state interest here is to ensure the state agencies have access to tech support so

the agencies can better serve their clientele, the taxpayers of the state and others. However, the availability of tech support locally does not guarantee the support will be received more timely than if it is located elsewhere. This law also violates the Constitution because it would prohibit doing business with foreign countries that have tech support centers. Here, the law would unjustly prohibit state agencies from purchasing computer software from companies that don't have technical support in Nevada, and this would be deemed unconstitutional.

Conclusion

It will be likely held that AB1 violates the Commerce Clause and found unconstitutional, and struck down.

2. Assembly Bill 2

Standard of Review

The standard of review when states use alienage as a determining factor is more strict than when the federal government considers alienage. When states consider alienage as a qualification for a job, the procedure and requirements, the standard of review is strict scrutiny.

Here, AB2 amended qualifications to require applicants be a US citizen and pass a knowledge of legal terminology test to be a court reporter in Nevada, therefore,

because whether or not a person is a US citizen is a determining factor, the standard of review is strict scrutiny. The additional portion of the law was to pass an exam that shows the applicant's knowledge of legal terminology, and the standard of review for this portion is rational basis review because it does not fall in the categories protected under either strict scrutiny or intermediate scrutiny.

Analysis

When analyzing whether a law passes strict scrutiny, the courts will determine if the law is designed to substantially further a compelling state interest. States are allowed to restrict non-citizens from jobs that are designed to teach our children about our nation and its political views, as well as certain jobs that protect people from other dangerous people, such as probation officers and cops. The job of a court reporter is to record information that is stated during legal proceedings, and there is nothing to indicate there is a need for this job to be done by a citizen to protect any specific interests. Because this job is a mere recording of information, and not influencing nor protecting people, there is no compelling interest that the state is trying to further, and this portion of the law should be struck down.

When analyzing whether a law passes a rational basis test, the courts determine if the law is rationally related to further a legitimate state interest. Here, the knowledge test requirement to be a court reporter is related to the job because if a court reporter does not know any legal terminology, there may be errors in the reports because some of

the words are Latin, and others are just obscure and not used in every day speech. Therefore, to help cut down on errors in reports of legal meetings, an applicant should have knowledge of legal terminology, and this is related to the states interest in efficiency in its courts. Therefore, this portion of the law does not violate the US Constitution and should be allowed to stand.

3. Assembly Bill 3

Standard of Review

The First Amendment of the US Constitution prohibits government from passing laws that interfere with or proscribe religion, known as the Establishment Clause. Public schools are considered government actors because they are funded by taxpayer dollars, therefore this law is subject to review with the schools being deemed a government actor. The issue of whether a proscribed amount of time constitutes a religious practice has been reviewed several times by the Supreme Court. The test used to determine if a law violates the First Amendment is the Lemon test, and the elements are:

1. Secular purpose-- the law must be passed for a secular purpose;
2. The law must neither advance nor prohibit religion; and
3. Excessive entanglement-- there must not be excessive engtangement with the government.

This law will be analyzed under this Lemon test.

Analysis

There have been cases where schools had a moment for optional prayer during school, and these were deemed to violate the First Amendment because there was an advancement of religion and excessive entanglement with the government, because public schools are government actors, and children are very susceptible to what they are told because their minds are young and open to new things.

Secular Purpose

The law as written is to combat childhood obesity, calm aggressive children and increase flexibility to reduce injuries, and based on the face of the law appears to pass the secular purpose test. However, it may be argued that the purpose is not secular because there was extensive testimony that there are positive spiritual benefits to yoga, which seems to be more religious in nature. However, this argument will likely fail because the law was written to include only 'yoga poses and silent meditation', so it will be likely found the law passes the first prong of the Lemon test.

Enhance or Prohibit Religion

The law does not explicitly mention religion, however, periods of meditation may be

construed as religious. This argument will likely fail, because the testimony shows the physical benefits students will get from both the yoga and meditation, and therefore this law will likely pass the second prong of the Lemon test.

Excessive Entanglement

Here, the law states there is an option to attend a half hour of instruction per week, but it would also be part of the prescribed physical education curriculum, so there is definitely government entanglement because schools are government actors. While it may be argued that government is excessively involved in religion, this will likely fail because the instruction period is only 30 minutes per week, which is a small amount of time considering school children are at school 30-35 hours per week. Therefore, this law will likely pass the third prong of the Lemon test.

Conclusion

Based on the fact that the law will likely pass all three prongs of the Lemon test, AB3 does not violate the US Constitution and should be allowed to stand.

END OF EXAM

FEBRUARY 2016

EXAMINATION DAY 3;

QUESTION NO. 2: ANSWER IN YELLOW BOOKLET

Abe, a former Deputy District Attorney with the Carson City District Attorney's Office, recently started his own law practice. To attract clients to his new practice, Abe sent out a mass mailing to all Carson City residents stating in its entirety:

**Abe, Attorney at Law, is a Nevada licensed attorney
and a former Deputy District Attorney.**

ABE KNOWS ALL THE RIGHT PEOPLE TO GET YOU THE BEST RESULT!

Give Abe a call today at 555-123-4567 for a free consultation.

Dan receives one of Abe's mailers. Dan's adult son, Samuel, is in jail awaiting trial on charges of robbery with the use of a firearm and conspiracy to commit robbery with the use of a firearm. Dan contacts Abe's office to obtain legal representation for Samuel. Dan informs Abe that the charges are bogus because his son did not intend to steal anything. According to Dan, his son was duped by his hooligan friends into holding the gun while the friends committed the robbery. Dan tells Abe that Samuel wants to enter a plea deal, but Dan wants the case to go to trial so Samuel can be proven innocent. Abe tells Dan he will take Samuel's case to trial if Dan will pay his attorney's fees and costs associated with the representation, in addition to a \$100,000 non-refundable retainer. Dan agrees to Abe's terms and pays the \$100,000 non-refundable retainer. Abe deposits the retainer into his client trust account.

As a result of the positive response to the mass mailing, Abe hires Lucy as his assistant to help him with his caseload. Lucy is not an attorney. Abe borrows \$2,000 from his client trust account to purchase a computer for Lucy to use in the office. Abe executes a promissory note in favor of the client trust account agreeing to pay back the amount borrowed, with interest at an annual rate of 12%, until the outstanding balance is paid in full.

Abe instructs Lucy to meet with prospective clients and have each prospective client sign a representation agreement before Abe begins working on the client's case. Abe tells Lucy he will give her a \$100 bonus for each signed representation agreement she procures. Abe fails to instruct Lucy to check the firm's client list before having the prospective client sign a representation agreement.

Frank contacts Abe's office seeking legal representation. Per Abe's instruction, Lucy meets with Frank. Frank tells Lucy he has pending felony charges and needs a good criminal defense attorney. Lucy assures Frank that "Abe is the best criminal defense attorney in Nevada" and hands him a representation agreement that Frank signs. Shortly thereafter, Abe begins working on Frank's case and discovers that Frank is one of the co-conspirators in the robbery charges pending against Samuel.

Fully discuss all ethical issues raised by Abe's conduct.

Exam Day 3, Q 2

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2)

Question 2 Ethical Issues

1. Competence

A lawyer has a duty to clients to provide competent representation, and there must be sufficient knowledge, thoroughness and preparation to represent the client in the issues presented. Here, Abe (A), is a former Deputy District Attorney, but there are no facts as to how long A was at the DA's office, and if A specialized in particular types of cases. Therefore, if A never did criminal defense, and now is offering to represent a client and defend against criminal charges, A must either get the knowledge by learning, without excessively charging the client, or associate with another attorney knowledgeable in this area of law. While it is possible A has experience defending clients, it is just as likely he does not, and A must be certain to become knowledgeable to competently represent clients or may face sanctions under the Nevada Rules of Professional Conduct (NRPC).

2. Advertisements

Lawyers may advertise for services provided they follow the rules in NRS that govern the information allowed. A lawyer must include the name and address of the lawyer on any mailers, as well as include "This is an advertisement" in red font, large

enough to be obvious to the reader. The flyer must also be sent to the Nevada Bar within 14 days, and kept on file for 4 years. Here, the flyer A sent out only had his first name, no address, and no disclaimer that the flyer was an advertisement, and there are no facts indicating A sent a copy of the flyer to the Nevada Bar, therefore A is liable for sanctions for the non-conforming advertisement.

Lawyers may not advertise using misleading information nor use comparative information that is not verifiable. Here, A's ad stated A knows all the right people, which can be considered misleading, and A could get you the 'best' result, which is a comparative term that cannot be verified. Lucy, L's employee, also told a prospective client that A is the 'best' criminal defense attorney, and A is responsible for his employees actions. Therefore, A has violated NRPC with the advertisement and is liable for sanctions.

3. 3rd Party Representation

A lawyer may allow a third party to pay for the representation of a client if the lawyer gets the clients informed consent, in writing, the third party does not interfere with the representation, and the information between the client and the lawyer remains confidential. Here, Dan (D), the father of Samuel (S), an adult, contacted A to represent S in a criminal defense case, and agreed, but A never spoke to S. Therefore, A never got consent from S, let alone in writing, and A discussed the case with D extensively without input from S. While it may be argued that S was not in a position

to contact A directly because S was in jail, A could have gone to the jail to confer with S and get S's consent, in writing, for the representation. Therefore, A violated this rule, and is subject to sanctions.

4. Scope of Representation

During a legal representation, the client decides matters such as whether to settle, enter in to a plea bargain, or waive a jury trial, and the lawyer decides how to accomplish these objectives and must abide by the clients wishes provided they aren't illegal. Here, A (improperly) spoke with D, and was aware S had told D he wanted to enter a plea, but D wanted the case to go to trial, and A went against S's wishes and went with D's wishes, which is a direct violation of both Confidentiality and Scope. While it may be argued that A and D know better about what should be done for S, S is an adult, and there is no mention of any incompetency or deficiency where S cannot make sound decisions, so this arguement will likely fail. Therefore A is subject to sanctions under NRPC.

5. Fees

A. Unreasonable

The fees that a lawyer charges must not be unreasonable. Here, A charged S/D a retainer fee of \$100,000 in addition to fees and costs for the representation, which

seems unreasonable for the charges of robbery with the use of a firearm and conspiracy, and considering S did not want to go to trial and wanted to enter a plea. These fees were not stated with any specificity, either, which fee agreements are required to indicate how fees will be charged. While it is not required that agreements be in writing, the client must still be apprised of how fees will be charged, at what rate, and what types of costs to anticipate, and none of those things happened here, therefore A is in violation of NRPC and subject to sanctions.

B. Fee splitting

A lawyer shall not split fees with non-lawyers unless they are the heirs of a deceased lawyer/partner or bonuses or salary for employees. Here, A was giving his assistant, Lucy (L), a non-lawyer, bonuses for each signed representation she procures, which sounds more like a referral fee than a bonus, and therefore A is liable for sanctions for improperly splitting fees with a non-lawyer. A may argue they were bonuses, but the amount is a fixed rate per transaction, and appears to be more of a referral fee, therefore this argument will likely fail.

C. Retainers

A retainer must be reasonable and refundable to the client in case the client fires the lawyer or the lawyer must withdraw. Here, A's retainer was non-refundable, which violates this rule, therefore A is liable for sanctions under NRPC.

6. Unauthorized Practice of Law

A lawyer shall not participate in the unauthorized practice of law (UPL), nor shall he allow employees or people he supervises to participate in UPL. Here, A hired a non-attorney, L, and had her get clients to sign representation agreements before A met them, therefore L was determining fees and getting confidential information, which is UPL, and A is liable for sanctions and may be disbarred. While A may argue that L was merely filling out forms he had previously reviewed, the facts do not state this, and the argument will likely fail.

7. Fiduciary Duties

A lawyer owes his clients a fiduciary duty to handle client funds in a trust account for representation purposes and costs related to same. Here, A improperly borrowed funds from the client trust account to purchase a computer for the office, which is in direct violation of the rule, and A is liable for sanctions. Additionally, A executed a promissory note, and A may argue that was to protect the amount of money he borrowed, but this is still a violation and A will be sanctioned.

8. Conflicts

A. Due Diligence

A lawyer shall investigate whether there are any conflicts with current or former clients prior to representation. Here, did not tell L to check the firms client list for conflicts, and A did not check, either, therefore A violated NRPC and is liable for

sanctions. A may argue that the number of clients was too small to make a difference, but, it did cause a conflict with a new client, therefore the argument is not valid.

B. Concurrent Clients

A lawyer shall not take on new clients if it will substantially interfere with a current representation. Here, A ended up taking on one of S's co-conspirators, Frank (F), which is in direct violation unless A got S's and F's informed consent in writing and could represent both of them adequately. Here, there was no consent from either party, and A cannot represent both S and F because S was going after F as forcing S to commit the crimes, therefore A violated NRPC and is subject to sanctions.

9. Former District Attorney

Former government lawyers have an additional duty to not represent clients that are related, substantially, to prior cases. Here, there are no facts to support what types of cases A had, prior, but A needs to consider this prior to taking on new representations or he may be liable for additional sanctions.

10. Confidentiality

A lawyer has a duty to not reveal any information about his client or case to other parties unless the disclosure has been consented to, is required by law, or is needed

for assistance on the case from another lawyer. Here, A spoke with D extensively about S's case without S's consent, there was nothing to indicate this disclosure was necessary, and this was not a conversation with an attorney, therefore violated the NRPC and is liable for sanctions. While it may be argued that S was in jail, already awaiting trial, and there wasn't time to get to jail to see S, this argument will fail because there are no facts to indicate the trial was within the next few days, so A likely had sufficient time to see S.

END OF EXAM

FEBRUARY 2016
EXAMINATION DAY 3;
QUESTION NO. 3: ANSWER IN DARK BLUE BOOKLET

Mark, who was working as a foreman for a general contractor, entered into the following written contract with Steve: “Mark has the exclusive right to distribute and apply Steve’s EZ Apply Stucco in Washoe County, Nevada. Mark will pay Steve \$25,000 on signing and \$25,000 in six months. Steve does not guarantee his distributor’s profitability.”

Mark then quit his job and started a new business applying the stucco to the exterior walls of new homes during construction. Within months after the stucco was applied, it began to fall off the homes. The homeowners demanded that Mark fix the problems but he had no funds to do so and quickly went out of business. Steve then sued Mark in Nevada state court for the second installment due under the contract. Mark denied liability and filed a counterclaim for breach of contract and misrepresentation.

At trial:

1. Mark offered his own testimony that, during their negotiations, Steve insisted Mark would make a profit because Steve’s stucco is easier to apply and more durable than competing products. Mark also testified that Steve told him he would not have to pay the second installment if he was not making a profit. Steve denied making the claimed representations and insisted Mark was just trying to avoid paying what he owed under the contract. Mark offered his brother’s testimony that before the contract was signed, Mark told his brother about Steve’s representations. Mark offered his CPA’s testimony that Mark told the CPA the same thing at the time the second payment was due under the contract.

2. Mark offered the testimony of Bob, as an expert witness, regarding his claimed damages, including lost profits. Bob is not a college graduate and has no professional license, but has worked as a bookkeeper and financial advisor to several small construction companies for over twenty years.

3. Steve offered his expert's written report that had been timely produced, together with an affidavit from his expert authenticating his report and stating that he could not testify in person because he would be on vacation. The report stated that the stucco fell off the homes because it was not applied correctly. Steve also offered the transcript of his expert's deposition in a similar case where the expert opined that improper application was the problem. Steve's expert resides in Reno and is a well-respected construction expert in the community.

4. On cross-examination, Mark testified he could not recall what warnings his former employer gave him about the risks of starting a new business before he quit his job. Steve's lawyer then showed Mark a copy of an email that Mark received from his former employer before he quit his job that outlined those risks. Then, without offering the email as an exhibit, Steve's lawyer re-asked Mark the same questions about his former employer's warnings and Mark again said he could not recall. Steve then offered the email as an exhibit.

5. Mark asked the court to take judicial notice of the testimony of one of Steve's other distributors in a case that was being tried before the same judge. That distributor had testified that Steve made similar misrepresentations to him.

Address in full detail the evidentiary issues raised by the evidence that was offered at trial.

Exam Day 3, Q3

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3)

Question 3 Evidentiary Issues

1. Parol Evidence Rule

When a contract is fully integrated, conversations may not be used to change the terms unless there was a mutual mistake. Hearsay is an out of court statement by the declarant offered to prove the truth of the matter asserted.

Here, Mark is testifying, in court, that Steve (S) had told M he would make a profit, and would not have to make the second installment payment if M was not making a profit, but the written contract indicated, 'S does not guarantee is distributor's profitability.' M may argue that he didn't realize this would mean he would have to pay the second installment, based on conversations. M may also argue that M relied on this information and S materially misrepresented the information to M, so the contemporaneous statements should be allowed in as evidence regardless of the parol evidence rule.

If the court finds S did misrepresent material information when forming the contract, it may allow the testimony from both M's brother and M's CPA regarding the representation that M did not have to make the second installment payment if M was not making a profit. This testimony should therefore be admitted because of the material misrepresentations made.

2. Expert Witness Testimony

Expert witnesses are witnesses that have specialized knowledge or skill in a particular field or area, and the testimony an expert witness provides can be based on information learned during the trial. Here, M offered the testimony of Bob (B), a bookkeeper and financial advisor to small construction companies. S may argue that B is not qualified as an expert, because B does not have a professional license and did not graduate college, but, B has 20 years experience with construction companies, and the testimony is regarding claimed damages, including lost profits, so B has enough experience to offer relevant information to the court, and B will likely qualify as an expert witness.

3. Expert Witness Report

Hearsay

Hearsay is an out of court statement by the declarant offered to prove the truth of the matter asserted. Here, S offered a report written by an expert witness, which is hearsay unless it is a self-authenticating document, fits the business records exception, or there is another exception it falls under. Here, the report was authenticated with an affidavit, and therefore should be admitted. However, the report stated the the stucco was not applied correctly, but there was no other information to back up that claim.

This likely will be found not relevant because there were no facts to support the conclusion stated. Therefore, the report is inadmissible.

Transcript of Deposition

Prior testimony is admissible if it was made under oath, the witness is unavailable, the other party had a chance to cross examine the witness, and it was on the same issue. Here, the transcript S is offering in to evidence is from a deposition, which means it was made under oath, the witness is unavailable (see below), however, M did not have a chance to hear the testimony or cross examine the witness, and the case was similar, but not the same. Therefore, the transcript should not be admissible because it does not meet the exception of prior testimony.

Expert Witness

Expert witnesses are witnesses that have specialized knowledge or skill in a particular field or area, and their opinions are those that are founded on scientific bases or evidence and comport with other experts in the field. Here, the expert S offered is a well respected construction expert in the community where the controversy occurred, and should be considered an expert for the purposes of this case. Therefore, his testimony can be considered that of an expert witness.

Declarant unavailable

There are exemptions available if the hearsay declarant is unavailable due to privilege, incapacity, greater than 100 miles from the court, or has a lack of memory. If the declarant is deemed unavailable, former testimony may be admissible as non-hearsay. Here, the expert witness S offered is not available because he is on vacation and S may argue that the witness is more than 100 miles from the court, the witness is considered unavailable. However, S could request a different court date to have this witness in court, therefore the expert witness should not be considered unavailable, and his prior testimony should not be admissible.

Prior testimony

Prior testimony is admissible if it was made under oath, the other party had a chance to cross examine the witness on the same issue, and the declarant is unavailable. As previously mentioned, S offered a report from a witness that was on vacation, which does not meet the test of unavailability, therefore the prior testimony is not admissible as an exception, and should not be admitted in to evidence.

4. Recollection Refreshed/Recorded

Hearsay evidence will be admitted if the declarant is available, recognizes the material as having known about it when he originally read it, but can no longer recall the specifics of the content. Here, M was asked about an email his former boss sent to

him, but M did not recall the information, so S's lawyer showed M a printout of the email, but M still could not recall when he was asked again about the information.

When a witness has been shown a document and verifies it, but can't recall the contents, the document may be admitted in to evidence as a recorded recollection.

Here, M was shown the document, but never stated he had in fact received it, therefore M's memory was not refreshed, and the email should not be admitted in to evidence as an exhibit. While S may argue that M is lying, that is for the jury to decide.

Evidence is relevant if it will tend to prove or disprove a material fact. Here, on cross, M was asked about emails he had received regarding the risks of starting a new business, but there was nothing to indicate how this information was relevant to the case. S may argue that M was aware that starting one's own business is risky, but M's contention is that S made assurances and misrepresentations, and the email would not be relevant even if it were true.

5. Judicial Notice

Judicial notice is when a court enters in to the record information that is considered true without testimony, for example the information from an almanac. In a civil case, the jury must accept what the judge accepts but in a criminal case, the jury may accept what the judge has given notice to. Here, M's request to take judicial notice of prior testimony is an improper request, and should be denied, because the testimony should

be elicited directly from Steve's other distributors, or admitted as an exception to hearsay. Prior testimony is not the type of information to which judicial notice should be given, so M's request should be denied. M may argue that it should be allowed because this is the same judge, but that argument should fail, and the request be denied.

END OF EXAM

FEBRUARY 2016

EXAMINATION DAY 3;

QUESTION NO. 4: ANSWER IN LIGHT GREEN BOOKLET

Ann rented a Cut, Inc. brand saw from Nevada Saws, Inc. Nervous about using a power saw for the first time, Ann chose a saw located under a large manufacturer's promotional sign that read, "Safest saw on the market." At home, Ann commenced carefully sawing pieces of wood for a project. When the saw made contact with the last piece of wood, it recoiled causing Ann to fall with the saw. Ann suffered serious injuries.

One year before, Nevada Saws spoke to sales representatives of both Cut, Inc. and Edge, Inc. about their products. After the Cut representative told Nevada Saws its saw is the "safest saw on the market," Nevada Saws entered into a long-term contract to purchase Cut's saws, including the saw rented by Ann. The saw originally had a bright colored warning label affixed to it that read, "Brace for recoil during use!" After many rentals of the saw, the warning label fell off and was not replaced by Nevada Saws before the saw was rented to Ann.

Prior to selling the saws to Nevada Saws, Cut conducted a safety study. The study showed the model of saw sold to Nevada Saws, and rented by Ann, recoiled ten times more often than any other similar saw on the market. The study also established that, for a nominal cost, a plastic guard could be attached to the saw that would substantially reduce recoil. The saw was a top-seller, and Cut determined stopping sales to add the guard would cost the company too much money. Cut also determined the plastic guard was an unnecessary expense because the warning label attached to each saw was sufficient to protect consumers.

After Nevada Saws purchased the saw from Cut, Edge's sales representative contacted Nevada Saws and asked, "Did you know Cut uses child labor and has been selling you defective products?" Nevada Saws stopped placing monthly orders with Cut, and placed its next large saw order with Edge.

1. Discuss fully any claims Ann has against Nevada Saws.

2. Discuss fully any claims Ann has against Cut.

3. Discuss fully any claims Nevada Saws has against Cut.

4. Discuss fully any claims Cut has against Edge.

Exam Day 3, Q4

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Question 4 Claims

To prove a prima facie case of negligence, a plaintiff must show the defendant had a duty of reasonable care, the defendant breached the duty of care, there was both actual and proximate cause, and the plaintiff suffered damages from the defendant's breach. If there is an issue of strict liability, the plaintiff need not show a duty of reasonable care, because the defendant is deemed to breach the duty of care if there are damages caused by its product.

1. Ann v Nevada Saws

N owed A a duty of care to provide her with a product that was safe and information on how to operate the product. Here, there had been a warning label on the saw that Ann(A) had rented from Nevada Saws (N), but it had fallen off and not been replaced by N, therefore N breached its duty of reasonable care by not replacing the label prior to A renting the saw. Had the label been on the saw, A would have likely read the label, because the facts indicate she rented the saw after reading the promotional sign, therefore we know she can read, and the warning label was brightly colored, which would catch her attention on a power saw. The cost to N to affix a new label to the saw was nominal, and this might have prevented A's serious injuries, therefore N was negligent in not replacing the missing label. N may argue it was C's responsibility to

check for labels, however, that argument will likely fail because N was the retailer, and the retailer has the responsibility to check for items such as warning labels.

Additionally, since this was A's first time using a saw, and she was nervous, that would make her more likely to read any product information or warning labels available to her. The lack of a label warning of recoil is the cause of A's serious injuries, therefore N was negligent and should be held liable. N may argue that it was A's inexperience that caused A's injuries, however, A cut through several pieces of wood, and it wasn't until the last piece that she experienced the recoil and got injured, so that argument would likely fail. Additionally, when a store rents a dangerous piece of equipment, you would expect the store to explain the inherent dangers or at least ask if the renter has previously used this type of equipment before, and then explain the best ways to be safe. N was negligent and A should prevail in a negligence claim against N for failing to check the rental equipment for the appropriate warning labels.

2. Ann v Cut

A manufacturer of dangerous products has a duty to create the product in a safe way to prevent injuries. If the cost to make a dangerous product safer is nominal and the company is aware of the possible change, then the company has a duty to make the change so there are less injuries. Here, C was aware that it could attach a plastic guard

to the saw that would substantially reduce recoil, and the cost was nominal, but C chose not to add the guard, and therefore breached its duty of care by not making the product safer. A's injury was due to the not safe action of the product, recoil, that could have been prevented by the installation of the plastic guard, therefore C is liable to A for the injuries she sustained using their product. C may argue that the warning label it had originally attached to the saw was no longer attached, and blame N, but, C will not win this argument because the product could have been made safer at a nominal cost to the manufacturer. N may share in the blame, but C could have made the product safer.

Additionally, there was a manufacture's sign in N's store that the saw was the safest saw on the market, and A relied on that information when she rented the sign. Had the sign not been there, A may have chosen a different saw and not been injured at all. Therefore, A's reliance on the material misrepresentation about the saw's safety was a factor in her choosing the saw, and C should be liable for the false representations that it made regarding safety, and be liable for punitive damages to A in addition to pain and suffering.

3. Nevada Saws v Cut

C had a duty to not falsely advertise the safety of its saws. When a sales representative speaks to potential clients, they may not lie about the safety of an inherently dangerous piece of equipment to make the sale. Here, C had conducted a

safety study that showed that the model saw that A rented recoiled 10 times more often than any other similar saw on the market. C breached this duty by telling N it was the safest saw, knowing that it was not the safest and in fact was an unsafe saw because it recoiled 10 times more often than other similar saws. N relied on this information and posted C's promotional sign that read the sign was the safest, A relied on that representation, and was harmed. N will be liable to A, and N may want to hold C responsible for the damages. Therefore, the sales rep's statement to N that the saw is the 'safest saw on the market' was not true, and that was a material misrepresentation, and N will prevail in a claim of misrepresentation of a material fact that caused harm.

4. Cut v Edge

Intentional Interference

Intentional interference in a contract is when one party gets in the way of contractual duties or promises that another party currently has in place. Here, N had contacted both C and Edge (E) in regards to purchasing saw, and N had entered in to a long term contract with C after the conversations. After the contract was formed, E contacted N and told N that C uses child labor, and sold defective products, which caused N to stop placing the contract orders with C, and placed an order with E, instead. Therefore, E's statement to N caused N to breach the long term contract, and E intentionally interfered with the existing contract, and is liable to C for damages

such as lost profits and compensatory damages.

Defamation

Defamation is the use of untrue statements, published to a third party, and damage is caused. Here, E stated to N that they use child labor and sell defective products, then N stopped ordering from C, which is a damage to C. There are no facts concerning whether E's statement to N regarding child labor is true, but, it concerned E's business, and caused damage, therefore it is slander per se, because C's business reputation was harmed. Unless E has facts that show there is actual child labor as a means of a defense, E is liable to C for this defamation.

END OF EXAM