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Appendix C: Hunting and Gathering on the Legal Information Savannah

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Appendix C – Twelve problems

1. ERISA PROBLEM

A large corporation has a retirement and health plan for its employees that includes a long-term disability benefit. The plan is governed by ERISA. One of the corporation's employees has claimed a disability. The employee has already been determined to be disabled, and has been approved for payment. However, the employee has returned the last few checks that have been sent to him, The returned checks are always in a new envelop, and were sent directly back to the HR Department. What are the corporation's obligations regarding these returned payments?

The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law that sets minimum standards for most voluntarily established pension and health plans in private industry to provide protection for individuals in these plans.

2. Oil & Gas Problem

Onshore leasing of federally-owned oil and gas is governed by the Mineral Leasing Act of 1920 ("MLA"). 30 U.S.C. §§ 181-287. Under the MLA, oil and gas leases on federal lands are effective for a primary term often years and so long thereafter as oil or gas is produced "in paying quantities." *ld.* at§ 226(e). However,§ 39 ofthe MLA authorizes the Bureau of Land Management ("BLM") to grant a lessee a "suspension of operations and production" on an oil and gas lease, and thereby extend or toll the term of a lease for the length of the suspension period. *Id*. At § 209.

We are concerned that the BLM has been (1) generously granting lease suspensions and (2) not terminating or lifting suspensions when the circumstances that originally justified the suspension no longer exist. Millions of acres of federal oil and gas leases are currently under suspensions, and, in some cases, suspensions have been in plBird for decades. In part, this concerns us because the presence of oil and gas leases, even leases out of production, can prevent the BLM from otherwise designating public land for alternative uses, including recreation and conservation. In light of our concern, please answer <u>at least one</u> of the following two research questions:

(1) When does the BLM have discretion to reject a suspension request under§ 39? Is the BLM ever required to grant a suspension request under§ 39?

(2) Do lease suspensions under§ 39 ever terminate automatically, by operation of law? And, specifically, do suspensions terminate by operation of law when the circumstances that originally justified the suspension no longer exist?

In addition to traditional sources of authority, be sure to consider any relevant case law from the Interior Board of Land Appeals ("IBLA") as well as any guidance provided by agency manuals

3. Real Estate - Agency

Our wealthy client, X and his wife are in the market for a new home. Because X is a real estate tycoon, he has decided that he does not need to be represented by a real estate agent. He also hopes this arrangement will let him to discount his purchase offer by 2.8%, since there would be no buyer's agent to be paid the customary 2.8% co-op commission by the listing agent. On April 4, X received an email alert from zillow.com with a new listing in Cherry Hills that matched all of X and his wife's requirements and he scheduled a visit with the listing agent for 4:00 p.m. later that day.

The home exceeded their expectations and they knew they would have to make an aggressive offer immediately, due to the fact that available homes in their price range are few and far between in the current sellers' market in the Denver area and it is well known that competition is spirited for any home that hits the market. When they finished touring the home, they advised the listing agent of their intention to submit a full-price offer, with no contingency for selling their current home, and the agent told them that he expected that the sellers would accept their offer. The agent then insisted that he act as a Transaction-Broker for the deal, so he could orchestrate a deal more effectively. In return, he would split equally the co-op commission that would have otherwise gone to a buyer's agent.

This arrangement would mean that the agent would keep half (1.4%) of the co- op commission, and the Poles would receive either a 1.4% reduction in the purchase price, or a 1.4% credit toward closing costs, whichever they preferred. Because they believed that the agent's demand was non-negotiable, X and his wife signed the standard Colorado Real Estate Commission-approved Exclusive Right-to-By Listing Contract, which designated the listing agent as a Transaction-Broker and contained, under Section 19 ("Additional Provisions"), dle split-commission concept described above *(see* embedded link for the blank form below). X and dle listing agent then collaborated on the contract offer, which was for the sellers' full asking price. However, the Poles' offer included the sellers' high-priced home theatre system, which was shown as an exclusion on the MLS listing. At 6:30p.m., the Poles submitted the contract offer, which gave the sellers an acceptance deadline of
9:00 p.m. that same evening.

By 9:05p.m., X and his wife had heard nothing from their agent and X emailed him for an update. Worried about competitive bids, X asked the agent whether any other offers had been submitted or would be forthcoming in the near future and the agent responded that no other offers had been received and none were expected. He advised X that the sellers were away at a party that evening and had informed the agent that they would review X's offer the following morning, notwithstanding the 9:00 acceptance deadline. At 10:30 Sunday morning, the agent emailed X to notify him that the sellers had accepted a higher offer. Enraged, X emailed the agent and asked how they could have been outbid, since the agent had told X just 13 hours earlier that he knew of no other impending offers. The agent replied that because X and his wife had included the sellers' prized home theatre system in their offer, the sellers had told him on Friday night that they were disappointed, but would wait until morning to make a final decision. He added that "[u]ltimately other offers came in and I was obligated to present all offers as they come in. One of them happened to be better than yours."

X is furious, especially since no other homes in his price range have come on the market and he wants to know if he and his wife have any remedies against the agent under Colorado law.

4. America Invents Act

Intro: Client is concerned that the on-sale bar might apply under the America Invents Act (AlA). Relevant Facts: The client developed technology relevant to peer-to-peer device discovery and communication (the type of communications used, for example, for a smartphone to communicate with a television directly without going through a wireless router). One specific invention relates to reducing power consumption of device discovery communications. At a technology conference in January of 2014, the director of engineering of the client encountered the VP of product development for a smartphone and wearable device manufacturer. The director of engineering discussed the technology with the VP in some detail, including the potential power savings, but not the specific patentable features that enabled the reduction in power consumption. The director of engineering indicated that the features would not change the product price. Because of initial discussions between the client and manufacturer related to prior products, the client had a non-disclosure agreement (NDA) with the manufacturer that covers the product line as well as improvements. However, the NDA had an express term that expired in February of2014.

Background: The AlA was passed in 2011 and modified the scope of prior art relevant to patentability, effective as of March 15, 2013. The relevant parts of the statute include 35 U.S.C. § 102(a) and § 102(b), which include a bar to patenting of an invention that was "on-sale" more than one year prior to the effective filing date (which would be today in this case). The pre-AlA on-sale bar applied to so-called "secret" sales, but the Patent and Trademark Office has concluded that the AlA on-sale bar only applies if a sale or offer for sale is "public," *i.e.,* is not among individuals "having an obligation of confidentiality to the inventor." Manual of Patent Examination Procedure § 2152.02(b).

What is the relevant law that applies to the clients situation, and analyzes whether the on-sale bar might apply. Specifically, I believe that the discussion of the invention with the VP, even if rising to the level of an offer, would not, at the time of the discussions, be considered a "public" sale because it occurred under the NDA. However, because the NDA expired more than one year before the effective filing date, I believe a dispositive issue is whether the expiration of the NDA triggered the start of the grBird period for the on-sale bar. If, based on your research, you believe that any other issues are relevant or dispositive, feel free to include a discussion of the relevant issue. Where you can make a firm assertion that certain factors will or won't apply under the law, please do so. Where certain factors may be important but we do not have enough information to go on, please indicate what facts would be dispositive, if possible. If important, please assume that Colorado law applies.

5. Psychotherapist Confidentiality

I have just been contacted by one of the University counseling center's directors. She asked me about the confidential nature of students' treatment records, which are essentially the counseling center's medical file for a student-patient. These records are made by a recognized professional psychotherapist, are made, maintained, and used only in connection of treatment of the student, and are disclosed only to other treatment providers. I have a telephone conference with her at 4:30 today, and I'm hoping you can provide me with a memo that briefs me on the legal framework for this issue. Specifically, can you answer the following questions?

1) Is there a statutory ethical responsibility for psychotherapy that addresses confidentiality?

2) It's been a few years since I took evidence in law school, but I seem to remember a psychotherapy privilege applicable in litigation. Is that correct, both for state and federal? What is it? Who does it cover? What is its scope?

I know that the State of Woodward is new, but our state laws are identical to the state of Colorado, so please focus on Colorado for the state analyses.

6. Disability Discrimination

I have recently consulted with a client who is interested in pursuing a claim of disability discrimination against her former employer. We have discussed the strengths and weaknesses of her case and, as a firm, decided that we are not willing to represent her in litigation because of the vulnerabilities of her case. The client has requested an opinion letter explaining this in more detail.

The relevant facts are as follows: for 2 ½ years, the client worked as a physical therapist assistant (PTA) for a health care company that sends physical therapists, PTAs, and other medical providers into the homes of patients who have recently been discharged from lengthy hospital stays and are currently homebound. As a PTA for this company, she would go to patients' homes and demonstrate exercises that they could do to increase their strength, including while seated in a chair or lying in bed. She would then observe the patients doing these exercises and help to stabilize them if they needed assistance. According to the client, her job did not require much walking – only between her car and the home and within the house itself – or lifting, as she carried a small bag with light equipment. The employer disagrees, contending, instead, that a PTA being able to walk long distances, i.e., greater than 200 or 300 feet, is required for a vast majority of patients that the company serves.

Ten years before her employment with the company, the client was diagnosed with Multiple Sclerosis (MS). About a year and a half into the client's employment, the employer assigned her to spend more time at the company's main office helping them with compliance,

e.g., ensuring that personnel files were completed and performing other special projects, and she was kept quite busy for a number of months. She continued to see patients, but the number that she was assigned to dropped dramatically. While she was working in the office, the client's MS flared up, causing weakness in one of her legs. She readily disclosed her condition to co-workers in response to their expression of concern after seeing her limping, dragging her weaker leg while walking, or holding on to the wall for support. At this point, i.e., 6 to 8 months before her termination, she began to use a cane and her physician recommended that she refrain from walking more than 200 feet at any point while at work. After spending about 6 to 8 months in the office with a reduced client load, she was put on leave until her condition improved enough to return to working with patients. After her condition did not improve, she was terminated. The client contends that she could have continued to work with patients and the expectation that she would "improve" was preposterous given the progressive nature of MS.

The client recommended that I contact a PT with whom she worked at the company and assured me that he could attest to the fact that she was fully capable of doing her work. Unfortunately, when I contacted the witness, he expressed concerns about exactly that. He said that he observed several visits of the client with patients and was concerned about her ability to perform her job duties, including supporting patients with balance issues and walking with patients for long distances. He said that he tried to refer patients to the client who did not have severe balance issues or who did not need to be walked long distances, but the number of these patients became fewer and fewer. According to the company, the client's supervisor also observed the client working with a patient at the patient's home and was fearful for the patient's safety because the client appeared so unsteady.

It also appears that, in the months before her termination, the client sent some e-mails to her supervisor in which she expressed understanding that she had been placed in the office and was not assigned to many patients because of the company's concern about patient safety and that she was willing to "forego patient care" until she "got better," which could happen after her doctor put her on new medications. (The client did not have copies of these e-mails and had forgotten that she had sent them.) Unfortunately, her condition did not improve and so she was terminated. Since her termination, her condition has deteriorated further and she requires the use of crutches and a wheelchair for longer distances.

In your opinion letter, please explain the basics of the Americans with Disabilities Act (ADA)[1] and the areas where we believe her case is vulnerable, keeping in mind that your audience is not an attorney. My greatest concerns about the client's case are the fact that the employer will claim that she could not do the essential functions of the job and was, therefore, not a qualified individual under the ADA, and that the employer was justified in putting her on leave and terminating her because of patient safety concerns. Please discuss this in the letter, as well as any other weaknesses that you foresee, along with some relevant case law (again, explained in a way that will make sense to a non-attorney).

[1] You can read more about the ADA at the U.S. Equal Employment Opportunity Commission's website: https://www.eeoc.gov/laws/types/disability.cfm. Also take a look at *White v. York Int'l Corp.*, 45 F.3d 357, 360-61 (10th Cir. 1995), keeping in mind that it came out before the Americans with Disabilities Amendments Act of 2008.

7. Hazardous Waste

Anna Purna from the Colorado State Technical University just called with an interesting issue. A local corporation has given the School a bunch of sophisticated lab equipment. The catch is that the equipment is located in Commerce City, and there is no facility on campus that can house it. The School has located a large industrial building nearby where the equipment could be housed, and it is available for lease. The concern is that this building is adjacent to the Suncor refinery, and it is well known that there are plumes of benzene and other contaminants throughout the area. The School also has no information on the history of the building, and it is possible that previous activities generated hazardous wastes at the property. As you may recall, the School has been wary of CERCLA liability since the very costly closure of the Asarco smelter site on its East campus. Anna has asked if the School could be held liable for preexisting contamination at the facility, just by entering into a lease.

She also would like some guidance on what due diligence the School should undertake before signing a lease, and what specific terms we might recommend in a lease to manage potential liability.

8. Consumer Protection - telemarketing

As you know, our media-focused law firm just got a new client – a new non-profit entity that wants to start making phone calls to their donors. Our client is a 501(c)(3) organization, so it's exempt from federal income tax and donations made to it are tax deductible.
Our non-profit client has heard a lot in the news about the TCPA - Telephone Consumer Protection Act of 1991 – and especially about vicarious liability for third-party callers. They've asked about this third-party liability in the context of outsourcing its telemarketing to a specialized firm. The telemarketers will only be calling the non-profit's lapsed members (people who haven't given a donation in a year or so).

I need you to do two things: first, I haven't had a lot of time to research the TCPA, since I usually deal with the FCC licensing side of things. I need you to research a memo to the client to give them a quick intro to the issues and how the TCPA affects our client.

Second, I'd appreciate it if you could give me a run-down of the legal issues surrounding TCPA and texts or calls to cell phones. (Just do the research – cany you answet this questyiion in the database?) I think I heard something in the news about DISH Network and the law of agency with regard to robocalls, or maybe it was the consent question that some social media site – was it GroupUs? Or perhaps something else? - I don't have the details, but I'm sure you can figure it out.

To help you out with the FCC regs, though, you'll want to check into Part 64 of Title 47 of the Code of Federal Regulations.

9. **ESL**

I just got a call from D. D. at Central School District. An attorney with the United States Office of Civil Rights contacted the District regarding English language development services in the District. Currently, the District has two separate programs for English learners—a transitional bilingual education program at Central Elementary School and sheltered English immersion as needed at all other schools. About two months ago, Central's Board of Education discussed ending the transitional bilingual education program. This is not a surprise, as there has been varying public opposition and support to that program over the last several years, and several Board members have been publicly advocating English-only instruction. At the meeting two months ago, one Board member made some very offensive public comments about non-English speaking students as "tourists." I am sure this caused lots of hard feelings in the community that may be driving this apparent federal investigation. Despite the Board's public comments, the transitional bilingual program has been very popular with parents. There already is a waiting list for next school year. The District added another classroom this school year to meet demand, but D.D. indicated that the Superintendent is reluctant to approve another expansion due to a tighter budget forecast.

Anyway, the Board's next meeting is Friday, May 19th, and D.D. has asked for guidance on the potential programming changes. May the District eliminate the transitional bilingual program? As an alternative, if the District continues to offer the transitional bilingual program, can it refuse to honor parental preference based on enrollment limits? Finally, if you have time, would a family have a cause of action against the district for allegedly providing language instruction that they feel does not meet their child's needs, and what kind of damages would be available?

It's been a few years since I have looked into this issue, but I can steer you towards the seminal legal provisions. Colorado's English language development statute is called the English Language Proficiency Act. There are two potentially relevant federal laws—the Equal Educational Opportunities Act and the Every Student Succeeds Act. The latter is voluminous, so I would be careful not to get lost! It probably would be more efficient to look at the US Department of Education's guidance, if any, on ESSA and English language development. There also are some major federal cases, though I would be surprised if there are any published decisions on enrollment preference.

10. Public trust

The public trust doctrine is the common law principle that certain natural resources (usually navigable waters) are too valuable to be privately owned, and must remain unimpaired for use and enjoyment by the public. Since the publication of Professor Joseph Sax's *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 48 Mich. L. Rev. 471 (1970), the public trust doctrine has become a topic of significant academic debate. It has also led to some notable legal decisions that protect natural resources. Chief among them is *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 452 (1983), in which the California Supreme Court held that the public trust doctrine imposed a continuing duty on the state to protect public trust uses, and required the state to reconsider water allocations from the Mono Basin by the Los Angeles Department of Water and Power.

In addition to this common-law recognition of the public trust doctrine, many states have adopted provisions enshrining the public trust doctrine in their constitutions. *See* Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 Vt. L. Rev. 781, 831–41 (2010) (discussing public trust provisions in the state constitutions of Pennsylvania, Rhode Island, Louisiana, Illinois, and other states).

My research question is: apart from *National Audubon Society*, which fairly conclusively saved Mono Lake from the water withdrawals that imperiled it, how have states and conservation organizations used the public trust doctrine to actually protect natural resources? I have seen a great deal of academic debate about the public trust doctrine, but I am interested in concrete examples in which the public trust doctrine was a contributing or deciding factor in resolving natural resource conflicts. I realize this is a 4–6 hour research assignment, so I am not expecting an exhaustive treatise—just a short memo that concisely summarizes the legal foundations and then launches into the best examples you can find where the public trust doctrine has been used effectively.

11. **Colorado Easements**

We have a client who lives on a large lot in Jefferson County. A previous owner of our client's property granted a "multi-purpose recreational easement" to a neighboring community for the use and enjoyment of its residents. I don't have a copy of the easement, but it's my understanding that it's quite short, so the above description is likely all there is. The trail granted by the easement cuts across the northeastern corner of the property.

Our client is concerned with the number of people who are using the easement, and the purposes for which those people are using it. He explained that the intensive use is damaging the natural beauty and plant life in and around the trail. He would like to limit the scope of the easement, and is considering all of the following types of limitations:

1. Prohibiting non-pedestrian uses (in particular, horses and mountain bikes, but also off-road motorized vehicles, which are not yet popular, but may become so);
2. Limiting the use of the easement to certain hours of the day (e.g., sunrise to sunset); and
3. Limiting the number of people permitted on the easement at once.

Our client is considering erecting signs in and around the trail and/or constructing fences with gates for easement access around his property in order to accomplish these goals. We need to advise him regarding which of the above actions he may or may not be permitted to take in accordance with the terms and conditions of the easement.

12. **Mandatory Retirement Age**

Our client is a school district and they want to know if they can implement a mandatory retirement age of 65 years old for school bus drivers and/or physical education teachers under the federal Age Discrimination in Employment Act. Please research and provide me a memo analyzing that statute and relevant case law to help answer this question for the client?