



Practice Question 1: Comments, Detailed Outline, and Model Answer

This document has three parts. The first sets out some overall comments on the outlines and answers that were submitted. The second part has more comments on outlining, with advice on how to do it in the context of this Practice Question, followed by a very long outline that lays out all the issues. The third part is a model answer.

Part I

Outlining. Outlining is an important skill in writing exam questions. Equally important, the kind of analytical approach outlining helps you master is a useful legal skill as well. In that sense, the outline was the most important part of your answer, especially if you're not used to working this way. I will not require that you outline your answer on the final exam; I will leave that up to you. But it is a skill that can help you immensely if you spend some time on it. I won't rehash what is on the [Outline and Exam Writing Advice](#), but I suggest you re-read it.

In terms of the outlines people submitted, one of the most common mistakes was not initially separating out the major issues at the most general level (see Step 1 in Part II below). In part this was a substantive mistake: many outlines and answers assumed the right to exclude is not absolute, and immediately launched into a discussion of whether Aisha's refusal was reasonable in the circumstances.

A few outlines were just very short, or consisted of the facts or key issues in bullet points. In the end, the issue isn't length per se, or Roman numerals and letters versus bullets, but whether the outline reflects the kind of analytical thinking that will best serve you in advising a client or writing a bench memo for a judge.

Another basic problem was taking an IRAC or CREAC approach and just setting it out with Roman numerals and letters. The problem with IRAC or CREAC or similar approaches is that it too easily draws you into identifying "the issue" for a whole set of *issues* encompassed in a fact hypo. If alternatively, you go through the IRAC or CREAC format for each issue, your answer will become overly elaborate and time consuming, and you won't have time to adequately address all the issues. The IRAC or CREAC form works reasonably well for legal memos, but I don't recommend you use it on exams unless the professor who is giving the exam specifically recommends it. I don't prohibit use of CREAC or IRAC. It's up to you. But I would recommend it only if you have very little writing background and have seriously attempted outlining your answers in the way I've suggested, and found that outlining in that way just doesn't work for you. There will be a number of other practice questions where you'll have that chance.

One thing you don't need to do – and in fact I recommend against it – is write out your outline in complete sentences. An outline is like a roadmap, breaking down the questions into issues and sub-issues in some logical order that you've chosen. You don't need to spend the time writing sentences to do that (in contrast, of course, to your answer).

Answers. There was a significant engagement with the facts in most of the answers, which is good. In general, in making arguments for one side or the other, or in writing about what a ruling should be, it helps to make your mantra: “How should the law apply to these particular facts in light of the underlying policies?” “Policies” here does *not* mean something separate from the law – *i.e.*, it does not mean first discuss the law and decide what it says, and then address the separate matter of policies. They are not separate, at least in the sense I’m using it. “Policies” means “the reason(s) for having the rule (a statute, a regulation, or a common law requirement) in the first place.” Legal rules are not meant to be pointless, though some might be, especially if terribly badly drafted, or if they are long outdated. But apart from those circumstances, you want to think about how the law or rule could be applied in a given set of facts in a way that best serves the purpose of or reason for having the law or rule in the first place.

What makes this approach complex in more than a few instances is that there might be disagreement over what the policy – the reason for having the rule in the first place – is. Moreover, even in a situation where there might be common agreement on that point, there could of course be disagreement about what application of the law to a particular set of facts will best serve that purpose. This is one of the many ways in which the law is fascinating, and lawyering is important – but not easy.

A number of the answers left some important issue out – for example, whether Rexial should be treated as a “solicitor” under *Shack*, and if so, whether Rexial would qualify for the exceptions to *Shack’s* statement that in general solicitors would not have access. As noted, a number of answers didn’t really engage with the argument that the right to exclude should be absolute, and Aisha’s reasons for saying no, or Rexial’s claims about the importance of access, should be matters for consideration.

Another mistake, not evident in most answers, is to start out with a restatement of the facts. It doesn’t help advance the analysis to do that. You want to cite particular facts in connection with each specific issue as they relate to the analysis of that issue.

Some answers had formal Bluebook-style cites in addition to case names. There is no need for that on exam answers. In fact, there’s typically no need to cite case names. What counts is your analysis. Here, the question in effect directed your attention to two cases, *Shack* and *Steenberg Homes*, and given that we’d spent a fair amount of time on them, it was most natural to refer to each of them by name. If, on the final exam, you were to blank on a case name and wanted to refer to it some other way (*e.g.*, “the case with the migrant farmworkers”), that would be fine. Further, I’m not looking for case cites in the same way that you might do in a brief to a court – where you might state a proposition and simply cite a case that supports it. It’s your *analysis*, as informed by reading and studying the cases, that I’m looking for.

Most of the answers made some effort to analyze the arguments on both sides. But sometimes there was no consistency in that respect – that is, there were arguments on both sides for some issues but not others. It is true that on certain facts, there may not be much of an argument on one side for a particular issue. In an adverse possession question, for example, the facts might raise little if any question about exclusivity. You would still want to address that in your answer, but you don’t need to create a belabored argument on one side to counter the otherwise very strong argument on the other. That will just waste your time. But keep in mind that most law school exam questions are designed to raise issues that aren’t open and shut.

Instructions. For the most part, the submitted outlines and answers followed the instructions. Almost all of them followed the instruction to double-space, but a few had single-spacing or 1-1/2 line spacing. Some included a header like “Practice Question I AGN XXXXXX” without putting the section in, or a header in some other improvised format, like “Property A2 [or C1]:XXXXXX.” This wasn’t what the instructions said. Putting your name instead of or in addition to the AGN also was not following instructions. I did not personally look at the emails, since they weren’t sent to me and I maintained the anonymity of the process, but I’m told that while the majority did follow the instructions to the letter, there were some emails that didn’t. Some didn’t put the section in the subject line. Others had the required information but not in the format specified.

Another feature in some of the exam answers (a definite minority) was analyzing *Iron Bar* or the Florida Migrant Farmworkers Statute. This was a mistake. It’s not that they would necessarily be irrelevant. It’s that the [Instructions](#) on the web page specifically said, “Review the materials in Section [I.A.1](#) of the Syllabus. You will use the materials in Section [I.A.1](#) to answer the Question. In writing your answer, you need *not* refer to materials in Sections [I.A.2](#) or [I.A.3](#).” This was aimed at limiting the set of materials you needed to address. It’s to your own advantage to pay attention to instructions aimed at making your task easier. Also, my reason for putting this limitation in is that in my judgment, within the time limits provided, there wouldn’t be enough time to fully address the issues under *Shack* and *Jacque* and also get into *Iron Bar* and the Florida Migrant Farmworkers Statute, and nothing in the answers that did get into them made me conclude otherwise.

Practicing law is an intellectually satisfying endeavor, among many other things. But that doesn’t change the fact that part of the practice of law is carefully following mandatory instructions or rules to the letter. Courts don’t hesitate to reject briefs if they don’t meet filing requirements, including technical ones. The same can be true of administrative or other legal filings.

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While I have these (I hope) useful criticisms, my overall comments wouldn’t be complete without also saying that I was impressed by how good the answers generally were for this early point. In general, they reflected some vital features for answering exam questions – and for lawyering: (a) some attempt to break down the question into major issues and sub-issues, (b) some real effort to think about arguments on both sides, (c) genuine use of the facts to help support the arguments, and (d) careful responsiveness to the question (*e.g.*, giving not only your analysis of the arguments on both sides but also your recommendations as to how to rule). Of course I expect everyone to do much better on the final, but I’m very happy with where things stand so early in the semester.

Part II

Step 1 in your outline: Decide What the Major Issues Are, and Make Them the Roman Numerals

- I. **Is the right to exclude absolute?**
- II. **Outcome If *State v. Shack* Applies**

Why pose these as the two major issues? There is a basic divide in the analysis. One way to see it is to imagine that you are Aisha's attorney. Aisha will want to convince the court that she has an absolute right to exclude. That way, she won't have to justify whether her desire to keep Rexial out is reasonable or fair in the particular circumstances.

To understand this, think about the evidence the parties will have to present. The legal standard often determines this. If the legal standard is "the owner has an absolute right to exclude," then all Aisha will have to prove is that (a) she is the owner, and (b) she said no to Rexial's request. These will be very simple to prove (given the facts set out in the question; in other circumstances they might be complicated).

If the legal standard is something different – *e.g.*, the owner can generally exclude others but not if the cost to human values or dignity is too high – then all sorts of other evidence becomes relevant, like how effective NoSkito is, what are the alternative sources of mosquito repellent, how dangerous is dengue, whether limited access would be too burdensome, and so on.

If you were Aisha's attorney, which of the two standards would be more favorable to you in terms of the evidence you'd have to present and the likelihood of your succeeding? Would you rather be arguing according to:

- a standard that conceives of property rights as serving human values, set out in a ruling (*Shack*) where the court found no trespass; or
- a standard that emphasizes that the right to exclude is fundamental and must be given significant protection, set out in a case (*Jacque*) where not only was the finding of trespass upheld but an award of punitive damages was approved?

Of course, just as Aisha would favor the latter standard, Rexial would favor the former.

Note what you *don't* want to do as a student answering this exam question: immediately launch into an explanation of why or why not Aisha's refusal is reasonable, or begin by comparing the facts of this question with those of *Jacque* and those of *Shack*, with an eye to determining which of those two cases most resembles what happened here. Either of these approaches begs the question whether Aisha has to persuade the court that she *is* acting reasonably here. Similarly, the absolute legal standard would mean that the impact on the workers was simply irrelevant. Under a *State v. Shack* approach, on the other hand, all those factors become relevant.

Further, note what is implicit in what's listed in Roman numerals I and II: where the events take place and what the law is. They do not take place in New Jersey or Wisconsin. You can't just assume that *Jacque v. Steenberg Homes* or *State v. Shack* applies. *State v. Shack* is a New Jersey decision; *Jacque*, a Wisconsin decision. This question concerns events in Cania and litigation in Cania courts. The question does tell you that Cania courts generally will consider precedent

from other states, which would mean they'd look at both *Jacque* and *Shack*. You need to analyze which approach the court should follow here.

To reiterate what was said earlier, there is no reason to discuss how the question here might come out under *Iron Bar Holdings*. That's not because it's irrelevant. It's because the instructions were to review Section [I.A.1](#), which includes only *Shack* and *Jacque*. Ordinarily, you would want to consider what *Iron Bar Holdings* had to say, but I wanted to make the question more manageable, and there is enough (maybe more than enough) to consider with *Shack* and *Jacque*. Keep in mind, when answering exam questions, that you should pay close attention to what the question is asking.

What about the Florida statute? That wasn't in Section [I.A.1](#) either. Apart from that, courts that are deciding what the common law should be are less likely to take the *statutes* of other states into account, as opposed to the judicial decisions of other states. Whereas they may see courts in other states as engaging in the same general activity in which they are engaging – *i.e.*, judging – legislative judgments as embodied in statutes are viewed more clearly as policy choices made by elected representatives. The judgment of the elected representatives of Florida voters might not be the same as those of Cania voters, so typically a court in the Cania court's position – deciding a case on these facts, with no *Cania* precedent on point – would not pay a lot of attention to other states' statutes. But that's not absolute. If many states had enacted statutes protecting a right of access, and others had done so by judicial decision, a court in a state where there was no binding precedent and no statute might consider both.

Finally, notice what else is not present here – a section at the beginning of the answer recounting the facts. In many situations as a lawyer, you would want to start out that way. For example, if your client tells you facts A, B, C, D, E, F, G, H, I, J and asks you whether she might face liability under those facts, your legal memo to the client would start out stating, "As you have informed me, [A, B, C, D, E, F, G, H, I, J]."

There are two reasons for doing this. One is self-protective. Suppose the client had forgotten to tell you fact K, and fact K made a huge difference to the analysis; you wouldn't want any later claim by the client that she had told you about K and you overlooked it. The other is to help the client make sure she's told you everything. The fact portion of the memo is written in the understanding that the client will read it and let you know if you omitted anything or got anything wrong.

Neither of these functions applies in answering an exam question. Unless the question (or your professor) tells you otherwise, it's never a good idea to begin an answer to an essay question by recounting the facts. The professor knows what the facts are, after all, having written the question. Of course, you do want to make use of the facts in your answer. It is essential to do so. But the way to do that effectively is to deploy specific facts in service of your legal analysis. It would be a good idea as well to review your answer in light of the [Outline and Exam Writing Advice](#).

Step 2 in your outline: Begin to Break Down Each of the Major Issues into Components, by sub-headings A,B,C etc.

- I. **Should the right to exclude be absolute?**
 - A. Why it matters
 - B. Arguments as to whether the right should be held absolute versus limited
 - C. Recommendation as to how the court should rule
- II. **Outcome If *State v. Shack* Applies**
 - A. How important is protection from mosquitoes and dengue to the migrant farmworkers (MWs)?
 - B. Availability of protection from mosquitoes and dengue by other means
 - C. Burden on Aisha
 - D. Should Rexial be treated as a solicitor?
 - E. How broadly/narrowly to read Shack?
 - F. Recommendation as to how the court should rule

Once you've decided on the major issues, spend some time thinking about what the most important sub-issues are. If you take your outline at least to this point, you will be much less likely to overlook any major issue. You can also begin to get a sense of which of the two major issues (I or II) will take more time to answer – already, just from the outline at this stage, you should see that you have more to cover in II than in I, and you should allocate your time accordingly.

Step 3 in your outline: Begin to Break Down Each of the Major Issues into Components, by sub-headings A,B,C etc.

- I. **Should the right to exclude be absolute?**
 - A. Why it matters
 - B. Arguments as to whether the right should be held absolute versus limited
 - 1. Fairness
 - 2. Efficiency/best use of property (in general)
 - 3. Administrability (what rules are best suited for courts to administer)
 - 4. Courts versus legislature
 - C. Recommendation as to how the court should rule
- II. **Outcome If *State v. Shack* Applies**
 - A. How important to the MFWs is protection from mosquitoes and dengue?
 - 1. Rexial: like lawyer/field service worker in importance (health care, prevention, testing) and is free
 - 2. Aisha: not everyone at risk; and Rexial is a profit-making business, so its help is suspect
 - B. Availability of protection from mosquitoes and dengue by other means
 - 1. Rexial: not so easy (no pub transp, Off expensive)
 - 2. Aisha: there's some pub transp or carpooling; commissary sells Off!, no evidence of price gouging; free tips on the internet
 - C. Burden on Aisha
 - 1. Rexial: Aisha's burden is small, no privacy interest, might help get employees; reasonable regs OK
 - 2. Aisha: my burden is significant – other sellers or charities may seek entry; where does it end (slippery slope)
 - D. Should Rexial be treated as a solicitor under Shack?
 - 1. Is Rexial like charity or like solicitor?
 - 2. Even if Rexial a solicitor, does it satisfy Shack standard?
 - E. How broadly/narrowly to read Shack?
 - 1. Rexial: In light of dignity and limited self-help, read broadly to protect MFWs
 - 2. Aisha: Property right to exclude is fundamental so read narrowly
 - F. Recommendation as to how the court should rule

Of course you can go down more than 3 levels when you outline, or sometimes you might want to keep it broader. But for this question, an outline that is less detailed than what's shown in Step 3 – completed *before* you start writing your answer – is unlikely to give you the help you need in covering all the issues in a logical order.

Step 4: Write Your Answer

Note: What follows is a relatively detailed answer, presented in outline form so you can see the organization more easily. In Part III, which is after the end of the outline, I have also provided a model answer, which you will see is briefer. The model answer is roughly 1130 words if you eliminate the redundancy of different examples of conclusions in brackets.

- **NOTE:** Word length is not easily correlated with excellence in answers. On the one hand, some very short answers may just not be able to cover all the issues adequately. On the other hand, some shorter answers can be much better than some longer answers. For some people, words flow quickly when writing. This can be an advantage if the person knows the material well, and has done an outline before starting to write that lays out the main issues in a logical, coherent form. It can be a disadvantage if the writing is more like stream of consciousness, touching on issues as they come to mind. Also, some longer answers may be filled with pure repetitions of the facts stated in the question, or general summaries of cases (as opposed to legal *analysis*).

Normally, of course, you would not write your outline in complete sentences or make it anywhere near as detailed as what follows. And normally you would not write an answer in outline form. As noted, the purpose of presenting the answer in outline form is to make the organization more apparent.

Answer (in outline form)

I. Should the right to exclude be absolute?

A. Why it matters:

1. If the right is absolute, all that matters is that Aisha has denied Rexial permission. They may not enter her property. She wins under this standard.
2. If the right is limited by “human values” (Shack), then the court will have to address, on the facts of this case:
 - a) whether the Rexial representatives may enter Aisha’s farm without her permission; and
 - b) on what conditions.

B. Arguments as to whether the right should be held absolute versus limited

1. Fairness
 - a) Absolute right:
 - (1) Property owners pay for the land and invest in it, so in fairness they ought to have control over it, including right to decide who enters their property without being second guessed by others.
 - (2) Property owners shouldn’t have to put up with strangers coming onto their property (privacy).
 - b) Limited right:
 - (1) Property rights are created to serve human values, and the owners’ interests aren’t the only ones, as State v. Shack shows.
 - (2) Privacy is important, but not an absolute right, especially where the land is used for commercial purposes and the owner has invited “strangers” onto it, like employees (i.e., isn’t a family home).
2. Efficiency/Best Use of Property (in general)

- a) Absolute right
 - (1) It's better to give the property owner an absolute right, and then let people bargain with the owner for rights of access. There's no reason to think property owners in general will be unreasonable.
 - (2) If property owners can't control who will come onto their property, the resulting uncertainty may make them less willing to invest in it and improve it:
 - (a) They may be concerned that others coming onto the property will damage it or interfere with the owner's use of it.
 - (b) The very fact subjecting to court review all the decisions by property owners as to whom to admit also creates uncertainty, even if a property owner's decision to deny access is ultimately upheld in a given case.
 - b) Limited right
 - (1) Bargaining is good in general, but not everyone has the bargaining power needed to protect their own interests. There are some people with vital needs dependent on limiting the owner's control over access, and who are so weak or dependent that they can't effectively bargain.
 - (2) Carving out some limitations on the right to exclude won't create so much uncertainty that investment in land will suffer.
 - (a) There are already many limitations on land ownership and use (zoning, antidiscrimination laws, etc.)
 - (b) Uncertainty about judicial outcomes can be kept to a minimum by articulating sufficiently clear rules, so property owners have good guidance about how a court might rule in their case.
3. Administrability
- a) Absolute right: Courts are not necessarily better than property owners at deciding what the best use of land is. And it's not worth the judicial resources taken up in a case to correct the very few instances where the property owner is acting unreasonably in denying access.
 - b) Limited right: Where vital human needs are at stake – such as the right to information about legal rights or access to health care – the use of judicial resources to protect those needs is worth it.
4. Courts versus legislature
- a) Legislature: Any major departure from treating the right to exclude as absolute ought to be handled by the legislature, which is elected and accountable, and better able to consider the larger social effects of such a change.
 - b) Courts: The right to exclude has never been absolute, and courts have long had the power to reshape the common law to improve and update it.

- C. **Recommendation as to how the court should rule**¹
1. [Example A: The court should rule that property rights are absolute, because control of access is so vital to owners, and in most cases property owners will act reasonably. Aisha owns the property and denied access; that should be enough to decide the case]; OR
 2. [Example B: The court should rule that property rights are limited by human values and needs, especially when the question of access has a great impact on other actors who are unable to protect themselves adequately.]; OR
 3. [Example C: The court should rule that property rights are limited by human values and needs when the property has little personal privacy value for the owner (e.g., when it is used for commercial purposes and open to a large number of invitees (shoppers, laborers, etc.)).]
 4. [Example D: Property owners have long counted on an absolute right to exclude. Any change in that approach should come from the democratically elected legislature.]²

II. **Outcome If *State v. Shack* Applies**³

- A. **How important to the MFWs is protection from mosquitoes and dengue?**
1. Rexial: it's very similar to the aid the lawyer and field service worker offered
 - a) MFWs' work makes them especially exposed to infection.
 - (1) Their health is at stake: illness/possibility of death
 - (2) Their opportunities to find work that keeps them inside may be limited, depending on their skills and education and on the job market.
 - (3) There may be public health benefits. The testing may show that NoSkito is effective, benefiting everyone.
 - b) NoSkito is being offered for free for 5 weeks. The tips from the charity workers are also free. Cost is important for MFWs, who typically don't earn much
 2. Aisha: it's very different from the services offered in Shack.
 - a) While health in general is important, it's not that critical deciding the question of access here:

¹ The judge asked you not only for arguments on both sides, but also your recommendation as to how she should rule. It's best to do that on each major *Shack* issue you discuss. What counts is giving a conclusion and a good reason, not whether I agree with your conclusion. I provide different examples in this Model Outline just to show what they might look like, and to make clear that there's no one right answer. Because the *Shack* analysis ultimately requires weighing a number of relevant factors, you will need some overall conclusion for this Question.

² Many other variations are possible. For example, you could say something like Example C, but add, "especially when the question of access has a great impact on other actors who are unable to protect themselves adequately."

³ Notice that there's no Roman Numeral heading, "If *Jacque v. Steenberg Homes*" applies. Normally, if you have a question of which of two standards is the one the court should adopt, you'd expect to go on to show how each applies. But here, you've essentially taken care of how it would come out under an absolute right approach – in I.A.

Also, note that even if you recommend that the absolute right approach be adopted, you ought to work out what it would mean to apply *State v. Shack*. The judge is asking for you to set out the arguments and issues and give your recommendations. You can't just say, "I recommend the absolute right to exclude approach," and then leave it at that, because she might not accept your recommendation on that point, and would want to see what the issues are in a *State v. Shack* approach.

- (1) Not everyone will be infected. Most will likely have only a mild illness if infected. Rexial isn't offering treatment.
 - (2) No one is forcing migrant farm workers to work on her farm.
 - (3) The possibility of public health benefits can't justify forcing her to make her property available for testing.
 - b) Since NoSkito is being provided by a profit-making corporation, the claims about its effectiveness might be biased. It's not clear the tests are being according to scientific standards. And the prevention tips are pretty basic and even obvious.
- B. Availability of protection from mosquitoes and dengue by other means**
- 1. Rexial: Protection may not be so easily available if Rexial can't enter to provide NoSkito.
 - a) MFWs are out in an agricultural area, apparently away from stores, with spotty public transportation, and most have no cars. This makes access to stores very difficult.
 - b) Aisha has a commissary on her farm, but it only sells Off!
 - (1) It's "expensive" (versus NoSkito for free for five weeks). Since MFWs typically don't earn a lot of money, they might not be able to use as much Off! as you need to repel mosquitoes all day.
 - (2) Access to one product in one store doesn't give MFWs a choice; having a choice of something so important to health (and with the possible side effects of DEET) is crucial to human dignity.
 - (3) The tips may be basic but they're still useful.
 - 2. Aisha: The MFWs have plenty of alternatives
 - a) They are not confined to shopping in her commissary:
 - (1) Public transportation may be spotty, but it does exist; and some (even if not most) MFWs have cars, so they could carpool to get to town.
 - (2) With internet access on the farm, they can order other products online.^{4]}
 - b) Even if the commissary is the only alternative, it's enough.
 - (1) It sells a product that the EPA has said is safe and effective.
 - (2) There is no indication that Aisha is charging inordinately high prices off it to make extra money for herself.
 - (3) She is proud of the wages she pays, which might indicate that they are able to afford it.
- C. Burden on Aisha**
- 1. Rexial: the burden seems fairly small
 - a) There's no privacy interest on Aisha's part; it's a farm business, with many people not her friends or relatives routinely on site, being paid.
 - b) Providing a product that MFWs need, only on Sunday mornings for five weeks, won't interfere with the farm business.

⁴ In general, you don't want to invent facts. You should stick to those in the hypothetical. But sometimes there might be a relevant argument that depends on some fact not stated. You can deal with that by briefly stating what that fact is (here, "if the MFWs have internet access") and its significance. A good answer could be written without this, though, and in general you don't want to spend much time on facts not stated.

- c) Rexial’s activities might even help Aisha attract employees if people realize that they get NoSkito for free.
 - d) Aisha can place reasonable restraints on the time, location of the Rexial workers’ and charitable members’ entry.
 - e) Some other farm owners are agreeing to Rexial’s plan, so how burdensome can it be?
2. Aisha: the burden is significant
- a) If she has to let Rexial in and it gets all the favorable publicity it’s seeking, there may be a lot of other similar companies seeking access, maybe even selling repellent at a discount rather than giving it away.
 - b) How would a court distinguish between mosquito repellent and other medical (or vital) products? Should vitamin sellers have access? Companies selling pain killers? Cold medicine? Food? Cell phone plans?
 - c) The structure of the other farm owners’ operations might be different from Aisha’s and so cause less of a burden.
- D. **Should Rexial be treated as a solicitor?**⁵
1. What kind of entity is Rexial?
- a) Aisha: Rexial fundamentally different from legal services/field worker Shack
 - (1) Shack says there is no general right of solicitation.
 - (2) Rexial reps work for a for-profit corporation. They’re basically doing a promotion, hoping to increase sales of NoSkito.
 - (3) The presence of some charity workers and medical testing doesn’t transform the basic character of what Rexial seeks to do: get publicity that will help sell its product.
 - b) Rexial: In these particular circumstances Rexial is more like a charity providing a vital service than a solicitor selling things.
 - (1) Rexial is a profit-making company, but here, as a public service, they’re providing a product to a group of disadvantaged workers who have a particular need for mosquito repellent.
 - (2) Aisha’s employees need repellent *because* of their work for her. Their access to repellent is limited because of their work for her – they work on a farm that’s isolated (few have cars; spotty public transportation)
 - (3) Rexial’s free NoSkito along with bringing in the charity workers and providing medical testing shows that its plan is very different from an ordinary sales or advertising pitch.
2. If Rexial is treated as solicitor:
- a) Rexial: we satisfy standard for the exception set out in Shack

⁵ Why is this a distinct issue? It’s because near the end of the opinion, the New Jersey Supreme Court put a limitation on its willingness to do the kind of weighing and balancing that *Shack* implies. It says the court is not intending to open the employer’s property to “solicitors or peddlers” of all kinds. Supp. 2. It seems to set out a test specific to them, which has two factors (whether the employer’s purpose in denying or limiting access is to gain an advantage for herself, and whether the denial or limitation of access deprives the MW of practical access to things he needs).

Why put Aisha’s arguments first here, in contrast to the rest of the outline? This point is kind of like an affirmative defense, so you’d expect her to be the one to raise it. But it doesn’t have to be in this order.

- (1) Aisha is depriving MFWs of practical access to things they need – a choice on repellents, and the chance to get one free, as well as free advice and free testing.
 - (2) If Aisha is saying no because she doesn't like Rexial undercutting the Off! sold in her commissary, then she's barring its entry to gain a commercial advantage for herself, which shouldn't be allowed.
 - (3) There is a public benefit to Rexial's plan.
 - b) Aisha: Rexial fails the standard for the exception set out in Shack
 - (1) Barring Rexial doesn't *deprive* MFWs of anything. They can still buy an EPA-approved repellent right in her commissary, and if they're free to wear long-sleeve shirts, etc.
 - (2) There's no evidence she's price-gouging them.
 - (3) As noted above, the public health benefits aren't clear because the testing may not be following scientific protocols.
- E. **How broadly/narrowly to read Shack?**
- 1. Rexial: Courts should read the right of access broadly. If in doubt, grant access.
 - a) It offends human dignity to deny MFWs, who typically are very low-income and disadvantaged, full access to protection against a disease that their employment subjects them to.
 - b) MFWs are not organized, not in a position to help themselves. This is not something they would likely be able to bargain over with employers. The general presumption should be to let anyone in if they offer help to MFWs well-being and there's minimal practical burden on Aisha.
 - c) Though Rexial is a profit-making business, this particular endeavor has non-profit-like features.
 - 2. Aisha: Courts should treat the holding in Shack as a narrow exception to the vital right of property. Unless there's a very clear case for it, don't grant access. It's not very clear here.
 - a) The right to exclude is fundamental; therefore exceptions should be narrow and for highly compelling reason
 - b) The farm isn't just a workplace, but a place where workers live. It's not consistent with MFWs' dignity or privacy to have it crawling with employees of profit-making businesses.
 - c) Rexial is offering the MFWs something that ultimately, the company hopes, will benefit its bottom line. Bringing in a few charity workers while it gives some of its product away doesn't change its basic status as a seller of goods.
- F. **Recommendation as to how the court should rule**
- 1. [Write your own overall conclusion about how the Shack analysis should apply in these facts.]

Part III

Property (A2 & C1)
Professor Schnably
Fall 2024
Model Answer

The first question is whether Cania should treat an absolute right to exclude as an essential feature of property rights, as in *Jacque*, or as subject to case-by-case consideration in light of the human values that property serves, as in *Shack*. If the former, Aisha (A) should prevail, simply because she, as the owner, said no.

A will argue that the right should be absolute. First, it's only fair that property owners, who paid for the land, have control over its use (as well as the privacy that comes with determining who has access). Second, property will be most efficiently used if the owner controls its use without others' interference; otherwise, they may be reluctant to invest in improvements. Third, courts aren't necessarily better than owners at deciding the best uses of land. Without an absolute right, there'll be a lot of needless and expensive litigation over access. If a non-owner wants access, they can bargain with the owner.

Rexial (R) will argue that property rights are created to serve human values, and it's not just the owner who has an interest in access, as *Shack* shows. Further, efficiency isn't the only societal value – human dignity and access to health are also important values. Moreover, there clearly are limits on owners' rights already, in the form of zoning or laws that outlaw racial discrimination in renting. Further, where human values are at stake, it is worth expending judicial resources to protect them. Bargaining with the owner isn't a realistic option for people with very limited power and resources.

[The court should rule that property rights are absolute, because control of access is so vital to owners, and in most cases property owners will act reasonably. Aisha owns the property and denied access; that should be enough to decide the case. Nevertheless, in case the court decides to follow the *Shack* approach, a *Shack* analysis will be provided as well.]; OR

[The court should rule that property rights are limited by human values and needs, especially when the question of access has a great impact on other actors who are unable to protect themselves adequately in response to something as vital as their health. This requires an analysis under *Shack.*]; OR

[The court should rule that property rights are limited by human values and needs when the property has been opened up to strangers for commercial purposes, and so carries no personal privacy value for the owner. This requires an analysis under *Shack.*] OR

[The court should rule that the right to exclude is absolute, because that has been the general understanding, on which property owners have relied. Any major change should come from the legislature, which is accountable to the people, and also has better means than a court to take all relevant factors into account in judging what the rule the should be.]⁶

If the *State v. Shack* approach applies, the first question is how important the service is. R will likely argue its services – free repellent, tips on avoiding mosquito bites, and testing – are vital to the migrant workers’ (MWs’) health, since dengue can cause serious illness, possibly even death. R’s plan may even have a public health benefits by testing a new repellent. Moreover, it’s the MWs’ work for A’s profit that puts them at risk.

A will counter that NoSkito isn’t so vital. Dengue is usually mild. R will give them repellent for only five weeks, which means they’ll still have to deal with mosquitoes on their own most of the year. No one is forcing the migrants to work for A. And the law shouldn’t make her open her property to testing of a new product.

⁶ [Since there are two major prongs to the analysis – (a) whether the right to exclude should be absolute, and (b) whether R should have access if it is not – it makes sense to give your recommendation as to the first prong, rather than waiting until the end of the entire answer.]

[Given that helping prevent a potentially serious – even deadly – illness seems even more vital than the need for stitches to be removed, as in *Shack*, I recommend that the court determine that R’s services are vital.]; OR

[Given that dengue usually isn’t too serious, that NoSkito’s effectiveness isn’t certain, and that R isn’t going to provide treatment for those infected, I recommend that the court determine that R’s services aren’t vital.]

A second factor is whether there are alternatives. A will likely point out that MWs can get to town, even if public transportation is spotty, and could buy repellent there – or at her commissary. Plus they can wear long clothes to cover themselves, as tips they can find on the internet might advise. R will reply that practical access to alternatives is what counts, not time-consuming access via spotty transportation and iffy internet access. Plus the MWs likely earn low incomes, so free repellent can make a big difference for them. Practical denial of medical alternatives to wearing lots of hot clothes while harvesting is incompatible with their dignity.

[The transportation situation looks a lot like what the workers had in *Shack*, so this factor may favor R.]; OR

[R will make access easier to a repellent *easier*, not to mention free, but that’s a far cry from what *Shack* involved: services (law and medicine) for which professional help is essential.]

The third factor is burden on the owner. A will likely argue she doesn’t want a bunch of strangers coming onto her farm every Sunday morning for weeks. Further, there’s no way to limit access to just R; there will be other businesses seeking access to offer what they say are “vital” products and services. She shouldn’t have to spend time guessing how vital they are, and whether there are adequate alternative means for getting them, with the prospect of lawyers’ fees if she has to defend her decision in court.

R will likely respond that the burden is minimal, and other owners have accepted R's proposal. There's no privacy interest on A's part since it's a farm, not her personal home. The MWs don't work on Sundays when R will be coming, and A can impose reasonable entry requirements (like showing photo ID).

[The burden on A seems fairly comparable to that in *Shack*, since there's no privacy interest on A's part, and the visits will only be once a week for five weeks.]; OR

[Shack R will make access easier to a repellent *easier*, not to mention free, but that's a far cry from what *Shack* involved: services (law and medicine) for which professional help is essential.]

A fourth factor is what kind of entity R is. A will argue that businesses are still businesses even if they give away a product and provide other services free as part of some marketing plan. R will likely reply that where it's doing something so vital for the MWs, it should be treated *like* a charity, not a solicitor. Also, the health care workers whom R is bringing in are in fact charitable workers. Even if R is a "solicitor," moreover, it should have access to the farm under *Shack's* exception, because otherwise the MWs won't have practical access to something that will be a huge benefit to them. This is much closer and a court could go either way, because *Shack* was generally not keen on solicitation; on the other hand, this is a great deal for the MWs.

Finally, A will likely argue that *Shack* is an unusual exception to the property owner's fundamental right to exclude, and should be read narrowly; if in doubt, access should be denied. R will likely respond that because property rights serve human values, and MWs are vulnerable and isolated, any ambiguities should be resolved in favor of access.

I recommend that the court [grant access because free protection against dengue is very helpful to MWs, the alternatives are difficult and expensive, and R's plan may promote the pub-

lic interest in developing new repellents, with little real burden on the owner] [deny access because R is ultimately a profit-making company, its plan is part of a larger scheme to promote a product, MWs have other ways to protect themselves from dengue, and the burden on A, while not so great here, could easily snowball into something big.].

Assuming R does have access, A should be allowed to require a photo ID to come in, as *Shack* recognized. Given that no confidential relationship (as with doctors or lawyers) is involved, A might be able to also require that one of her supervisors be present while R's employees and the charitable workers interact with the MWs.

* * *

Note: In general, an essay answer to a question should be written this way:

- Each paragraph should have a topic sentence at the beginning of the paragraph
- The topic sentence should tell the reader what the paragraph is about. This means:
 - Everything in (say) paragraph 1 should relate directly to the topic sentence in paragraph 1
 - Nothing in any *other* paragraph (paragraphs 2, 3, etc) should relate directly to the topic sentence of that paragraph (i.e., paragraph 1)

A reader who is in a hurry ought to be able to read just the first sentence of each paragraph and have, in effect, an "executive summary" (i.e., a brief overview of a longer memorandum) of your answer.