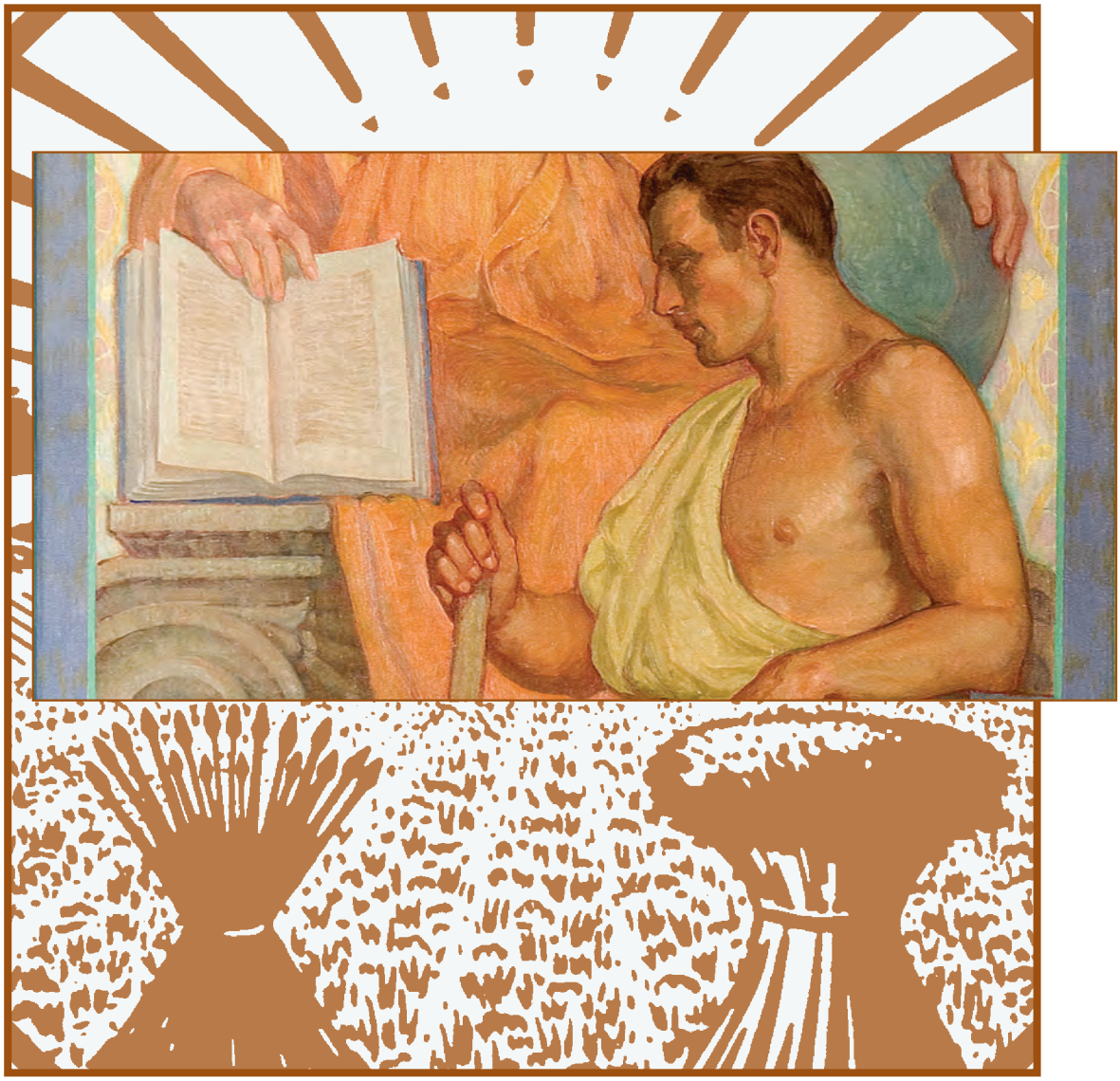
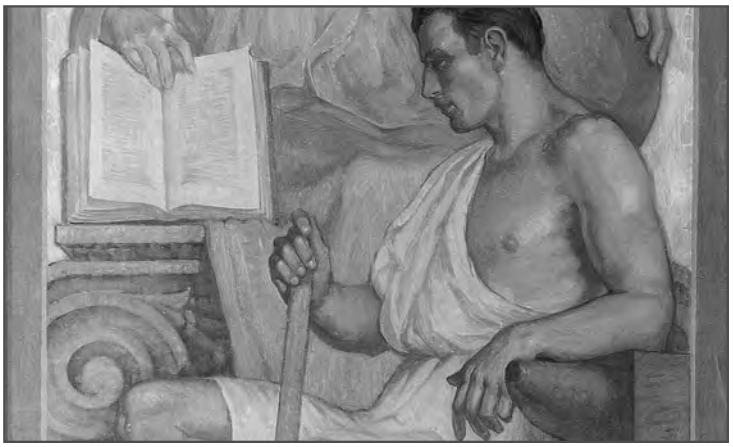
THE SUPREME COURT *of* OHIO

February 2017 Ohio Bar Examination

Essay Questions & Selected Answers

Multistate Performance Test Summaries & Selected Answers





On the cover:

Detail from the Thomas J. Moyer Ohio Judicial Center Law Library Reading Room Mural 7, which depicts the availability of knowledge in printed books.

The Supreme Court *of* Ohio

FEBRUARY 2017 OHIO BAR EXAMINATION

Essay Questions & Selected Answers

Multistate Performance Test Summaries & Selected Answers

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OHIO BAR EXAMINATION

FEBRUARY 2017 OHIO BAR EXAMINATION

Essay Questions and Selected Answers

MPT Summaries and Selected Answers

The February 2017 Ohio Bar Examination contained 12 essay questions, presented to the applicants in sets of two. Applicants were given one hour to answer both questions in a set. The length of each answer was restricted to the front and back of an answer sheet.

The exam also contained two Multistate Performance Test (MPT) items. These items were prepared by the National Conference of Bar Examiners (NCBE). Applicants were given 90 minutes to answer each MPT item.

The following pages contain the essay questions given during the February 2017 exam, along with the NCBE's summaries of the two MPT items given on the exam. This booklet also contains some actual applicant answers to the essay and MPT questions.

The essay and MPT answers published in this booklet merely illustrate above-average performance by their authors and, therefore, are not necessarily complete or correct in every respect. They were written by applicants who passed the exam and have consented to the publication of their answers. See Gov.Bar R. I, Sec. 5(C). The answers selected for publication have been transcribed as written by the applicants. To facilitate review of the answers, the bar examiners may have made minor changes in spelling, punctuation, and grammar to some of the answers.

Copies of the complete February 2017 MPTs and their corresponding point sheets are available from the NCBE. Check the NCBE's website at ncbex.org for information about ordering.

QUESTION 1

Questions 1-5 below are based on the following facts:

On June 1, Homeowner contacted Painter for a quote to paint Homeowner's home. At the first meeting with Painter, Homeowner explained that only a special oil-based paint manufactured by Special Paints, Inc. guaranteed to last 15 years should be used; that the house was to be painted white; and that the entire job, including clean-up, had to be completed by July 1. Painter agreed and prepared a written contract containing these terms with a price quote of $5,000. The contract also included a requirement for a $2,500 down payment (one-half of the total price) due to the special paint requirement. Homeowner and Painter signed the contract.

Assume the following facts for question 1 *only*.

When Painter attempted to buy the paint, he learned that Special Paints, Inc. was no longer in business. Without telling Homeowner, Painter purchased and used a paint that was made by a different manufacturer, was water-based, and had only a 5-year guarantee. After the house was completed, Homeowner learned of the switch and refused to pay the balance of the quoted price. Painter sued Homeowner for breach of contract.

1. **How should the court rule? Explain.**

Assume the following facts for question 2 *only*.

Upon completion of the painting, Homeowner decided that he did not like the color used by Painter. When he asked Painter what color he used, Painter showed him a can of paint that was made by Special Paints, Inc. was oil-based, had a 15-year guarantee, and was identified as the color "Mountain Snow." Homeowner complained that he required plain white and that the selected paint did not conform to his specifications. Homeowner refused to pay the balance of the quoted price, claiming that Painter had failed to use the specified color. Painter sued Homeowner for breach of contract.

2. **How should the court rule? Explain.**

Assume the following facts for question 3 *only*.

One week after Painter began to paint Homeowner's home, it began to rain intermittently for the next two weeks. Painter was at Homeowner's home painting every dry day through the month of June. However, due to the rain, he was unable to complete the painting job until July 10. Homeowner refused to pay the balance of the quoted price, claiming that Painter had failed to complete the job by July 1. Painter sued Homeowner for breach of contract.

3. **How should the court rule? Explain.**

Assume the following facts for question 4 *only*.

One week after Painter began to paint Homeowner's home, Painter was solicited by Homeowner's neighbor to paint the neighbor's home. Painter left Homeowner's home and painted the neighbor's home. He returned to Homeowner's home and completed the job on July 5. Homeowner refused to pay the balance of the quoted price, claiming that Painter had failed to complete the job by July 1. Painter sued Homeowner for breach of contract.

4. **How should the court rule? Explain.**

Assume the following facts for question 5 *only*.

Instead of paying Painter the full $2,500 down payment, Homeowner offered Painter only $1,000. Homeowner promised the balance of the down payment three days later. The next day, Homeowner learned that the paint only cost $1,000. He

contacted Painter stating that he would not pay anything further on the down payment and expected the painting to be completed. Painter refused, saying that the remainder of the down payment was required prior to any painting. Painter sued Homeowner and Homeowner countersued Painter, both claiming breach of contract.

5. How should the court rule? Explain.

A

In order to have a contract in Ohio, there must be an offer, acceptance, mutual assent, and consideration. Here, the Homeowner offered to pay Painter $5,000 to paint his home with a specific white oil-based paint manufactured by only one company. Painter accepted the offer and assented to the terms. There was consideration.

1. The court should rule in favor of Homeowner because the use of a different type of paint is a material breach to the contract formed. The issue here is whether Homeowner's failure to provide payment constitutes a breach of the contract when Painter did not use the specified paint. A breach of contract may arise when one party fails to perform any part of the agreed upon contract. A breach may be material or minor. A breach is minor if it does not affect the main purpose of the contract. A breach is material if it does affect a material portion of the contract or there is failure to perform an express condition included within the contract. Without doubt, Homeowner not paying Painter is a breach of contract. However, this breach may be excused if Painter failed to perform some condition precedent or if Painter materially breached the contract. Here, the terms of the contract provide for payment to Painter after painting his home with a special oil-based paint manufactured by Special Paints, Inc. that had a 15-year guarantee. Painter discovered that Special Paints was out of business and decided to purchase different paint that was water based and only had a 5-year guarantee. Moreover, Painter did not tell Homeowner of the issue or the substitution. This constitutes a breach of contract because the type of paint used was a material term of the contract and the agreement expressly stated the type of paint to be used. Homeowner would likely argue that there was no contract because of the inability to have the specified paint, and therefore rescission should be implemented. Painter could argue impossibility in response to Homeowner. Impossibility arises when a contract is impossible to complete due to the happening of some event out of the control of the parties. Here, Painter could not paint the house with the specific paint because the manufacturer was out of business. However, Painter should have notified Homeowner of the issue prior to substitution. Painter breached this contract by substituting the type of paint, which was an express condition and material term, and not notifying Homeowner of the substitution. Therefore, the Court should rule for Homeowner. Painter should argue quantum meruit.

2. As stated above, nonpayment constitutes breach, but may be excused. Here, Painter used Mountain Snow as the color to paint the house. The terms of the contract state that the house is to be painted white. Depending on the significance in the differences of colors, this may be a material breach. If the court finds it to be material, Homeowner will be excused from paying painter. In the alternative, if it is considered a minor breach, then Painter will be said to have substantially performed. In this case, Homeowner will be required to pay Painter.

A

3. Again, breach may occur as stated above. Usually, the expiration of the stated time in the contract will not be considered breach so long as the performance occurs within a reasonable amount of time. An exception is if there is a time-is-of-the-essence clause. Here, there is no such clause. Further, the delay was not caused by painter. If this is considered breach, it will be minor and it will not excuse payment by Homeowner.

4. An exception to the above rule is for bad faith or if caused by the parties. Here, Painter caused the delay because he painted the home of neighbor before finishing the job. Homeowner will likely win, but still have to pay for performance.

5. Mistake can act to rescind if there is mutual mistake. There is no mutual mistake here. Homeowner must pay.

QUESTION 2

The private litigants in the following situations, all having proper standing, have challenged the described government laws in federal court on the grounds that the laws violate their rights under the Commerce Clause of the United States Constitution.

1. In response to an increase in terrorist attacks against personnel working on passenger trains, the United States Congress passed the Railway Safety Act (the Act), making it a federal offense to commit assault against any railway personnel during a domestic or international passenger railway trip. The Act imposes severe penalties for any violation of the Act.

   Abe was arrested and charged with a federal offense under the Act for assault and battery of a railway conductor during a trip from Seattle, Washington, to Los Angeles, California. Abe's defense is that the United States Congress does not have the power under the United States Constitution to pass the Act.

2. Recently, the State of Columbia saw the arrival of a rare insect previously only found in the mountains of Uganda. The insects were accidentally transported to Columbia in a shipment that originated in Uganda. The insects quickly destroy trees and shrubs and are difficult to detect until significant damage has been caused. Before the insects could be detected, they had been transported to other states in tree shipments.

   The State of Jefferson is known for its beautiful trees and is a popular tourism destination for tree lovers. While there have been no reports of the insect in Jefferson, the state legislature passed a law banning the importation of trees from any state where there has been a confirmed presence of the insect.

   Tree Farm, a Columbia nursery that sells trees nationwide, has challenged the Jefferson law as a violation of the United States Constitution.

3. The State of Franklin has decided to build several new state office buildings. Cement producers in Franklin had for years produced cement. In recent years, however, the in-state cement industry had begun to suffer because of high costs. In an effort to help the in-state cement industry, the Franklin legislature passed a law, stating that all cement used in new state buildings must be purchased from in-state cement producers. This is despite the fact that the price would be higher than if the cement were purchased from out-of-state cement companies. A cement producer in a neighboring state has sued Franklin asserting that the Franklin law violates the United States Constitution.

How will a court likely rule in each of the following:

1. **Abe's challenge of the Act?**
2. **Tree Farm's challenge of the Jefferson law?**
3. **Cement producer's challenge of the Franklin law?**

Explain your answers fully.

A

1. Abe will lose. Congress has the broad power to regulate interstate commerce, including the channels, instrumentalities, and persons within it. Channels include railways, and instrumentalities include methods of transportation. Even economic activities that are not themselves interstate commerce can be regulated if, in the aggregate, they have a substantial effect on it. Here, Abe (A) was on an interstate train when the crime occurred. He was utilizing a channel of interstate commerce. Congress will argue that even the limited instances where railway travel does not implicate interestate commerce, all train travel will have a substantial effect on it. Further, here the train was traveling between Washington and California, which is clearly interstate. The court will find that Congress has the power to regulate this because of its interstate commerce power.

2. Tree Farm (TF) will lose. Under the Dormant Commerce Clause, a state cannot impede interstate commerce. Any law that discriminates against out-of-state commerce is a violation. However, a state may so discriminate if promoting an important (non-protectionist) interest and there is no less discriminatory alternative. Here, Jefferson (J) has passed a law that bans trees from infested states, which is explicitly discriminatory against other states. However, the point of the law is protecting J's trees, from which it derives tourism dollars, by preventing the spread of an insect that moves quickly and is hard to detect. This will likely be an important government interest. No less discriminatory alternatives are present; the law only bans sales from states with infestations, which is a reasonable way to stop them. J will succeed.

3. The cement producer (CP) will lose. The standard for the Dormant Commerce Clause is stated above. Another exception to the prohibition of state discrimination against out-of-state commerce is when a state is acting as a market participant – that is, when the state is engaged in buying, selling, or contracting for its own use. Here, Franklin (F) has passed a law that requires cement for new state buildings to be purchased from in-state CPs. This is clearly discriminatory against out-of-state producers such as CP. However, F is acting in its capacity as a market participant – it is controlling who it buys from. Importantly, it is not restricting purchase for other buyers, only for state buildings. This is an appropriate action and F will win.

QUESTION 3

Q

Inventor, Accountant, and Promoter each own 100 shares of stock of ABC Beverage Co., a duly organized Ohio corporation (Beverage), whose business includes a plan to produce green beer. Inventor, Accountant, and Promoter serve as the Directors and hold the following positions as officers: Inventor as President, Promoter as Vice President-Treasurer, and Accountant as Secretary. Beverage has a bank account at Big Bank (Bank). Inventor, as President, is the only person authorized to sign checks. Bank delivered the checks to be used for the account with Beverage's full name printed thereon.

Inventor, Promoter, and Accountant agreed that Beverage needed additional capital. Accountant stated that he represented a trust that would invest $100,000 for 25 percent of the stock of Beverage. The three of them agreed that as a result of this investment, each of them, together with the trust, would own 25 percent of the stock of Beverage. Accountant sent Beverage a letter that he signed as duly authorized agent for the trust, stating that the trust would pay $100,000 for 25 percent of the stock of Beverage. Inventor, as President of Beverage, signed the letter and returned it to Accountant, creating an agreement on those terms. Accountant said he would provide Beverage with the name and address of the trust shortly and would promptly deposit the trust's investment in Beverage's bank account. Accountant was unaware of the fact that the trust had been terminated.

Inventor met with Manufacturer to place an order with detailed specifications for machinery necessary to produce the green beer. The order required delivery in 10 days. Inventor sent a letter to Manufacturer, placing the order and immediately below his signature, he printed the words "acting for Beverage." Without Beverage's knowledge, Manufacturer ordered the machinery from Ace Equipment (Ace) and did not disclose Beverage's name in placing the order. However, before placing the order, Manufacturer had told Ace's President that the machinery was for Beverage and that the machinery should be shipped directly to Beverage. The machinery arrived on time.

Inventor issued a check on Beverage's account for $100,000 to the Licensing Agency for the licenses needed to produce and sell green beer. Inventor signed the check, but did not include his title as part of the signature.

Unfortunately, the machinery did not meet the specifications, so no green beer could be produced. The check for licensing fees was returned by the Bank as unpaid because Accountant did not make the deposit of $100,000 for the trust's share in Beverage. As a result of the foregoing, Beverage is insolvent and the following lawsuits have been filed:

1. Beverage sued Accountant for Accountant's failure to deliver the $100,000 that he committed on behalf of the trust.
2. Manufacturer sued Inventor for payment for the machinery.
3. Ace sued Manufacturer for payment for the machinery.
4. Beverage sued Ace because the machinery did not meet the specifications.
5. Licensing Agency sued Inventor for the amount of the dishonored check.

Assume all suits were properly authorized.

Which lawsuits, if any, should succeed, and which lawsuits, if any, should not succeed?

Explain each answer fully.

A

1. Beverage will prevail. Accountant as an officer sitting on the board of directors owes the company a fiduciary duty and a duty of loyalty. Here Accountant with his interest in the trusts, has to inform the board of his interests and then a 2/3 vote by disinterested board members has to pass for the venture to go forward. Here everyone agreed, but accountant should have been left out of the vote. Accountant had the duty to inspect the trust to make sure there was money and to transfer the money to Beverage.

2. Manufacturer will prevail because inventor had actual authority to enter into the contract. Actual authority is when an agent acts on behalf of a principal to do business with third party. Actual authority can arise through express or implied authority. The principal can hold the agent out as an agent or conduct can imply it. Here Inventor had the authority to enter into the contract because he was the President for Beverage and was the only one with authority to write checks. Inventor placed the order with Manufacturer and wrote "acting for Beverage." Thus, Manufacturer would believe that Inventor had actual authority and when there is actual authority the principal is liable for the contracts entered into by the agent with a third party. Thus, Manufacturer will prevail because inventor had actual authority to enter into the agreement.

3. Ace will prevail against Manufacturer. A principal can become liable for the contracts of an agent to a third party when there is apparent authority. Apparent authority is when a third party believes the agent has actual authority from the principal. Beverage had no knowledge that Manufacturer ordered from Ace, so no actual authority to enter was given. Apparent authority could be found if Manufacturer had actual authority in the past by Beverage to enter into with ace. Ace will say there was apparent authority because Manufacturer said the order was for Beverage and the machine should be shipped directly to them. However, that would be unfair to Beverage because there is no evidence that they have done this in the past, so Beverage will not be liable, but Manufacturer will.

4. Beverage will prevail over Ace. Third-party liability when undisclosed or undiscovered principal. If there is an undisclosed principal, the performance is still owed to the third party unless the agent has special skills. Here Beverage is the third party and Ace is undisclosed. Ace will still be liable because they were contracted and the machine did not work properly

5. Licensing agency will not prevail against Inventor. Inventor was acting on behalf of the corporation and as a corporation, stockholder, or officer inventor cannot be held personally liable for the faults of the corporation. Beverage itself can be held liable, but not Inventor. Inventor is immune from lability, thus, licensing agency will not prevail.

QUESTION 4

Ben and Sam each own a parcel of real property in Anytown, Ohio, physically separated only by a lot that they both call the Field. Ben took possession of his property, the Ponderosa, on January 1, 1999, under a land contract with the owners, the Clumps. Title to the Ponderosa was later conveyed to Ben on January 1, 2008. Sam acquired title to his property, the Spread, on January 1, 2016, from the Wilsons.

Soon after Sam purchased the Spread, a dispute arose between Sam and Ben as to the ownership of the Field. Ben claims that the Field belongs to him, that he has used it since January 1999, and that it was used by the Clumps, his predecessors-in-title. Sam, however, claims the Field as part of the Spread that was conveyed to him in 2016. Ben has refused Sam entry onto the Field and he refuses to vacate the Field. Their dispute has continued for months.

With each claiming ownership of the Field, in August 2016, in the proper court, Ben filed an action against Sam to quiet title. Sam filed a countersuit against Ben also seeking to quiet title.

In January 2017, at trial, the Clumps testified that when they purchased the Ponderosa in 1967, they assumed that the Field was included. They didn't use it until 1994, when they cleared it of brush, erected a fence enclosing the entire Field property, and planted a vegetable garden and fruit trees. Additionally, they built a small building (Shed) from which they sold produce from the garden and fruit from the trees. The Clumps continually used the Field as a garden and otherwise maintained the Field and the Shed through December 31, 1998, until they transferred possession of the Ponderosa and the Field to Ben on January 1, 1999. They sold the property to Ben and conveyed title to him on January 1, 2008.

In addition to agreeing with the Clumps' testimony, Ben testified that he always assumed that he was purchasing the Field as part of the Ponderosa. He stated that from the moment he took possession in January 1999, he made full use of the Field, cultivating and maintaining the garden and fruit trees. He testified that, with the exception of 2010 and 2011, for each year of his possession and ownership of the Field, he personally maintained the fence surrounding the Field and continued to harvest and sell the produce and fruit from the trees from the Shed, as the Clumps had done. Ben erected a sign at the entry of the Field that read, "Ben's Ponderosa Farm Market."

Ben stated that in 2010 and 2011, he was abroad. However, during that time, his cousin (Cousin) lived at the Ponderosa and planted, harvested, and sold the produce, and otherwise maintained the Field. Cousin even painted the Shed and put up a new sign that read, "Ben's and Cousin's Ponderosa Farm Market."

The Wilsons testified that their grandfather (Grandfather) purchased the Spread in 1938, and that the Field was always part of the Spread. When Grandfather died in 1986, the Wilsons inherited the property, but never occupied or visited the property after Grandfather's death because they lived in another state. Using a realtor, the Wilsons sold the Field and the Spread to Sam on January 1, 2016.

Sam testified that when he purchased the Spread, the Field was included in the transaction. He produced a seller's affidavit signed by the Wilsons attesting that the Spread and the Field constituted the entire property for sale. Most importantly, Sam introduced the survey of Surveyor, which confirmed that the Field was part of the Spread. Sam testified that the survey and affidavit confirm that he is the rightful owner of the Field.

Who is likely to prevail on the claim of ownership of the Field? Discuss fully.

A

B will likely prevail in ownership of the Spread due to adverse possession. In Ohio, the statutory period for adverse possession is 21 years. During that time period the adverse possessor must have: (1) continuous use; (2) open and notorious use; (3) actual use; and (4) use that is hostile to the actual owner. Additionally, parties in privity may "tack" their adverse use in order to satisfy the statutory time requirement for continuous use. Here B obtained possession in the property in 1999, and title in 2008. Although he himself did not occupy the property for the entire statutory period, he may tack his possession with the possession of his predecessors, the Clumps. The Clumps purchased the property in 1967, and assumed the field was included in their purchase. They began use of the property in 1994, in a way that would satisfy the statutory requirements. Erecting a fence and enclosing the entire field shows actual use of the entire property. Clearing the brush, planting trees and vegetables, and building a shed are open and notorious use (visible) uses of the property. Wilson's testimony and Sam's evidence of the survey that shows that the property is within his property line shows that this use was hostile to the actual owner since the Clumps did not actually own the Field. He also prevented S from entering the Field, which was adverse to S's ownership interest. The Clumps' use continued until the property was possessed by B. The Clumps took possession of Ponderosa in 1999, by contract with the Clumps, therefore they are in privity and B's use can tack on to their use to satisfy the statutory period. B, since taking possession in 1999, used the property as if he was the proper possessor and made full use of the Field by cultivating and maintaining the fruit trees and continued to do so when he obtained title to the property in 2008, by maintaining the fence, continuing to harvest and even making a sign that says "Ben's Ponderosa Farm Market" at the entry of the Field. Although he was not in possession for 2010 and 2011, he continued to act in a manner of a true owner of the Field, which was hostile to S's claim by having a tenant on the premises while he was away and permitting his cousin to live there, maintain the Field, paint the shed, and putting up a new sign. The cousin was also in privity with B and there with B's permission during this period and therefore, even though B was not physically present, this time can be used toward tacking and does not defeat the continuous use for adverse possession. Since B satisfies all of the requirements of adverse possession, B is likely to prevail in an action to quiet title in the Field.

QUESTION 5

Paul ended his long-term romantic relationship with Kitty. Paul and Kitty had lived together in Paul's Anytown, Ohio, home until Paul told her to move out. Kitty was devastated.

Early the next morning, determined to seek revenge, Kitty hung a large poster in the window of Pet Store, where Paul worked as a manager. The poster included a photo of Paul holding his adorable pet cat, with Kitty sitting in the background. Under the photo, the poster included the caption:

> **This guy manages Pet Store? Not only does he not love Kitty, he recently dumped her and left her out in the COLD to survive on her own!**

Shortly afterward, Paul arrived at Pet Store and tore down the poster before the store had opened or any customers had arrived.

Before Paul had removed the poster, however, Denise left Coffee Shop next to Pet Store, stopped to take a picture of herself, and posted it on social media showing that she had just grabbed a scone and a cup of her favorite latte. The picture was seen by many of her 1,200 social media followers. Unbeknownst to Denise, Kitty's poster about Paul was clearly visible in the background of her picture.

The poster about Paul outraged many of Denise's social media followers, who ultimately disseminated the picture to thousands of other people, sometimes including their own captions about boycotting Pet Store or demanding that Paul be terminated as its manager. Pet Store soon thereafter terminated Paul's employment due to pressure from the media and several animal rights organizations to get rid of the guy on the poster.

What viable tort claims, if any, does Paul have against:

1. **Kitty?**
2. **Denise?**

Explain both of your answers fully.

Do not discuss potential claims between or against any other parties.

A

Paul can sue Kitty for libel per quod. Libel is a type of defamation. Defamation requires proof of a defamatory statement of fact, meaning one that would cause someone's reputation to go down or for people to not want to associate that person, publication to a third party, falsity and damages. For a private plaintiff in a private matter, there is no need to show negligence. Slander is spoken defamation while libel is written. As a poster, this is written defamation, so it is libel. With libel, damages are generally presumed unless the defamation is not apparent on its face. Kitty's poster is not defamatory without context. Paul did end his relationship with Kitty, and while that might make her mad, it does not necessarily mean that people will think less of him for it. This is libel per quod, which requires context. The fact that Kitty posted this message with a photo of Paul holding his adorable pet cat makes people think that he dumped a cat and left it exposed to the elements, which would be bad enough were it not for the fact that Paul managed a pet store. Being cruel to animals would make Paul unsuited to run a pet store, which makes this poster defamatory. Kitty could argue that it was not published because no one in the store saw it, but Denise inadvertently republished the picture on her social media account making it available to 1,200 people. A tortfeasor in defamation is said to publish the defamation when they make it possible for others to hear it, even if inadvertent. Here, Kitty intended to hurt Paul's reputation.

Kitty could also sue for interference with business relations, which requires a business relation or valid expectancy on the part of the Plaintiff, knowledge of the business relationship on the part of the defendant, intent to interfere with business relationship on the part of the defendant, and actual interference. Here, Kitty knew that Paul worked at a pet store and her actions show an intent to interfere with his job because the poster was placed in a large window of the pet store. Finally, Paul was terminated from his position as a direct result of Kitty's interference.

Paul could claim false light, which includes the false portrayal of someone in a way that a reasonable person would find offensive. It generally has the same standards of fault as defamation, but false light is usually used when the statement is not really defamatory, but would make people not want to be portrayed in such a way. The classic example is the baseball player who does not want people to say he is generous because he does not want to be bothered by people trying to get money from him.

Finally, Paul could sue for disclosure of private facts and appropriation of image, but both claims will fail. While it is his image in the poster and he did not consent to having it blown up like that, Kitty did not do this for pecuniary gain. Furthermore, the two private facts revealed in this that are true are a photograph of him holding a cat, which would not be an unoffensive intrusion into privacy for an average person, and a statement that he dumped Kitty, which would also not be an offensive intrusion since Paul would probably expect the word to get out.

Paul could try to sue Denise as a republisher. At common law, a republisher was as liable for the original defamation as the original tortfeasor. However, the modern trend is to require liability of republishers to be based at least on negligence. As a private plaintiff in a private matter, Paul need not prove negligence against Kitty. However, he must prove negligence against Denise as a republisher. Denise did republish the poster and cause damages to Paul's reputation, but she was merely trying to take a picture of herself, which is a very common activity. Most people would not think to look for defamatory material in the background of a selfie.

QUESTION 6

The following events all took place in Anywhere, Ohio:

1. On July 4, 2001, Bill issued two validly executed promissory notes to Sam. Note A in the amount of $10,000 was payable on January 1, 2008, and Note B in the amount of $20,000 was payable "on demand." Sam made a demand for payment of Note B on January 1, 2007, and a demand for payment on Note A on January 1, 2008. Bill did not make any payment on either note and Sam filed suit on December 31, 2013, to enforce payment on both notes. Bill has filed a Motion to Dismiss Sam's claims as to both notes based upon the statute of limitations.

2. John purchased a used 2010 Chevrolet truck (Vin No. XYZ111) from We R Trucks, Inc. (Trucks) on May 3, 2014. John had only been driving the truck for two weeks when the engine failed. John called Trucks and threatened to sue Trucks for the cost of repairs in the amount of $25,000. Attempting to resolve the matter, on June 10, 2015, Trucks made an offer to John to settle the matter by sending John a check in the amount of $15,000.

   There had been no discussion of a settlement between John and Trucks, but John indorsed Trucks' check upon receipt. The check contained a restrictive indorsement printed in bold, underlined language on the back of the check that said: "Accepted in full settlement and satisfaction of all claims against Trucks for the 2010 Chevrolet truck (VIN No. XYZ111)." John placed the $15,000 in his savings account to use to pay for the repairs. However, John subsequently learned that it would, in fact, cost $30,000 to repair the truck. Accordingly, on October 1, 2015, John sent a personal check in the amount of $15,000 back to Trucks with a note disavowing any "settlement agreement." Trucks returned John's $15,000 personal check to him with a note saying that "the matter has been resolved." John then sued Trucks for $30,000.

3. Mary is the secretary of ABC Inc.'s (ABC) President, Calvin. Mary has no authority (either real or apparent) to enter into any debt on behalf of ABC. However, she executed a corporate promissory note payable upon demand by ABC to Nursery for work that Nursery did at ABC's facility and signed the note in Calvin's name because she "didn't want to bother him with it." Nursery indorsed the note over to Sodco to pay for lawn material purchased by Nursery from Sodco. Nursery had no knowledge that Calvin did not actually sign the note.

   When the note became due, Sodco presented the note to ABC for payment, but ABC refused to pay because Mary had no authority from ABC to execute corporate notes in the first place, and Mary had forged Calvin's name on the note.

   Unable to collect from ABC, Sodco then sued Nursery for alleged breach of transfer warranties.

How is the court likely to rule on each the following:

1. Bill's Motion to Dismiss?

2. John's action against Trucks for $30,000?

3. Sodco's action against Nursery for breach of transfer warranties?

Explain your answers fully and do not discuss holders in due course.

A

1. The Court should overrule Bill's motion with respect to Note A, but sustain his motion with respect to Note B. The statute of limitations for notes in Ohio is 6 years from the date payment is due and owing. If an instrument is payable at a specified date, the statute of limitations begins to run the following day. If the instrument is payable on demand, the statute of limitations begins to run when demand for payment is first made.

   Note A: Note A is a valid promissory note payable on January 1, 2008, a definite date. Thus, the statute of limitations began running on January 2, 2008, and has yet to run for a full six-year period. Therefore, the statute of limitations cannot bar Sam's claim as to Note A, and the court should overrule the motion to dismiss with respect to Note A.

   Note B: Note B is a valid promissory note payable on demand. Demand for payment was first made on January 1, 2007. Therefore, the statute of limitations would have fully run on January 2, 2013. Since the period has fully run, Sam can no longer collect on the instrument, and the court should grant Bill's motion to dismiss with respect to Note B.

2. The court will likely rule against John in his action against Trucks for $30,000. When the amount of a debt owed is disputed, one party can accept partial payment in full satisfaction of the uncertain obligation. If that party later wishes to instead seek full payment, they must return the partial payment within 90 days. A restrictive indorsement is used to limit the liability of a party.

   Here, there was a dispute as to the validity of a debt. John sought payment to fix his truck before obtaining a judgment or similar right to guarantee his right to payment from Trucks for fixing his truck. Nevertheless, Trucks sent him a check in the amount of $15,000 with a restrictive indorsement acknowledging that accepting the instrument constituted a "full settlement and satisfaction of all claims against Trucks for the 2010 Chevrolet truck." John accepted those terms when he cashed the check and deposited the $15,000 into his savings account. However, John still had 90 days to return the money, yet failed to do so. The 90-day period passed in September of 2015, and John did not attempt to return the check until October of 2015. Thus, the court will likely find for Trucks.

3. Here, the court will rule in favor of Sodco. A transfer warranty is a warranty made by a transferor to a transferee, each time a negotiable instrument is transferred. A transfer is any change of possession of a negotiable instrument that occurs after issuance of a negotiable instrument. Transfer warranties include the warranties that the transferor is entitled to enforce the instrument, that there is not any forgery or alteration of the instrument, and that the instrument is not subject to any claims or defenses. When a transfer warranty has been breached, the transferee can bring an action against the transferor. The transferor can then bring an action against a party that breached any transfer warranties when they received the instrument through negotiation.

   Here, Nursery breached their transfer warranties to Sodco. Nursery would not have been able to enforce the instrument, as it was subject to a real defense (fraud) that would prevent even a holder in due course from recovering on the instrument. They transferred an instrument that was forged. Finally, they transferred an instrument that was subject to the real defense of fraud, the personal defense of non-issuance. Thus, Nursery breached their transfer warranties and Sodco can recover against them.

QUESTION 7

One afternoon in Anytown, Ohio, Driver was driving his automobile on Main Street, accompanied in the front seat by Passenger. While on routine patrol, Sgt. Taylor (Sarge) of the Anytown Police Department was traveling directly behind Driver. Sarge observed Driver proceeding through an intersection in violation of a red traffic light.

Sarge activated his lights and siren, and Driver immediately pulled his vehicle to the side of the road in obedience to Sarge's signal. Sarge approached the Driver's side window of Driver's vehicle and requested that Driver provide him with his driver's license. Driver said he didn't have a license and refused to provide Sarge with any information regarding his identity. Consequently, Sarge ordered Driver to exit his vehicle. As Driver did so, Sarge noticed a strong odor of burnt marijuana emanating from the interior of the vehicle and that Driver's eyes were bloodshot. Sarge placed Driver in handcuffs, secured him in the back of his cruiser, and radioed the station for backup assistance.

Meanwhile, Passenger remained in the front seat of the vehicle. Sarge ordered Passenger to exit the vehicle and put his hands on the hood of the vehicle. Passenger fully complied with Sarge's orders.

Sarge searched the interior of the vehicle and found a loaded handgun under the driver's seat. Sarge secured the handgun and placed it in the trunk of his cruiser.

Officer Backup (Backup) then arrived in response to Sarge's call. After being briefed by Sarge, Backup conducted a pat-down search of Passenger and found a small bag of what he suspected was cocaine in Passenger's front pocket. When Backup attempted to handcuff and detain him, Passenger fled the scene on foot.

Backup chased Passenger into a nearby neighborhood and saw Passenger break the front window of a home and gain entrance to it. Several additional police officers arrived and surrounded the home. Backup, along with two other police officers, entered the home to find Passenger. They observed a large amount of equipment in the kitchen, which appeared to be a methamphetamine lab.

The police located Passenger hiding in a closet of the home. He was arrested and handcuffed and later charged with possession of cocaine, resisting arrest, and burglary.

As police were securing the scene, Howard pulled into the driveway of the home. After identifying himself as the owner of the home, Howard was taken into custody.

Driver, Passenger, and Howard were all transported to the local police station. When booked into the county jail, all the defendants' belongings were taken from them for safekeeping, including Driver's cell phone. The police decided to search the call logs and records contained on Driver's cell phone. Several of the telephone records revealed the purchase and sale of marijuana by Driver. Driver was then charged with operating a motor vehicle while under the influence, carrying a concealed weapon, and trafficking in marijuana.

Howard's vehicle was impounded and remained at the police station for three days before officers conducted a warrantless search of the entire vehicle, including the trunk, where a sawed-off shotgun was found. Howard was then charged with the unlawful possession of the shotgun and with illegal manufacture of methamphetamine.

Each defendant has moved to suppress the evidence seized in prosecuting the charges against him. Driver moved to suppress the handgun and cell phone, Passenger moved to suppress the bag of cocaine, and Howard moved to suppress the methamphetamine lab equipment and the shotgun.

How should each defendant's Motion to Suppress be decided? Explain fully.

Driver

The handgun may not be suppressed. The rule is that police need probable cause to stop a vehicle traveling on the road without a warrant and probable cause to search the vehicle once a stop has been conducted. Here Sarge observed Driver go through an intersection without stopping for a red light. This observation gave Sarge the probable cause to pull Driver over. The probable cause for the search came when Sarge smelled marijuana coming from the vehicle. The Fourth amendment does not offer protection from odors. The smell gave Sarge the probable cause needed to place Driver into back of his car and search the vehicle. Even though Passenger was not secured in the cop car, Driver was, which gave Sarge the ability to search the car. The handgun was found during the lawful search and, therefore, may not be suppressed because it was in an area that Driver could easily reach it.

The cell phone will be suppressed. The rule is that when a lawful arrest has taken place an inventory of all items may be conducted if it is standard procedure. Here it may be assumed that searching a person before being placed into jail is standard procedure because officers would not want inmates to have anything on them that could be used as a weapon. The search of Driver to find the cell phone was therefore legal. However, the actual search of the call records was not within the scope of the search that is permitted by the Fourth Amendment. The officers would be able to look at the actual phone and see if there was anything on the phone, but by searching the contents of the phone they violated the 4th amendment rights of Driver. Therefore, the cell phone will be suppressed.

Passenger

The bag of cocaine will not be suppressed. The rule is that a passenger in a vehicle that has been lawfully stopped may be searched to protect the safety of the officer when the officer has probable cause to search the vehicle and to protect the safety of the officer during the search. Here Driver was pulled over legally and because Sarge could smell the marijuana, he had the ability to order Passenger out of the car to search it. When Passenger was ordered out, Sarge did not secure Passenger in the patrol car, but Backup was still able to do a pat down to check for any weapons. During the pat down is when the cocaine was found. The finding of the drugs while searching for weapons is legal because the officers were able to discover that it was drugs when it was found and, therefore, it will not be suppressed.

Howard

The methamphetamine lab equipment will not be suppressed. The rule is that officers may make a lawful warrantless arrest only when the arrest is under exigent circumstances. Here officers were in hot pursuit, a chase where officers are following a suspect, when they entered the home of Howard. Even though Backup waited for the two other officers to enter the home, they would still be in hot pursuit because they saw Passenger enter the house after breaking a window. The equipment was in the kitchen, which the officers saw as they were searching for Passenger. The items were in plain view, which is when the officers knew what the items were without moving or distorting them in any way. When Howard arrived at home he was placed under arrest lawfully and, therefore, it cannot be suppressed.

The shotgun will be suppressed. The rule is that when a person is lawfully arrested and the vehicle is impounded, the police may do an inventory search of the items in the vehicle if it is standard procedure. Here Howard was arrested at his home after he got out of his car. However, when the car was impounded the police did not conduct an inventory search for 3 days. An inventory search must be conducted when the vehicle is impounded or within a reasonable time. Three days is not a reasonable amount of time and, therefore, the shotgun will be suppressed.

QUESTION 8

ACME Inc. (ACME) was formed in January 2016, by Anne, Bob, and Carl. They had not engaged a lawyer to help them with their incorporation, but simply went online to find a form for Articles of Incorporation and the Code of Regulations. The form for the Articles of Incorporation that they prepared and filed stated only that: (1) ACME, Inc. is the name of the corporation, (2) 500 shares of stock are authorized, and (3) the purpose of the corporation is to conduct any legal business. Anne, Bob, and Carl each held 100 shares of ACME stock.

The three shareholders voted to name Anne, Bob, and Bob's brother, Mike, as Directors. Bob was then named as President of ACME, and Anne was named as Secretary. The term for each director was set at 3 years. ACME's fiscal year is a calendar year ending on December 31. Debby and Ed later each bought 100 shares of ACME stock.

ACME started performing well almost immediately. After it had been in operation for one year, the shareholders decided that they needed to hold a meeting. They wanted to approve the financial reports and consider adding another director. In addition, Carl, Debby, and Ed did not want Mike to continue as a director of ACME. They wanted to elect Ed as a director to replace Mike and serve out Mike's term. Bob and Anne disagreed and wanted Mike to remain as a director.

On Friday, January 20, 2017, Bob sent emails to Debby and Ed, which advised them that there would be an ACME shareholders meeting on Saturday, January 28, at 9 a.m. at the corporate office to approve the financial reports, elect a new director, and decide whether or not to remove Mike as a director. Bob later made phone calls to both Anne and Carl on Wednesday, January 25, and told them only that there would be a shareholders meeting on Saturday, January 28.

All of the shareholders complained to Bob about the short notice. They called each other and threatened not to attend the meeting, but they did not convey their threats to Bob.

Debby did not attend the meeting; however, three months earlier she had given Ed a written, signed proxy to vote her shares. Bob, Ed, Anne, and Carl arrived for the meeting, and no one voiced any concerns to Bob about the timing of the meeting. The meeting was held as scheduled. Carl and Ed, and Ed as Debby's proxy, voted to remove Mike and elect Ed to serve out Mike's term. Bob and Anne then announced that they wanted to elect a new director, Frank, to the Board, but the other directors opposed electing Frank.

1. **Were the ACME shareholders required to hold this meeting, and was it held at the appropriate time? Discuss fully.**
2. **Did Bob properly call the ACME shareholders meeting? Discuss fully.**
3. **Was the ACME shareholders meeting properly convened? Discuss fully.**
4. **Was the vote to remove Mike as director and elect Ed to serve out Mike's term a valid action? Discuss fully.**
5. **What action, if any, might Bob and Anne take to elect Frank as a new director over the opposition of the other directors and, are they likely to succeed? Discuss fully.**

A

Ohio corporations are governed by the GCL.

1. ACME shareholders were required to hold this meeting, but it was not held at the appropriate time. The annual shareholders meeting is required to elect directors. If the articles of incorporation are silent as to the annual shareholders meeting, it is to be held on the first Monday of the fourth month after the close of the fiscal year for the corporation. Here, the close of the fiscal year for ACME was December 31st. Thus, since the articles were silent at the annual shareholders meeting, the meeting needed to be held on the first Monday of April of 2017. Here, the meeting was held on January 28th. Therefore, the meeting was required, but was not held at the appropriate time.
2. Bob did not properly call the ACME shareholders meeting as to all shareholders. Directors are required to give shareholders written notice of special and annual meetings, including the time, place, and purpose by personal delivery, certified mail, or any other conveyance agreed to by the shareholders. Notice is required to be given 7 to 60 days before the meeting. Here, Bob gave notice to Debby and Ed 8 days before the meeting by email. This would be appropriate as to time and procedure if Bob and Debby approved email notification. Further, the notice specified the time, place, and purpose of the meeting. However, the phone calls made to Anne and Carl were only made 3 days before the meeting. This was not proper action as to time or procedure, as phone calls are not written notice.
3. The ACME shareholders' meeting was properly convened. The annual shareholder meeting is required to have a quorum of the voting shareholders present to vote on the election of directors. In Ohio, the quorum is the number of voting shareholders present at the meeting. Further, shareholders who do not receive proper notice are required to object in writing or lodge their protest at the annual shareholders' meeting. If they do not, their objection is waived. Other shortcomings discussed above aside, Bob, Ed, Anne, Carl, and Debby (through Ed), all five shareholders, were present at the annual shareholders' meeting. In Ohio, this would constitute a quorum and since no one lodged their protest as to inadequate notice, the shareholders' meeting was properly convened.
4. The vote to remove Mike as director and elect Ed to serve out his term was a valid action. Shareholders elect directors by majority vote and can also remove directors by majority vote. Further, shareholders can vote in person or through a written and signed proxy to another to vote their shares, which is good for 11 months. Here, Debby's proxy was valid as it was written and signed to Ed three months earlier. Further, the majority of the quorum present, three out of five, of the shareholders elected Ed to the Board and removed Mike. Thus, the vote to remove Mike and elect Ed to serve out his term was a valid action.
5. Bob and Anne can vote cumulatively. In Ohio, if the articles are silent, a shareholder can vote his shares cumulatively if he gives 48 hours prior to the annual meeting of his intention to do so. Cumulative voting allows a shareholder to vote their number of shares multiplied by the number of open director seats. Whichever director gets to the most votes, wins. This gives minority shareholders more power to elect directors than voting their shares in a normal course of conduct. Further, Bob and Anne can also nominate Frank to the Board if any of the current directors are removed or otherwise leave a vacancy during the year. Outside the annual meeting, directors can fill vacancies by majority vote of the directors present at a directors' meeting. Anne and Bob should also look for this open window.

QUESTION 9

On a Saturday afternoon in May 2014, in Anytown, Ohio, Tina went to the Sunshine Kitchen Store (Sunshine Kitchen) to buy a frying pan. Tina climbed the two steps at the entrance, opened the door, and went into the store. She quickly made her purchase. On the way out of Sunshine Kitchen, the store's video surveillance showed Tina pulling a cell phone out of her pocket and taking a call while she opened the door to exit. The video further showed Tina totally missing the top step and falling to the ground below. As a result of the fall, she sustained a badly broken ankle.

Tina's attorney filed a complaint in January 2016, in the Anytown Court of Common Pleas seeking damages for Tina's bodily injuries resulting from the fall. The Complaint named as Defendants: Landlord, who owned the building in which Sunshine Kitchen was located; Sunshine Kitchen, the tenant/business owner; and ABC Construction (ABC), who constructed the concrete steps leading up into the building.

Landlord's and Sunshine Kitchen's attorneys each timely filed Answers to the Complaint. ABC's attorney filed a notice of appearance as counsel for ABC, but did not file an Answer to the Complaint. Twenty-one days after ABC was served with the summons and Complaint, Tina's attorney filed a Motion for Default against ABC, but did not serve ABC or its attorney with a copy of the Motion for Default. Ten days after the Motion was filed, the court entered a default judgment against ABC in the amount of $250,000.

The lawsuit against Landlord and Sunshine Kitchen proceeded through discovery and to trial. During trial, Tina's attorney introduced evidence that in October 2015, Landlord made changes to the entrance of the store by painting the concrete steps a bright yellow to match the store signage of Sunshine Kitchen. Tina's attorney also called an expert to testify on Tina's behalf that at the time of the accident, the concrete steps presented a hazard because their color blended with the color of the sidewalk. On cross-examination, the expert admitted that Tina's own negligence in talking on the phone contributed to cause her fall.

After the parties rested, the jury deliberated and came back with a verdict in favor of Tina. The jury found Landlord to be 50-percent negligent and Sunshine Kitchen to be 50-percent negligent. The jury attributed zero-percent negligence to Tina.

Seven days after the order of judgment was entered in accordance with the jury verdict, Sunshine Kitchen filed a Motion for a Judgment Notwithstanding the Verdict (JNOV) and/or a new trial. The ground for the Motion was that the verdict was against the manifest weight of the evidence as Tina was not found to be negligent, even though her own expert admitted that her act in answering the cell phone contributed to the fall. The Motion was fully briefed, and the judge subsequently ordered judgment in Sunshine Kitchen's favor, finding the jury verdict was indeed against the manifest weight of the evidence.

Forty-five days after the order of judgment was entered, Landlord also filed a Motion for JNOV and/or a new trial on the ground that the evidence of a subsequent remedial measure (the painted steps) should not have been permitted to be introduced during trial.

1. **What arguments should ABC's attorney assert in a motion to set aside the $250,000 default against ABC, and how is the court likely to rule? Explain fully.**
2. **Was the court correct in granting Sunshine Kitchen's Motion for JNOV and ordering judgment in Sunshine Kitchen's favor? Explain fully.**
3. **a. Did Landlord have a proper basis for filing its motion? Explain fully.**
   b. Should the court grant Landlord's motion? Explain fully.

A

1. ABC's attorney should argue that Tina's attorney must have personally served a copy of the Motion of Default. However, their strongest argument is that Tina's attorney filed the Motion of Default prematurely. The court will likely rule in favor of ABC. In Ohio, one has 28 days after being served with a complaint to file an answer/motion. If no responsive pleading is made within 28 days and counsel or the client did not appear in court, the plaintiff may file a motion for judgment and does not have to serve the defendant with a copy of the motion. However, if opposing counsel does make an appearance, the plaintiff must serve the motion on the defendant. Further, a motion for default made be made within a reasonable time of discovering evidence to set aside default and must be filed within one year of entry of default. Here, ABC's attorney filed a notice of appearance with the court. Because ABC filed a notice of appearance, their attorney must have been served a copy of the motion for default filed by Tina's attorney. However, ABC's strongest argument is the motion for default was untimely. Tina's attorney filed for default 21 days after ABC was served. ABC has 28 days to file a responsive pleading, thus the motion was premature. Because the motion for default was premature, the court will likely grant ABC's motion to set aside default.

2. In Ohio, a party may file a motion for judgment notwithstanding the verdict (JNOV) within 28 days of entry of judgment. A JNOV may be filed when a jury finds for a party against the weight of the evidence. The filing party must present evidence that the jury decided the matter unfairly. A court, at its discretion and upon adequate findings, may grant a JNOV. Here, the jury found Tina was zero-percent negligent, even though her expert witness testified to Tina being negligent. This is clearly against the weight of the evidence established at trial. Further, Sunshine Kitchen filed the JNOV 7 days after entry of judgment, well within the 28 day period for doing so. The court was correct in granting Sunshine Kitchen's motion. However, the court erred by granting Sunshine Kitchen relief. The court could have done multiple things to determine Tina's fault. The court could have granted a new trial to assess all parties' fault or the court could have reconvened the jury to properly assess fault attributable to Tina.

3. a. In Ohio, subsequent remedial measures may not be admitted in products liability cases. However, subsequent remedial measures are appropriate in personal injury cases not involving a manufactured product. While subsequent remedial measures may not be used to prove fault, they are admissible to prove ownership or control of the area involved. Landlord properly filed a JNOV because Tina's attorney presented the evidence to attribute fault to Landlord. However, Tina's attorney could argue the evidence was presented to show that Landlord has owned and was in control of the steps of Sunshine Kitchen where Tina fell.

   b. The court should not grant Landlord's motion, however. A motion for JNOV must be filed within 28 days of entry of judgment. Here, Landlord filed his motion 45 days after judgment. Because Landlord's motion is untimely, the court should not grant his motion for JNOV.

QUESTION 10

Lisa recently was admitted to the bar in Ohio. She is setting up her law office and hopes to hire support staff in the near future. She is in the process of drafting model engagement letters to be used in three practice areas in which she intends to focus. Because she has limited financial resources, she wants to obtain retainers whenever practical. The three areas of law that she plans to practice are divorce and family law, criminal law, and plaintiff bodily injury tort law.

Describe in detail the contents that should be included in engagement letters regarding:

1. **Divorce/family law. Discuss fully.**
2. **Criminal law including traffic violations. Discuss fully.**
3. **Plaintiff bodily injury tort law. Discuss fully.**

Your responses should comply with the Ohio Rules of Professional Conduct.

A

In Ohio, a lawyer may charge reasonable fees based on a multitude of factors including the time it takes to complete the task, whether the attorney will forego other matters, the complexity of the case, etc. Almost any fee will be reasonable. If an attorney offers to provide a free consultation, it must identify when the consultation has ended and when charges will be incurred. Engagement letters are not required, but encouraged.

1. An engagement letter for divorce/family law should include a statement of the scope of representation, the hourly rate the client will be charged, that the client agrees to the representation, that the funds will be placed in an interest-bearing client trust/IOLTA account with the State of Ohio with account fees paid by the attorney. Lisa may request an availability retainer that is a fee to secure her availability and may then bill hourly for services, or an advance fee retainer where the retainer will be deposited into the IOLTA and funds transferred to Lisa's trust account as they are earned. The letter should also provide a statement as to how court costs will be paid, such as whether they will be advanced by Lisa or paid separately by client through the retainer. A lawyer may not lend client funds except to advance court fees. The engagement letter may not contain a contingency fee agreement that payment is contingent on successfully obtaining a divorce or support order. A contingency fee agreement is permitted in post-decree matters as a collection of a debt. The engagement letter should also include how the client's records will be kept, which is for 7 years. If Lisa partners with co-counsel on a matter, the letter must identify this arrangement and the client has to consent. The other lawyer must agree to be available and only take a proportional share. Include notice that the attorney-client privilege will be waived for joint clients who later sue the other.
2. The letter should include the scope of representation, the hourly rate, identification of the IOLTA account, and the relevant retainer arrangement as discussed above. Criminal law clients may not be charged a fee contingent on successful acquittal of the client. Lisa may not charge a nonrefundable fee unless agreed to in writing and signed by the client with notification that the fee will be refundable if the attorney does not complete representation of the case to the conclusion of it. If co-counsel is to be used, it will also have to include the items identified above. The agreement should specify that if the attorney is representing co-defendants, the information shared between them will not be subject to the attorney-client privilege in the event the co-defendants choose to testify against the other. In fact, the lawyer should refrain from undertaking representation of co-defendants. If the retainer or fees are paid by someone other than the defendant, the lawyer must explain that the person paying will not be entitled to be involved in the representation, make any decisions, be provided with any updates, or otherwise influence the litigation. The client is the only one who will be entitled to make those decisions. Also, any statements made in front of others will break the attorney-client privilege.
3. Engagement of personal injury cases may be through a contingency agreement, which is considered a reasonable fee. A contingency fee is usually a percentage of an award paid to the attorney upon a successful resolution of the claim. It must be in writing and agreed to by the client. It must state the percentage to be collected and how court fees will be applied (either before applying the percentage or after). The attorney must provide a monthly accounting to the client and make a final accounting displaying the distribution of fees and costs. If the client objects, the lawyer must keep her share in the IOLTA until the dispute is resolved.

QUESTION 11

David, an Ohio resident, married Wendy in 1980. David created a valid Ohio Will in 1995 (1995 Will). At that time, he and Wendy had two children, Pete and Amy. The 1995 Will provided as follows:

1. I give $50,000 to my brother, Ben.
2. I give 50 percent of the rest and residue of my estate to my wife, Wendy.
3. I give the balance of my residuary estate to my children, Pete and Amy.
4. In the event that any beneficiary should contest the validity of this Will or any provision thereof, that beneficiary shall forfeit his or her interest under the Will.

In 1997, David and Wendy had a third child, Hillary. Wendy passed away unexpectedly in 2005, and David has never remarried.

Pete joined the Marines in 2008, and while stationed in Iraq, was killed by enemy fire. Pete is survived by his child, Grant. David and his brother, Ben, had a serious argument in 2008 after Pete's funeral and have not spoken since 2009. Amy became a drug addict. She was in and out of treatment centers for many years, and David spent a considerable amount of money for her treatment. As a result of the situations involving Ben and Amy, David felt the need to revise his estate plan.

In 2010, David executed a valid Codicil (2010 Codicil) to his 1995 Will that provided as follows:

1. I revoke Item 1 of my 1995 Will due to my failed relationship with Ben. In its place, I give Ben only $5,000.
2. I revoke all provisions of my 1995 Will that provide for a share of my estate to pass to my daughter, Amy.

There was no reference in the 2010 Codicil to David's daughter, Hillary, or to the deaths of Wendy and Pete.

David's health began to deteriorate quickly in 2015. Amy, who had just completed her most recent rehab treatment at her own expense, came to live with David as he was beginning hospice care. David decided that Amy finally seemed serious about her treatment and decided that he wanted her to receive a share of his estate. David located his 2010 Codicil and wrote the following statement in his own handwriting at the bottom of the last page:

1. I revoke Item 2 of my 2010 Codicil and intend to revive the original provision of my 1995 Will as it relates to my daughter, Amy.

David signed and dated the handwritten notation. No part of the handwritten notation touched any of the dispositive provisions of the 2010 Codicil. There were no witnesses to David's handwritten notation.

David passed away in early 2016, without drafting any other testamentary documents. At the time of David's death, he owned the following assets:

1. An IRA in the amount of $100,000 that still listed Wendy as the primary beneficiary. Pete and Amy were named as the alternate beneficiaries.
2. $400,000 in an ABC Bank account. The account had no beneficiary designations.

David's 1995 Will and his 2010 Codicil with the handwritten notation at the bottom have been filed with the Probate Court. When Ben read the provisions of the 2010 Codicil, he was angry that David had modified his 1995 Will. Ben filed a Will Contest action, alleging that David must have been unduly influenced by other family members. After a brief hearing, the Probate Court dismissed Ben's Will Contest action based upon a lack of evidence.

Amy, Hillary, Ben, and Grant have all survived David.

1. **What, if anything, is Amy entitled to receive from David's assets?**
2. **What, if anything, is Hillary entitled to receive from David's assets?**
3. **What, if anything, is Ben entitled to receive from David's assets?**
4. **What, if anything, is Grant entitled to receive from David's assets? Explain your answers fully.**

A

1. **Amy**

   Holographic wills or codicils are not valid in Ohio. A holographic will is the entirety or material portions of a will or codicil that are in the testator's handwriting and no attesting witnesses. When David attempted to create a second codicil on the 2010 codicil, it was not valid without meeting the following requirements: 2 attesting witnesses who saw the testator sign and were in his conscious presence and the testator in turn saw or heard the witnesses sign in his conscious presence. Without these formalities, the holographic codicil is not valid in Ohio. Thus, its revocation of Item 2 of the 2010 codicil is not valid and the provision in the 2010 codicil revoking all provisions of the 1995 will that provides for a share of David's estate to pass to Amy governs and she will not take anything from the residuary estate. But, under the valid will and codicil, Amy will take the $100,000 in the IRA because she is still listed as an alternate beneficiary because a will cannot revoke this status, a document would need to be filed with the IRA. Additionally, the other beneficiaries have died, leaving her the sole beneficiary on the account.

2. **Hillary**

   Under the pretermitted heir statute, a child that is in gestation or born after a will is made is not barred from taking under the will unless otherwise stated in the will. Additionally, a testator may choose to disinherit a child, but they may not disinherit their spouse. Therefore, Hillary will end up splitting the residuary estate with Grant only because Amy is not provided for under the will any longer and there is no language suggesting that David disinherited Hillary. Hillary will take $200,000 of the ABC Bank account, splitting it with Grant, Pete's son.

3. **Ben**

   If a testator provides a clause in their will that revokes a beneficiary's interest if they contest the validity of the will, it is valid. The 2010 codicil of David's is noted as being valid. Additionally, the 1995 will is also noted as valid. Therefore, when David created his valid codicil changing his $50,000 gift to Ben to only $5,000, it was also valid. However, in the 1995 will, David includes a clause that acts to forfeit any beneficiary's interest if they contest his will. Based upon this clause, Ben will not take the $5,000 gifted to him in the 2010 codicil because he challenged the validity of the will.

4. **Grant**

   Under the Ohio anti-lapse statute, if a beneficiary dies prior to the death of the testator, the gift to the beneficiary lapses into the residue of the estate unless the beneficiary was related to the grantor as a stepchild, grandparent, or decedent of a grandparent and leaves descendants that survived at least 120 hours (5 days). Here, Pete was David's son. Pete died before David and thus, his interest in 1/2 of the residuary estate lapses to Pete's son, Grant. Grant is related to David as a grandchild and survived him by over 120 hours because he is still living. Pete's interest will lapse to Grant. Grant will then take Pete's $200,000 interest in the ABC Bank account. Additionally, Grant will not take Pete's interest in the IRA because IRA beneficiaries cannot be changed through will provisions.

QUESTION 12

Defendant Bill was indicted on multiple counts of domestic violence. Paula, an assistant prosecutor in Franklin County, Ohio, who was assigned to Bill's case, reviewed police reports and witness statements to prepare her trial strategy for the criminal case.

The initial police report noted that police dispatch received a 911 call from Bill's house at approximately 11:00 p.m. on the night in question. Wendy, Bill's wife, told the dispatcher that Bill was intoxicated, had struck her twice on the head, and was threatening their family with a gun. Officer Patrick and Officer Mike, in a Franklin County police car, heard the dispatch and immediately sped to the scene. On the way, they checked Bill's record and found that he had a domestic violence conviction from two years prior.

Upon arrival, Officers Patrick and Mike entered the premises and immediately separated the four occupants into separate rooms of the house. The occupants included Bill, Wendy, their 8-year-old son, Sam, and their 17-year-old daughter, Debbie. No weapons were immediately apparent and Officers Patrick and Mike began to interview all involved.

Bill stated that he was not going to say anything until he spoke with a lawyer. Wendy corroborated what she had reported on the 911 call about being hit twice on the head and Bill pointing a gun at both her and Debbie. In another room, Sam was crying hysterically and kept repeating that "daddy hit mommy." Debbie corroborated both Wendy's and Sam's statements, and she further stated that Bill had pulled her aside after her mom had called the police and told her to "hide the gun behind the oak tree down the street before the cops get here." Officer Mike, upon hearing this information, walked down the street and found the loaded gun right where Debbie said it would be.

A detective's follow-up report included the information that Debbie suffers from an anxiety disorder, but that she has been stabilized for a number of years on medication. The detective's report also included an interview of a neighbor named Nick, which took place two days after the incident. Nick stated that on the night in question he heard a voice he recognized as Bill's screaming, "I'll kill you, woman," shortly before the police arrived.

Paula prepared a list of all witnesses the state would be calling in order to prove the charges against Bill. The list included Wendy, Sam, Debbie, Officers Patrick and Mike, and neighbor Nick. However, when Paula contacted the officers, she learned that Officer Mike would be on vacation the week of the trial. Officer Patrick told Paula not to worry because he knew all the details about how and where Mike found the gun and he would be able to cover it from the witness stand.

Upon receipt of the witness list, Bill's defense lawyer, Dan, called Paula and said he would be filing a number of motions challenging the competency of all the witnesses on her list regarding their ability to testify. He also informed her that his investigator interviewed the neighbor Nick and determined that Nick's religious beliefs prohibited him from swearing an oath to tell the truth and for this reason he would not be able to testify if called to the witness stand.

What competency challenges might Dan reasonably raise, and how should Paula respond, regarding:

1. **Wendy?**
2. **Sam?**
3. **Debbie?**
4. **Officer Patrick?**
5. **Nick?**

Explain each fully.

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1. **Wendy**

   Dan can reasonably argue that Wendy is incompetent to testify against her spouse, Bill. Under Ohio Rules of Evidence, a spouse is considered incompetent to testify against defendant-spouse (in other jurisdictions this is often called immunity). Paula has several viable responses. First, Paula can argue that a witness-spouse can waive this "incompetency" and, therefore, testify. Second, there is an exception to the rule for a crime against the witness-spouse. Because Bill is indicted on domestic violence charges, Paula would not be considered incompetent.

2. **Sam**

   Dan can reasonably raise a competency challenge to Sam due to Sam's age. Under Ohio Rules of Evidence, a child under the age of 10, who is not able to truthfully relate the facts, is incompetent to testify. In response, Paula can try to prove that 8-year-old Sam is able to understand and truthfully relate the facts. Paula might argue that Sam's statements that "daddy hit mommy" corroborated his mom's statements. Further, Paula would want to put forth any additional information that she has to indicate that Sam would be able to truthfully relate the facts to the jury.

3. **Debbie**

   Dan might argue that Debbie is incompetent to testify due to her anxiety disorder. This could be of particular concern if Debbie did not take her medication during the trial. However, Paula should respond that Debbie has been stabilized for a number of years, and, therefore, her condition does not render her incompetent. She will have taken her proper medication when she testifies. She will be of sound mind.

4. **Officer Patrick**

   Dan can reasonably raise a competency challenge to Officer Patrick due to his lack of personal knowledge about the gun. Officer Patrick is contending that he will testify about how and where Mike found the gun and he would be able to cover it from the witness stand because Officer Mike would be on vacation the week of the trial. Under Ohio law, a lay witness is only competent to testify about matters within their personal knowledge. Here, Paula cannot have Officer Patrick testify about Officer Mike's experiences of which he doesn't have personal knowledge. However, to the extent Officer Patrick has personal knowledge about Mike leaving and finding a gun, to whom the gun belonged, etc. from being on the scene, Officer Patrick should still be able to testify. Furthermore, Officer Patrick is competent to testify regarding his experience with this event outside of the gun — he was one of the first responders and actively involved with the interviewing.

5. **Nick**

   Dan can reasonably raise a competency challenge to Nick, due to Nick's refusal to take an oath. Nick told the investigator that his religious beliefs prohibited him from swearing an oath to tell the truth. Under Ohio law, a witness must take an oath to tell the truth before taking the stand. However, perhaps Nick's religious issue is with the particular wording of the oath. Paula can discuss Nick's religious beliefs with him, and perhaps his religion and the trial court would allow him to take an alternative, but acceptable oath.

MPT 1

In re Ace Chemical

Examinees' law firm has been asked to represent Ace Chemical Inc., which is suing Roadsprinters Inc. for its alleged failure to deliver materials to one of Ace's customers in a timely manner. The issues in the problem relate to three poten¬tial conflicts of interest that must be resolved before the firm can accept Ace Chemical as a client: 1) the firm's Columbia office represents the Columbia Chamber of Commerce, of which Roadsprinters is a member; 2) Samuel Dawes, who would be the litigation partner in charge of the Ace litigation, once represented Roadsprinters in a trademark registration; and 3) the firm's Olympia office would like to hire an attorney who is currently employed by the Franklin office of Adams Bailey, the law firm representing Roadsprinters. Examinees' task is to draft an objective memorandum analyzing the three potential conflicts of interest. If a conflict exists, the memorandum should provide a recommendation for how the firm should handle the conflict. The File contains the instructional memorandum, a file memorandum summarizing the potential conflicts, and a newspaper article spotlighting Samuel Dawes. The Library contains excerpts from the Franklin Rules of Professional Conduct (which are identical to the ABA Model Rules), a Franklin Ethics Opinion, and a Franklin Supreme Court case.

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Introduction

This memo will review the potential for an ethical bar to our representation of Ace Chemical in its suit against Roadsprinters. In particular, it will review three issues of concern. First, our current representation of the Columbia Chamber of Commerce, of which Roadsprinters is a member, and for which Roadsprinter's president, Jim Pickens, was a former chairman. Second, Samuel Dawes' previous representation of Roadsprinters in trademark litigation. And third, the potential hire of Ashley Kaplan, currently working for Roadsprinters' outside counsel in Franklin, by our Olympia office.

This memo will rely predominantly on the Franklin Rules of Professional Conduct. Those rules are not binding on courts, per se. but as the Franklin Supreme Court made clear in Hooper Manufacturing, Inc. v. Carlisle Flooring, Inc., "[i]n the absence of any overriding policy considerations, courts in this state will be guided by the Rules of Professional Conduct, in addition to any other applicable law, in determining motions for disqualification based on conflicts of interest." The analysis below will also incorporate certain Franklin Ethics Opinions, which while also not binding, may prove persuasive to a court, should it come to that. It is understood that Roadsprinters will not be waiving any potential conflicts, so we will need to make sure we are in compliance with the rules as stated, and as most broadly applicable.

Chamber of Commerce Issue

Our representation of the Chamber in Columbia will not present a conflict requiring that we decline representation of Ace. Whether our representation of the Chamber of Commerce presents a conflict is most clearly addressed by Rule 1.7, relating to current clients and conflicts of interest. We may not take on a client if "the representation" of that client "will be directly adverse to another client," or "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." There is an exception to this potential for conflict, but it would require the informed consent of Roadsprinters, which we are unlikely to receive. On the face of the rule, it would appear that we do not face a conflict in representing Ace, notwithstanding our representation of the Chamber of Commerce in Columbia. The Chamber is distinct from each of its members, and our efforts related to tax matters, which would not appear to overlap in a substantial way with the particular contract dispute here. But, there is a case on point, Hooper Manufacturer (mentioned above), which we must consider.

First and foremost, the court made clear that the nature of our representation – that lobbyists rather than providers of strictly legal services – will not spare the firm the potential for conflicts. Hooper has the effect of converting the question of representation by trade groups into one of confidential information. In other words, the representation of the Chamber will be the equivalent of the representation of each of its members, provided that in the course of the representation, confidential information was shared. Here, that does not appear to be the case, according to the Memorandum to File.

We had clearly informed the member organizations that we represented the Chamber, not the individual members, as the Court in Hooper found important. Furthermore, we received no confidential information from Chamber members, and only limited confidential information from the Chamber itself. As Hooper makes clear, that substantially reduces the risk of conflict.

Finally, we must consider that Jim Pickens, the president of Roadsprinters, was a former chairman of the Chamber. As the Court in Hooper makes clear, this has the potential to invoked Rule 1.7(a)(2), which identifies the potential for a conflict where, in Hooper's words, "the nature and extent of the relationship between the attorneys" of the trade group and its members are broad. In Hooper, the lawyers of a trade group were disqualified because they had worked closely with an adverse party in the day-to-day operations of that group. It is true, in our case that Mr. Pickens was a former chairman of the Chamber. However, unlike in Hooper, that leadership position is not ongoing and current. Further, we worked far more closely with the executive director than the chairman. As such, the same inherent risk of limitation in ability for zealous advocacy is not present here.

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Samuel Dawes Issue

Overall, Mr. Dawes should not be conflicted out of this case, and it shouldn't represent a problem for the firm. The relevant rules for Mr. Dawes' situation are Rule 1.6, regarding the confidentiality of information, and Rule 1.9, relating to duties to former clients. Note that the two rules interact, somewhat, as discussed below.

First, Rule 1.6, makes clear that a lawyer shall not share any confidential information about a previous client, but for limited and specified circumstances. One such exception is Rule 1.6(b)(7), which is an interview for the limited purpose of revealing potential conflicts. As the Memorandum to File notes, such an interview was undertaken, and Mr. Dawes suggested that he did not acquire any confidential information that would prove adverse to the interests of Roadsprinters in this litigation. As he has relayed, his previous representation involved the registration of an uncontested trademark.

Rule 1.9 relates to duties to former clients. It makes clear that Mr. Dawes is disabled from representing a client, here Ace Chemical, "in the same or a substantially related matter," in which "that person's interests are materially adverse to the interests of the former client." As mentioned above, this does not seem to be a problem for Mr. Dawes. He represented Roadsprinters, but in a matter that was not substantially similar. An uncontested trademaker registration would not seem related to the current contract dispute. It should be noted that Franklin Ethics Opinion 2015-212 does offer a broad reading of "substantially similar." It ties the idea of a substantially similar matter back into confidential information, and makes clear that "[a] substantial relationship exists when the lawyer could have obtained confidential information in the first representation." Therefore, we will need to be certain that Mr. Dawes' previous representation, relating to trademark registration, is not the type that even could have led to information on contract disputes. But, again, that does not seem to be the case. Finally, it should be noted that there is nothing in the rules suggesting that the previous mentorship of Mr. Dawes by Mr. Pickens will present a problem, given that there is nothing suggesting that the relationship was of the sort that it would risk revealing confidential information relating to the business of Roadsprinters, as would be relevant, or even marginally so, to this representation.

Ashley Kaplan Issue

Finally, there is the issue of hiring Ashley Kaplan to work in our Olympia Office. Of the three issues, this is the most concerning. But provided the correct procedures are put in place, hiring Ms. Kaplan should not present a conflict.

Ms. Kaplan is currently employed by Adams and Bailey in Franklin, the firm representing Roadsprinters. Rule 1.10 has the effect of imputing any potential conflicts of Ashley Kaplan to the firm as a whole. As the rule states, "while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibit from doing so by Rules 1.7 or 1.9." And that she will be working in Olympia, rather than Franklin, is no matter. The Ethics Opinion 2015-212, mentioned above, makes clear that "especially in these days of telecommuting, electronic files, and multi-state transactions, the imputation of Rule 1.10 applies to all members of the law firm, regardless of the office in which they work."

Hiring Ms. Kaplan, who has previously worked on this very matter, is a substantial concern. Clearly, she would be conflicted off of working on this lawsuit directly. As covered by the rules above, she clearly would, if hired, have experience working on "the same or a substantially related matter." She was privy to just the kind of sensitive and confidential information that creates the most basic of conflicts. However, the Rules and previous Ethics Opinions interpreting them offer an option for the firm to hire Ms. Kaplan, notwithstanding these concerns. Rule 1.10(a)(2) provides that a lawyer with a conflict will not necessarily present a problem for the entire firm, provided that proper screening provisions are put in place. Ms. Kaplan would be disqualified from any fee. Further, she would be denied access to any files that may relate to the litigation, and prohibited from communicating about the case with other members of the firm. This screening would

A have to take place right away. As the Ethics Opinion notes, “Screening must take place as soon as possible but in no case may it occur after the screened lawyer has had any contact with information about the matter from which he or she is being screened.”

Notably, this process does not appear to require the consent of Roadsprinters (as was the case with other waivers, should they be required). The rules provide only that written notice must be provided to Roadsprinters, which will allow the company to monitor compliance with the screening procedure, and submit inquiries to assure compliance is undertaken. We will need to be sure to undertake and submit certifications of compliance at regular intervals, as provided in the rules.

MPT 2

In re Guardianship of King

Examinees are associates at a law firm representing Ruth King Maxwell, who is petitioning to be named guardian for her elderly father. Ruth's brother, Noah King, currently has their father's health-care and financial powers of attorney; he opposes the petition and has requested that the court appoint him as guardian instead of Ruth. Examinees' task is to draft proposed findings of fact and conclusions of law in the guardianship of Ruth's father, with the goal of preventing Ruth's brother from being named guardian. As part of completing the task, examinees must address two legal issues: whether and in what circumstances the trial court has the legal authority to override a prior nomination of a proposed guardian, and whether Noah King's conduct as health-care agent and holder of the financial power establishes "good cause" to override the nomination. The File contains the instructional memorandum, office guidelines on how to draft findings of fact and conclusions of law, and excerpts from the hearing transcript containing relevant testimony by Ruth and Noah. The Library contains excerpts from the Franklin Guardianship Code. It also contains two cases: *Matter of Selena J.*, concerning the statutory priorities for appointment as guardian; and *In re Guardianship of Martinez*, concerning whether "good cause" exists to remove a guardian.

Proposed Findings of Fact

1. Ruth Maxwell King is the daughter of Henry King.
2. Noah King is the son of Henry King.
3. The mother of Ruth Maxwell King and Noah King died in 2012.
4. A year after this occurred, Henry King was diagnosed with the early signs of dementia.
5. On May 20, 2013, Henry King signed an advanced directive and a power of attorney giving Noah King authority to make health-care and financial decisions for him.
6. A major reason for this was that Noah King lived in Dry Creek, near Henry Green, while Ruth King Maxwell lived outside the state.
7. In both documents, Noah King was also nominated as Henry King's prospective guardian.
8. Since that time, Henry King's mental condition has deteriorated.
9. In 2016, Henry King started making purchases on Amazon and E-bay to make gifts to friends that Noah King was aware of by his own admission.
10. From February 2016 to February 2017, these purchases totaled more than $9,000.
11. Henry King's income is $2,515 per month between Social Security payments and his pension.
12. By his own admission, Noah King took no steps beyond asking his father to stop making purchases and trying to explain how it was hurting him.
13. On June 22, 2016, Henry King tripped over a rug and broke his wrist.
14. Henry King told Noah King that his wrist was stiff after the fall, and Noah King did no further investigation.
15. Noah King took Henry King to the hospital once he learned from a neighbor that Henry King's wrist was swollen.
16. Previously, Ruth King Maxwell and Noah King had to take Henry King to the hospital when Henry King fell in the show and bruised his right arm.
17. In August of 2016, Ruth King Maxwell moved closer to Henry King and spent two or three evenings a week with Henry King.
18. Ruth King Maxwell found that Noah King was not buying food for Henry King.
19. Noah King had fallen behind on paying several bills for Henry King, including an overdue notice from the electric company.
20. Ruth King Maxwell then filed a petition to have Ruth King Maxwell named as guardian for Henry King.
21. This court found in an evidentiary hearing that Henry's nomination of Noah as prospective guardian in 2013 was valid at the time it was made.
22. The court also ruled that Henry is now incompetent, cannot manage his affairs, and needs a guardian to be appointed.

Proposed Conclusions of Law

1. The court shall appoint as guardian that individual who will best serve the interest of the adult, considering the order of preferences set forth in the Code. Franklin Guardianship Code §401 (a)
2. At any time prior to the appointment of a guardian, an adult may nominate in writing an individual to serve as that adult's guardian should the adult be judicially determined to be in need of a guardian, and that nomination shall be given preference as described in this Code provided it expressly identifies the

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individual who should serve as guardian and it is signed and acknowledged by the adult in the presence of two witnesses who sign in the adult's presence. Franklin Guardianship Code §401 (c).

3. A court may disregard an individual who has preference and appoint an individual who has a lower preference or no preference, provided, however, that the court may disregard the preference for the individual nominated by the individual only upon good cause shown. Franklin Guardianship Code §401(a)
4. Individuals who are eligible have preference in the following order: the individual last nominated by the adult in accordance with the provisions of subsection (c) of this Code section; the spouse of the adult; an adult child of the adult. Franklin Guardianship Code §401(b)
5. Upon petition of an interested party or upon its own motion, whenever it appears to the court that good cause may exist to revoke or suspend the guardian or to impose sanctions, the court shall investigate the allegations and require such accounting as the court deems appropriate. Franklin Guardianship Code §402
6. After the investigation, the court may, in the court's discretion, revoke or suspend the guardian, impose any other sanction or sanctions as the court deems appropriate, or issue any other order as in the court's judgment is appropriate under the circumstances of the case. Id.
7. A court may override the preference in favor of a nominated person upon a sufficient factual showing of good cause. Matter of Selena J. (Fr. Ct. of App. 2011)
8. The good-cause standard applied to overturn a proposed ward's previously stated preference for a guardian is the same as good cause in the context of removal of a court-appointed guardian. Id.
7. A court may refuse to appoint a proposed guardian when that person's previous actions would have constituted a breach of a fiduciary duty had the person been serving as guardian. Id.
8. A guardian may breach a fiduciary duty through either action or neglect if the action or neglect harms the ward. In re Guardianship of Martinez (Fr. Ct. of App. 2009).
9. A fiduciary can harm the ward through mismanagement of finances, neglect of the ward's physical wellbeing, or similar actions. Id.
10. A guardian has the responsibility to apply the income and principal of the ward's estate "so far as necessary for the comfort and suitable support of the ward." Nonnio v. George (Fr. Sup. Ct. 1932)
11. An advance directive permits the individual to specify the medical care she would prefer to receive and to name a "health-care agent" to make those decisions when she lacks competency to do so. Matter of Selena J. (Fr. Ct. of App. 2011)
12. A durable power of attorney gives the individual the right to name an agent to handle financial matters when she lacks competency to do so. Id.
13. Both documents create a fiduciary relationship. Id.
15. By signing the advanced directive and durable power of attorney, Henry King created a fiduciary relationship with Noah King whereby Noah King became a fiduciary of Henry King.
16. As a fiduciary, Noah King had the fiduciary duty to supervise Henry King's use of money.
17. By allowing Henry King to spend $9,000 in internet purchases over the course of 12 months, knowing that Henry King was mentally declining, Henry King breached that fiduciary duty.
18. By failing to pay Henry King's bills on time, Noah King breached his fiduciary duty through neglect.
19. As a fiduciary, Noah King had a duty to make sure Henry King's income was used to provide comfort and suitable support for Henry King.
20. By failing to buy food for Henry King, Noah King breached his fiduciary duty to provide comfort and suitable support for Henry King.

21. These breaches constitute good cause for overriding the Henry King's appointment of Noah King as preferred guardian.
22. As adult children of Henry King, both Ruth King Maxwell and Noah King have a preference in the absence of an individual nominated in accordance with the provisions of subsection (c) and a surviving spouse. Franklin Guardianship Code §401(b).
23. Henry King's history of falls indicates a neglect of Henry King by Noah King.
24. Combined with his history of fiduciary breaches and Ruth King Maxwell's recent transfer near Henry King, the court finds that it is in the best interest of Henry King that Ruth King Maxwell be appointed legal guardian.
25. The court deems it appropriate after the facts recited herein to order that Ruth King Maxwell be appointed legal guardian.

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