THE SUPREME COURT *of* OHIO

July 2016 Ohio Bar Examination

Essay Questions & Selected Answers

Multistate Performance Test Summaries & Selected Answers

The Supreme Court *of* Ohio

JULY 2016 OHIO BAR EXAMINATION

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OHIO BAR EXAMINATION

JULY 2016 OHIO BAR EXAMINATION

Essay Questions and Selected Answers

MPT Summaries and Selected Answers

The July 2016 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 July 2016 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 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 July 2016 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

Q

Otto operates a furniture manufacturing business and a retail furniture store in Anytown, Ohio. In the last year, he has been involved in the following financial transactions:

In order to expand production capacity, Otto received a loan from Bank 1. To secure this loan, Otto and Bank 1 executed a security agreement identifying Otto's existing manufacturing equipment as the collateral for the loan. No further action was taken.

Needing cash flow, Otto received a loan from Bank 2. To secure this loan, Otto and Bank 2 executed a security agreement identifying Otto's existing inventory as collateral for the loan. Bank 2 then filed a financing statement with the Ohio Secretary of State.

Customer purchased a dining room set from Otto, and Otto provided financing for the set through an installment loan agreement executed between Otto and Customer. No further action was taken.

Otto used the installment loan with Customer, along with similar installment loan contracts with other customers, as collateral for a loan to Otto from Bank 3. Bank 3 and Otto executed a security agreement, and Bank 3 filed a financing agreement with the Ohio Secretary of State.

Otto, needing further cash, offered Buddy his full interest in a $50,000 certificate of deposit. In return for a loan of $50,000, Otto gave Buddy a security interest in the full amount of the deposit account and any interest that accrued when it matured. Otto and Buddy executed a security agreement and filed a financing statement with the Ohio Secretary of State.

For each interest listed below: a) Did a security interest attach and, if so, when did it attach, and b) Has a security interest been perfected and, if so, when was it perfected?

1. Bank 1's interest in Otto's existing manufacturing equipment
2. Bank 2's interest in Otto's existing inventory
3. Otto's interest in the dining room set purchased by Customer
4. Bank 3's interest in the installment contracts
5. Buddy's interest in the certificate of deposit

Explain fully. Do not discuss any issues of priority.

A

In Ohio, for a valid security interest to exist there must be attachment and perfection. Attachment occurs when 1) value is given, 2) the debtor has rights in the collateral, and 3) there is a security agreement. The security agreement need not necessarily be in writing, but must be a memorialization of the agreement and must include the debtor's name, the secured party's name, and an adequate description of the collateral. Perfection occurs through the filing of a financing statement or when the secured party takes possession or control over the collateral.

1. Bank 1

   Bank 1's interest in the equipment attached when Otto and the bank executed the security agreement. Bank 1 gave value, Otto had rights in his equipment, and there was a security agreement. However, no perfection occurred because there was no filing and Otto maintains both possession and control over his equipment.

2. Bank 2

   Bank 2's interest in the then-existing inventory attached when the security agreement was executed. Value was given in the form of the loan, Otto had rights to the inventory, and the security agreement was the final piece necessary for attachment. Furthermore, this interest was perfected when the financing statement was filed with the Secretary of State, the proper place for such filing in Ohio. It should be noted that even though this security interest does not include an after-acquired property clause, because inventory is being secured, the after-acquired inventory will be implied to be secured as well.

3. Otto

   Otto has a purchase money security interest in the dining room set (a PMSI). A PMSI occurs when a lender provides funds to allow the purchaser to acquire goods, the funds obtained are actually used to obtain the goods, and the goods purchased are given as collateral to secure the loan in question. Here, Otto has given Customer a loan to buy the dining room set, the loan was used to purchase the set, and Otto retained a security interest in the set. Therefore, he has a PMSI. This interest attached when the transaction took place because Otto gave value in the form of the loan, Customer obtained rights in the set by purchasing it, and the loan agreement constitutes a writing that will serve as the security agreement. Furthermore, this interest will automatically perfect because it is a PSMI in consumer goods. Consumer goods are those used for personal, household uses. Here, as long as the dining room set was used for personal use by Customer and not as inventory or equipment, Otto will have a perfected security interest therein at the time he financed the set. However, if the dining set is used as inventory or equipment by Customer, Otto will not have a perfected interest as only PMSIs in consumer goods automatically perfect and Otto has taken no further action to perfect this interest.

4. Bank 3

   The interest attached when Bank 3 and Otto executed the security agreement for the reasons stated above. This interest was perfected when the financing statement was filed as well. The installment contracts will be considered accounts, as they are payments Otto is contractually entitled to receive. Accounts can be perfected by filing a financing statement. Therefore, the interest here was perfected when the financing statement was filed.

5. Buddy

   The interest attached when the security agreement was executed for the reasons outlined above. However, this interest has not perfected. The collateral in this interest is a deposit account at the bank and any interest that accrues from the account. Deposit accounts may only be perfected by control. In order to give Buddy control over the deposit account, Otto would have to have Buddy's name included on the account or sign the account over to Buddy completely. Since neither of those were done here, Buddy did not gain control over the account, and thus his interest in the deposit account is not perfected.

QUESTION 2

I. Abby has worked as a medical assistant at the Franklin State Hospital for several years. She is outspoken and has, at times, been critical of hospital policy. At the urging of the hospital's medical director and while continuing to work as a medical assistant at the hospital, Abby went to medical school. She graduated and began studying for the state medical exam, which she needed to pass in order to practice as a doctor. When Abby began medical school, the hospital's medical director had informed her that when she passed the medical exam, she would be promoted to staff doctor. There was no discussion about what would happen if she failed to pass the medical exam. However, other medical school graduates who had been hired as medical assistants at the hospital and had failed the state medical exam had been permitted to continue working as medical assistants while they prepared to take the exam again. Abby failed the medical exam and was immediately fired. Abby sued the State of Franklin for violating her procedural due-process rights.

II. Barry has been an eligible recipient of welfare benefits in the State of Franklin for five years. Based on a tip that, for several months, Barry was getting paid cash "under the table" for construction work, the State of Franklin sent Barry a termination-of-welfare-benefits notice stating that Barry was no longer eligible for welfare benefits under state law. The notice stated that if Barry wished to contest the termination of benefits, he must respond in writing within seven days, setting forth reasons for his contest. Barry timely contested the termination notice in writing. Barry's reasons for the contest were reviewed by a supervisor and rejected. Barry's welfare benefits were immediately terminated. Barry sued the State of Franklin for violation of his procedural due-process rights.

III. In response to a news story regarding the physical condition of the City of Green's police and firefighters, the Green City Council enacted an ordinance providing that any police officer or firefighter weighing more than 300 pounds is not fit to perform the essential functions of those jobs and will be terminated. Dale has been a firefighter for the City of Green for five years. He has always been a large person and regularly lifts weights and engages in other strength training. When he started his job as a firefighter, he weighed 275 pounds, but at the last scheduled weigh-in, Dale weighed 310 pounds and was fired pursuant to the ordinance. Dale sued the City of Green for violating his procedural due process rights.

1. How should the Court rule on the procedural due-process challenges asserted by Abby, Barry, and Dale, and to what process, if any, should each have been entitled?
2. How might the City of Green amend its ordinance to keep the weight requirement and also allow Dale to remain above 300 pounds and keep his job?

A

1. The 5th Amendment of the United States Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. The 14th Amendment incorporates that due process language to the states. Due Process ensures that if a person is deprived of life, liberty, or property, they must be given at least a hearing by a fair, neutral party, and notice. The action of deprivation must be by a government actor, as the constitutional restraints apply to the government, not private parties. In determining whether further action is required under procedural due process, the court looks at the accuracy of the process given; the likelihood of increased accuracy if the extra process is given; the interest that the claimant is being deprived of; and the costs and burdens on the courts in granting the extra process.

   I. The Court should rule in Abby's favor in her procedural due process claim. Property rights are constitutionally fundamental rights. Once an employee has a substantial interest in property in a government job, the employee generally has the right to a pre-deprivation hearing and notice. Here, there was state action, as the State Hospital of Franklin terminated Abby's employment. She was a medical assistant for seven years. She relied on the Medical Director's urging her to go to medical school while continuing to work. He told her she would be promoted to staff doctor when she finished. Other medical students who failed the exam had been permitted to continue working as medical assistants; however, when Abby failed, she was terminated immediately. Because Abby had a substantial property interest in the employment with the state, and further procedure would provide great accuracy without causing many efficiency problems, the court will rule that the hospital violated Abby's due-process rights and she was entitled to a pre-deprivation hearing.

   II. The Court should rule against Barry in his suit. A state may terminate the welfare benefits of a recipient as long as notice, a hearing, and the right to be heard before a neutral decision-maker is given. Here, Barry was receiving welfare benefits from the state. The state received a tip that Barry was being paid while receiving the benefits, and thus, would no longer be eligible for the benefits. The state sent Barry a notice, giving him a chance to respond in writing within seven days stating the reasons for contesting the welfare deprivation. Barry timely contested; and his contesting of the termination was reviewed by a supervisor. Only after a notice and a chance to be heard were Barry's welfare benefits terminated. Thus, it is unlikely that he will succeed in his claim.

   III. Dale will win in his procedural due-process claim against the City of Green. If a person is deprived of fundamental right, they are entitled to notice, and a pre-deprivation hearing. Here, Dale worked for the city for five years. He knew that it had a policy that firefighters must not weigh more than 300 pounds. Although he had notice of the law, he was not given notice, nor a pre-deprivation hearing, as he was terminated upon his last weigh-in. The right to work for the state is a substantial interest in a fundamental property right such that the court will find there are merits to having further process for accuracy, and that it will not be too costly or burdensome to the efficiency of the judicial system.

2. The City of Green could amend its ordinance to give a person who weighs over 300 pounds a chance to lose the weight. The ordinance might say that within 30 days of a weigh-in, where the firefighter or policeman weighs over 300 pounds, the employee must weigh in again at under that weight. Thus, the employee would have notice, and a fair chance to be heard prior to having his fundamental property interest in state work being terminated. around this responsibility if not directly violating it.

QUESTION 3

The following transactions occurred in Anywhere, Ohio:

1. On Monday, Merchant, a retail computer dealer, made a signed written offer to sell Buyer, "One dozen laptops for $10,000, with the offer to remain open for 1 week." On Tuesday, Merchant told Buyer, "I revoke my offer." On Wednesday, Buyer tendered $10,000 to Merchant for the laptops, which Merchant refused, claiming that the offer to sell had been revoked. Buyer filed an action against Merchant, demanding that Merchant deliver the laptops.

2. Al offered to sell his stereo to Bill for $2,000. Bill paid Al $20 in exchange for Al's agreement to keep that offer open for three days. On the next day, Al told Bill that the stereo was not for sale anymore. The following day, Bill tendered $2,000 to Al for the stereo, which Al refused, claiming that the offer to sell had been revoked. Bill filed an action against Al, demanding that Al deliver the stereo.

3. On July 1, Stadium Corporation (Stadium) solicited general contractor bids to construct a new sports arena. The general contractor bids were to be submitted no later than July 5, with construction to commence July 7.

   Knowing this, on July 2, Electro, an electrical subcontractor, submitted a bid to BuildAll, a general contractor, to perform subcontracting for all the electrical work, for $40,000, in the construction of the new arena.

   On July 3, BuildAll submitted a general contractor's bid to Stadium that included the $40,000 figure for electrical work based on Electro's subcontracting offer to BuildAll.

   On July 5, Stadium awarded the general contract to BuildAll, who in turn immediately notified Electro of the award. On July 6, Electro sent an email to BuildAll, stating: "Our $40,000 bid is revoked; our new offer is $45,000 for the work."

   On July 7, BuildAll demanded that Electro begin performance at Electro's stated price of $40,000. Electro refused, and BuildAll was forced to hire a different electrical subcontractor to perform the work at an even higher rate.

   In an action by BuildAll against Electro for breach of contract, Electro claims that the $40,000 contract offer was properly revoked by Electro before being accepted by BuildAll, and that no contract exists between them.

4. On Monday, Sam and Bob, both merchants with an excellent history of transactions together, discussed an arrangement whereby Sam would sell Bob a shipment of soap for $3,000, delivery to be made to Bob at Sam's expense, with payment due upon delivery.

   On Tuesday, Sam sent a signed offer to Bob detailing the terms the parties had orally discussed. On Wednesday, Bob signed a memorandum to accept the offer and sent it back to Sam. The memorandum included the following terms the parties had never discussed: "Quality of product must meet industry standards." Sam, insulted by the added term regarding quality, refused to ship the soap to Bob since he has always stood by his soap as any reputable soap maker in the industry does, and his soap is of the highest quality. In an action by Bob against Sam for breach of contract, Sam claims that Bob's additional terms regarding quality constituted a rejection and counteroffer and that no contract exists between them.

The answers printed in this booklet were selected because they were among the better answers written

Who is likely to prevail in the following actions:

1. Buyer v. Merchant?
2. Bill v. Al?
3. BuildAll v. Electro?
4. Bob v. Sam?

Explain each fully.

For each scenario, assume compliance with the Statute of Frauds.

A

A contract is valid upon an offer, acceptance, and consideration.

Buyer v. Merchant

Buyer will prevail in the breach-of-contract action against Merchant. Merchant made a valid offer. A valid offer must contain the essential terms and here it states the quantity, price and description of the goods. Normally, an offer may be revoked by the offeror prior to acceptance by the offeree. However, in this situation, Merchant made a firm offer. A firm offer is an offer made in writing, signed by the offeror, explicitly making a promise to hold the offer open for a certain number of days. For a firm offer, the offeror must be a merchant, and here Merchant is a merchant. Merchant made a signed written offer to Buyer promising to keep the offer open for 1 week. Merchant could not revoke the offer prior to that time period passing. Here, Merchant attempted to revoke, but the revocation was invalid due to the firm offer. Buyer tendered $1,000 two days after the firm offer had been made. Since Buyer accepted the offer within the week promised in the firm offer, there is a valid contract between the parties and Buyer will win in a breach-of-contract action. Buyer is more likely to get money damages than specific performance. The default remedy is damages and specific performance is used in special situations.

Bill v. Al

Bill will prevail in his action against Al. Neither Al nor Bill are merchants so the firm offer rule discussed above does not apply. However, Al made a valid offer identifying the stereo and the price. By accepting Bill's $20 in exchange for keeping the offer open for three days, Al created an option. An option is only valid if there is consideration. Here, Al promised to keep the offer open for three days and Bill gave consideration by paying $20 for that option. The $20 is not a down payment – it is consideration for the promise to keep the offer open. Thus, Al could not revoke the offer within the three-day window. Bill accepted the offer on day 3 and a valid contract was formed at that time. Bill will prevail.

BuildAll v. Electro

BuildAll will prevail in its action against Electro. Electro submitted a bid to BuildAll that was considered an offer. BuildAll accepted that offer when it notified Electro on July 5th that it had been awarded the stadium contract. A valid contract was formed at that time. Even if the notification was not an offer by BuildAll to Electro, BuildAll would prevail on a promissory estoppel/justifiable reliance claim. It justifiably relied on the quote by Electro and incorporated that quote into its bid for the Stadium. This doctrine is an equitable doctrine that allows for a valid contract even if the original offer and acceptance were invalid.

Bob v. Sam

Bob and Sam have a valid contract and thus, Bob will prevail. However, a finding of a valid contract does not automatically mean the additional terms will control. This is a contract for the sale of goods-soap. It is governed by the UCC. Sam sent Bob an offer in writing. Bob accepted that offer by signing the memorandum and sending it back to Sam. Under common law, the terms of the acceptance must be identical to the terms of the offer or it is considered a counteroffer. But this contract is governed by the UCC and the UCC states that an acceptance does not have to be identical to form a contract. Here a contract was formed. The additional term will only be included in the contract if the following is true: (1) both are merchants – yes, (2) the term does not materially alter the deal – yes, (3) the offer did not expressly restrict acceptance to its terms – yes, and (4) offeror did not object to the new term within 10 days – yes. Here, it is unlikely that the new term will materially alter the deal since Sam claims his soap is of the highest quality. Thus, the new term will be included in the contract.

QUESTION 4

One morning, Amber was driving on Main Street in Anytown, Ohio. Amber did not see Keri, a pedestrian, in time to avoid striking her with her car as Keri was crossing Main Street. At the time of the accident, Keri was busily texting on her cell phone and did not see Amber. Keri sustained bodily injuries as a result of the accident.

Keri's attorney filed suit against Amber in the proper county court to recover damages for the injuries she sustained in the accident. Amber's attorney filed an answer on Amber's behalf.

During discovery, Keri's attorney served on Amber a set of interrogatories and requests for production of documents. The interrogatories asked Amber to:

1. State the name, business address, and specific opinions that are to be offered at trial of each expert witness you have retained on behalf of defendant.
2. Describe what you believe to be the cause or causes of the accident in issue in this case.

The requests for production of documents asked for:

1. A copy of each and every insurance policy carried by Amber that may provide liability coverage for the subject accident.
2. Copies of any and all correspondence between Amber's attorney and the expert witness(es) that have been consulted or retained in this matter.
3. Copies of all draft reports prepared by the experts.

Amber has a personal automobile insurance policy that provides coverage for the accident and her attorney has, in fact, retained an expert witness to testify about the dangers of texting and walking (i.e., "distracted walking").

Amber's attorney has objected to these interrogatories and requests as being beyond the scope of discovery. Keri's attorney has filed a Motion to Compel as to both the interrogatories and the requests for production of documents.

What specific objections, if any, might Amber's attorney reasonably assert as to each of the interrogatories and requests for production of documents, and how should the court rule on the Motion to Compel?

Explain fully.

A

In discovery, parties to a civil trial may make demands upon the other party to produce documents, answer interrogatories, provide admissions and submit to depositions. Discovery is intended to provide as much information as is possible between the parties. The scope of discovery is all information that is relevant to the matter. The information need not be admissible if it is likely to lead to admissible evidence for use at trial. Privileges like the attorney-client privilege and work-product privilege apply to relevant materials.

Interrogatories

Amber's attorney should object to the first interrogatory as it seeks more information than the other party is permitted to provide with regard to experts, but cannot object to the second. An interrogatory is a request of a party to provide information relevant to the matter, and it must be responded to, under oath, or objected to, within 28 days. A party may seek the disclosure of any expert retained by the other party who is expected to testify, but the party is not entitled to a synopsis of the expected testimony. Beliefs of the other party about causes or conclusions about cause are proper subjects for interrogatory.

Here, Amber's attorney should object to the interrogatory request for the names of all experts retained, and to the request for the specific opinions to be given. An expert is required to provide his report to the opposing party 45 days before trial, or he will be precluded from testifying. There is no obligation to release expert opinions at this juncture, so the court should deny the motion to compel those opinions. Also, experts retained, but not expected to testify, need not be revealed. The interrogatory answer should list only the experts expected to testify.

The second interrogatory requests Amber's opinion about the cause of the accident, and the court will compel an answer from her.

Request for Production of Documents

Amber's attorney will not be able to prevent the release of the insurance information, but will be able to limit the production under the other two requests. A request for production is a request for a party to make available to the requesting party tangible items within the party's control or possession for review, analysis and copying. A request for production must be complied with within 28 days or a motion to compel may be granted. Here, liability insurance information is discoverable as it frames the damages award and is relevant to the matter, so Amber's attorney will not be able to prevent its release.

Amber's attorney will object to the second and third requests based on the work-product doctrine. Correspondence between an attorney and a retained expert is protected by the work-product privilege against discovery. An exception is made with regard to testifying experts which permits the release of information regarding payment of fees for testimony, the facts communicated by the attorney and relied on by the expert in forming his or her opinions, and assumptions communicated to the expert upon which he or she relied to formulate opinions. An expert's draft reports are absolutely protected under the work product doctrine.

Here, Keri's attorney seeks copies of all correspondence between Amber's attorney and her expert. Those communications are protected under the work-product doctrine as they are related to the expert's retention in preparation for trial. Therefore, only the permitted information about costs, facts and assumptions must be released. Further, any communication with experts not expected to testify at trial are protected from discovery. Finally, draft reports are never discoverable. Thus, the court will compel release of the insurance information and release of the permitted expert communications, but will deny the motion with regard to the expert's draft reports.

QUESTION 5

Throughout 2015, the city of Franklin suffered a rash of unsolved burglaries at church facilities throughout the area. The perpetrators caused thousands of dollars in damage by removing copper pipes presumably to be sold at local scrap yards.

On the evening of December 1, 2015, Father Murphy, who lived in the rectory at St. Patrick's Church, was awakened by an alarm set off in the church. He rushed to the window to observe a white Lexus with one occupant speeding away from the church. Father Murphy discovered the side door of the church had been pried open and several copper pipes had been ripped from a nearby wall.

Franklin Police quickly arrived at the scene and, based on Father Murphy's statement, issued a radio call to be on the lookout for a white Lexus. Half-an-hour later, Officer Jones observed a white Lexus driving suspiciously slow in a neighborhood near St. Patrick's. When Officer Jones attempted to follow the vehicle, it took off at high speed. Officer Jones gave chase and eventually pulled the vehicle over where Driver was ordered to exit with his hands in the air. Officer Jones reported that he was struck in the face by Driver prior to successfully placing him under arrest. A search of the vehicle revealed dozens of copper pipes and other copper artifacts in the vehicle's trunk.

The detective assigned to investigate the case found that:

Driver had accumulated 20 theft convictions as an adult over the past decade, as well as one prior misdemeanor assault case. Most of the theft cases involved shoplifting from local department stores; however, two theft cases within the last three years involved Driver being convicted of taking copper pipes from vacant homes. The detective also found that Driver's cell phone records placed Driver's phone within a one-mile radius of St. Patrick's Church at the time the alarm was triggered.

Driver was indicted on charges of burglary, receiving stolen property, and assault on a police officer. At trial, the State attempted to introduce the following evidence during the State's case in chief:

1. Father Murphy's testimony concerning the car that he observed leaving the scene.
2. The cell phone records concerning Driver's phone location in proximity to the church.
3. The copper pipes found in Driver's trunk.
4. All of Driver's theft-related convictions over the last decade.
5. Officer Jones' testimony relating to Driver's flight and subsequent assault during the arrest.

Defense counsel objected to all of this evidence as lacking relevance since no one could positively identify his client at the scene of the crime.

Driver then elected to take the witness stand in his own defense and testified that he had nothing to do with the burglary at the church and that the pipes in his trunk belonged to him and had been stored in his car for years. He stated that he only fled because he believed he had an outstanding traffic warrant. He further stated that he had always been a peaceful person and it was actually Officer Jones who struck him during the arrest, not the other way around.

Defense Counsel Objections

To be admissible, evidence must be relevant. Evidence is relevant if it has any tendency to make a fact of consequence to the determination of the matter more or less likely. Even if relevant, evidence may still be inadmissible if a judge determines it is more prejudicial than probative, inflammatory, cumulative, or may confuse/mislead the jury.

A lay witness is permitted to testify as to facts based on personal knowledge and may give opinions based on the witness's rational perception that do not require scientific or other technical knowledge. Father Murphy saw a white Lexus speeding away from the church immediately after hearing the alarm go off. Thus, this evidence is relevant because it tends to make it more likely that the white Lexus was involved in the theft as the defendant was later apprehended in a white Lexus. It is also based on Father Murphy's personal knowledge because he observed it. Thus, any objection to his testimony should be overruled.

The cell phone records should be admitted provided a custodian of records from the cell phone company can testify. Such evidence of Driver's whereabouts provided by the cell records constitute circumstantial evidence because it only infers that Driver was likely around the scene of the crime, which would suggest his involvement. However, the records are considered testimonial evidence because it suggests Driver was near the scene of the crime and thus, likely a perpetrator. Driver is entitled to confront the proponent of the evidence under the Confrontation Clause. Thus, the State must put a custodian of the records for the cell phone provider who can testify that he is familiar with the records and, therefore, can be cross-examined by Driver's counsel.

The copper pipes were properly admitted and any objection will be overruled. Driver was indicted for burglary, as well as receiving stolen property in regard to the pipes. The pipes were recovered from Driver's trunk of the Lexus. Thus, such evidence is real evidence because it is tangible. Additionally, it is relevant to a determination if Driver did in fact commit these offenses because having the pipes in his trunk would enable a jury to find it was likely he did in fact steal those pipes in his possession.

The Court should sustain an objection to all but the two theft cases involving the vacant homes. In a criminal case, the prosecution may not introduce character evidence of conviction to show propensity unless it concerns the defendant's: (1) motive; (2) identity; (3) absence of mistake; (4) intent; or (5) common scheme or plan. Here, the evidence of the two thefts can show Driver's modus operandi in stealing pipes from vacant homes was likely Driver based on the manner the crime was committed.

Officer Jones can testify as to Driver's flight and subsequent assault. Driver is on trial for assault and thus, his account of the assault is relevant. Driver's flight is also relevant provided the Court determines it satisfies the balancing test. Driver's flight will probably be admitted as circumstantial evidence as he was guilty of the thefts since he may have fled to avoid apprehension.

Driver's Misdemeanor Assault

When a defendant takes the stand in a criminal case, he subjects himself to impeachment by prior conviction. To be impeached by prior conviction the defendant must have been convicted of a felony or crime of criminal falsehood within the past 10 years. Extrinsic (outside) evidence can be admitted to prove conviction. Here, Driver's misdemeanor conviction cannot be introduced to discredit him. However, when a defendant claims self-defense, the Prosecution is entitled to put on evidence of the victim's peaceable character. In addition, during cross-examination, the prosecution can use evidence to show the defendant has a character for violence.

QUESTION 6

Tract 1

Tom is a teetotaler and has dedicated most of his life to helping those who are addicted to alcohol. For the past 30 years, Tom has owned Tract 1 in fee simple absolute, which is improved only with Café, Tom's restaurant that serves food and soft drinks only, and where he holds regular Alcoholics Anonymous (AA) meetings.

Tom recently decided to retire and sell Tract 1, including Café, to his nephew, Ned, who promised never to sell alcohol at Café. Tom transferred Tract 1 to Ned by a properly recorded deed with a granting clause stating, "I convey Tract 1 to Ned as long as alcohol is never sold at Café or on Tract 1." Within five years after the transfer, to make ends meet, Ned began selling wine and beer to Café patrons. All of the alcohol sold at Café was consumed on Tract 1. When Tom learned about the alcohol sales, he became furious and told Ned that he was taking Tract 1 back. Tom demanded that Ned immediately vacate Tract 1, including Café, but Ned refused to do so. Tom has filed an action in the appropriate Court seeking possession and title to Tract 1.

How is the Court likely to rule? Explain fully.

Tract 2

Nancy conveyed Tract 2, which she owned in fee simple absolute, by a deed stating, "I convey Tract 2 to my sister, Sally, for life and then to my children equally." Sally is deceased. Nancy is 85 years old. Nancy's only living child is her son, Dino.

Dino has offered to sell Tract 2 to Builder.

Can Builder obtain title in fee simple absolute to Tract 2 from Dino immediately, free of all interests of others? Explain fully.

Tract 3

Mac conveyed Tract 3, which he owned in fee simple absolute, by a deed stating, "I convey Tract 3 to Lance for life and then to James, if James marries Carrie." Lance is 65 years old and James remains single.

James has offered to sell Tract 3 to Builder.

A

Tract 1:

Under property law, a fee simple determinable interest is recognized in Ohio. The fee simple determinable is a fee simple grant made with the words of expression "provided," "for so long as," or other words of express condition. If the stated condition happens on the tract of land, then the property automatically reverts to the grantor and the grantor need not expressly assert his right.

Here, Tom deeded Ned Tract 1 with the express granting clause stating: "I convey Tract 1 to Ned as long as alcohol is never sold at Cafe or on Tract 1." This grant created a fee simple determinable with a possibility of reverter given to Tom since Tom used the words of expression "as long as." Therefore, Ned has a fee simple interest in Tract 1 until alcohol is sold at Cafe or anywhere on Tract 1. Within five years of the grant, Ned began to sell alcohol at Cafe through his wine and beer sales. Tom will be successful in his suit seeking possession because he need not do anything else since title automatically transfers. The grant expressly gave him a possibility of reverter that automatically transferred rightful title to Tom upon the sale of alcohol. Therefore, the Court will rule for Tom.

Tract 2:

Under property law, a future interest in property can be sold or devised so long as it is vested. This means that one cannot sell an interest in property he/she does not already have. Here, Nancy gave her sister a life estate and then gave her remainder to her children equally. Nancy has one child and her sister has died, thereby terminating her life estate. Now, Nancy's only living child, Dino, wishes to sell the tract to Builder, but he does not have a fee simple absolute. This is because of the fertile octogenarian rule, which essentially means that one is presumed to be capable of having children up until death. Therefore, the class has not closed and Dino is currently the recipient of a vested remainder subject to open. This means Dino's interest could become lessened by the birth of a sibling and, therefore, he may not have title in fee simple absolute. Because of the fertile octogenarian rule, Dino cannot sell Tract 2 to Builder since he does not have a fee simple absolute because another party may become vested upon birth.

Tract 3:

(1) Under property law, one can only sell an interest in property he/she already has. The facts here indicate Builder wishes to obtain a fee simple absolute from James for Tract 3, but James has not been vested with a fee simple absolute. Under the terms of the grant, James will have a fee simple absolute if he marries Carrie. So far, James remains single and, therefore, James has a contingent remainder in fee simple subject to condition precedent. Since there is risk that the interest may not completely vest in James, he cannot convey a fee simple absolute to Builder.

(2) Under property law, a grant for life gives the grantee a life estate. Here, Mac conveyed Tract 3 as follows "to Lance for life and then to James, if James marries Carrie." Therefore, Lance has a life estate and James a contingent remainder. James has a contingent remainder because he has not been vested with the remainder. Moreover, a remainder usually follows a life estate. In order to be vested with the remainder, James must marry Carrie as stated in the grant. Therefore, James has a contingent remainder in fee simple absolute and Mac has the reversion in case James does not ever marry Carrie. A reversion is the result of a grant that does not completely convey the whole property, but rather what is left after a grant. A reversion exists here because Mac conveyed a life estate to Lance. While a remainder usually follows a life estate, a reversion is the appropriate interest in Mac since there exists the potential James does not marry Carrie. In conclusion, Mac has a reversion, Lance has a life estate, and James has a contingent remainder.

QUESTION 7

Alex, an Ohio resident, married Holly in 1980. Alex and Holly had two children, Bella and Kip. In 1995, Alex obtained a $75,000 life insurance policy through his employer ($75,000 Group Life Insurance Policy) and named Holly as the primary beneficiary. Alex named Bella and Kip as the contingent beneficiaries.

Later that same year, Alex created a valid will (1995 Will), which provided as follows:

1. I give $50,000 each to Bella and Kip, if they survive me.
2. I give the rest and residue of my property to my wife, Holly.

In 2005, Bella gave birth to a daughter, Hillary. In order to help Bella purchase a house, Alex gave $25,000 to Bella, which was accompanied by the following note that Alex signed:

"I am giving you $25,000 as an advance against your inheritance.
Best wishes, /s/ Alex"

In 2014, Holly and Alex divorced. As part of the divorce settlement, Alex was obligated to name Holly as the beneficiary of a $100,000 life insurance policy. Shortly after the divorce was finalized, Alex purchased the $100,000 life insurance policy ($100,000 Life Insurance Policy) and named Holly as the beneficiary.

In 2015, Bella passed away unexpectedly. Bella never married and was survived by her daughter Hillary. Alex began dating Jolene, who had one child from a previous marriage, Drew. After a brief romance, Alex and Jolene were married in December 2015. The plane they took for their honeymoon crashed. Alex died instantly. Jolene was seriously injured and died six weeks later.

Alex had never amended or revoked the 1995 Will or changed the beneficiaries under his life insurance policies. Jolene had a valid will (Jolene's Will), which stated that all of her real and personal property would pass to her son Drew.

At the time of Alex's death, he owned the following assets:

A. The $75,000 Group Life Insurance Policy
B. The $100,000 Life Insurance Policy
C. $350,000 in an XYZ Bank account

At the time of Jolene's death, she owned the following asset:

A. $15,000 in a First City Bank account

Alex and Jolene are survived by Jolene's son Drew, Alex's son Kip, Alex's grandchild Hillary, and Alex's ex-wife Holly. Due to the brief period of time that Jolene survived Alex, Jolene never made any election regarding her rights under Alex's will.

Both Alex's 1995 Will and Jolene's Will have been admitted to probate.

Who is entitled to receive the following property and in what amounts?

1. The proceeds of Alex's $75,000 Group Life Insurance Policy.
2. The proceeds of Alex's $100,000 Life Insurance Policy.
3. The $350,000 in Alex's XYZ Bank Account.
4. The $15,000 in Jolene's First City Bank Account.

Explain your answers fully.

A

1. The proceeds of Alex's $75,000 life insurance policy go to Kip as the contingent beneficiary. Even though it is a non-probate asset, a divorce by operation of law removes an ex-spouse as beneficiary under a life insurance policy. Had Bella been living at the time of Alex's death, she would have split the policy with Kip. Because she predeceased Alex, Kip takes the entire $75,000. Ohio's anti-lapse statute does not apply to non-probate assets, so Hillary takes nothing.

2. The proceeds of Alex's $100,000 life insurance policy go to Holly. As part of a divorce settlement, Alex was required to name Holly as beneficiary of this policy and he did so. This took place after the divorce. None of the subsequent events affect Holly's ability to take under this life insurance policy.

3. The first $50,000 goes to Kip because under Alex's will he is a named beneficiary of $50,000 and he survived Alex. There was an advancement to Bella because Alex expressed his intent in a writing contemporaneous with the advancement that $25,000 be an advance against her inheritance. This would have reduced her gift under the will to $25,000. Ordinarily, anti-lapse statute would apply. If a beneficiary is testator's grandparent, descendant of testator's grandparent, or testator's stepchild and the beneficiary predeceases testator, the beneficiary's descendants can take under the will. Had the anti-lapse statute applied, Hillary would take the entire $50,000 because an advancement is not held against a grandchild in Ohio. However, language in Alex's will expressly required Bella to survive him, so Hillary does not take. By operation of law, when a divorce occurs after execution of a will, an ex-spouse is removed as a beneficiary or administrator, but the will remains valid. Here, Holly was the residuary beneficiary, so this provision of the will is struck. This leaves $300,000 of intestate property. When a decedent dies intestate or with a will that does not entirely dispose of his estate, the rules of intestacy apply. In Ohio, there is no pretermitted spouse statute, so because Alex did not change his will, Jolene does not take under the will. Additionally, in Ohio, unless there is a prior agreement, a surviving spouse is entitled to an elective share. However, the elective share is not automatic, and the surviving spouse must actually take action to be eligible for it. Because Jolene did not take an elective share, she is entitled only to an intestate share as Alex's surviving spouse. Because Alex is survived by one child and the descendant of another child from a different relationship, Jolene's intestate share is the first $20,000 plus 1/3 of remainder. Alex and Hillary (under Ohio's per capita by representation system) split that 1/3.

4. Drew takes $15,000 under Jolene's will. In Ohio, a beneficiary under a will or an heir for purposes of intestacy must survive the testator by at least 120 hours. Here, Alex is not a surviving spouse because he predeceased Jolene. Drew survived Jolene and as the named beneficiary under her will, he is entitled to the entire $15,000. Alex's son Kip and grandchild Hillary are not entitled to anything from Jolene's estate because they are merely step-children/grandchildren. Unless Jolene had adopted Kip, he cannot take under her will. Because the will disposed of all of Jolene's personal and real property, there is no need for intestacy rules.

QUESTION 8

Late one evening in Anytown, Ohio, Robber ran up behind Lady and tried to snatch her purse. Lady resisted and, in an effort to wrestle the purse from her, Robber struck Lady in the face with the flashlight he was carrying. When Lady fell to the ground, she broke her arm, and Robber escaped with her purse.

Witness was walking in the same area and saw Robber strike Lady and run away with her purse. Instinctively, Witness started to chase Robber down the street and yelled for help during the chase. Robber removed Lady's cash and credit cards before discarding the purse as he ran away.

Cop, an off-duty policeman who was out of uniform, responded to Witness's call for help and joined in the chase for Robber. As Robber turned a corner, he discarded his hoodie and his flashlight. Robber then saw Jogger, greeted him, and told him that he was out for his evening run. Robber and Jogger talked a little and agreed to run together and enjoy the exercise. Almost immediately thereafter, Witness and Cop turned the corner and spotted Robber and Jogger. Cop yelled "Stop or I'll shoot." Because of Cop's threat to shoot, Robber and Jogger began to run faster. Cop then fired three warning shots into the air.

Robber took the lead and Jogger followed him up a path to the back of Attorney's house. In an effort to evade their pursuers, Jogger picked up a brick, broke a small window on the back door of Attorney's house, and opened the door. Jogger and Robber then entered the house and hid in Attorney's home office. Cop and Witness were unable to locate Robber and Jogger and soon gave up the search.

After a while, Robber and Jogger believed they had successfully evaded their pursuers and decided to leave the house. On their way out, Robber noticed several valuables on Attorney's office desk. Robber pocketed the valuables, and Jogger also took several items of value and placed them into his own pockets. The two men then left Attorney's house and went their separate ways.

After being identified by witnesses from a surveillance film obtained from Attorney's home, Robber and Jogger were arrested and each was charged with (1) Aggravated Robbery of Lady, (2) Felonious Assault of Lady, (3) Criminal Trespass, (4) Vandalism of Attorney's home, and (5) Burglary of Attorney's home.

1. Should Robber be convicted of each offense?
2. Should Jogger be convicted of each offense?

Explain fully.

A

1. Robber should be convicted of aggravated Robbery of Lady, felonious assault, criminal trespass, and burglary.

   In Ohio, one can be convicted of complicity of a crime by helping the principal perform the act, having knowledge of the crime and helping in the facilitation of that crime, and having an agreement to help. When complicity occurs, the offender is charged with the actual offense.

   Aggravated robbery occurs with the unlawful taking of another's property by force, deception, or intimidation with a deadly weapon. A deadly weapon can be considered anything that causes serious bodily harm. Here, Robber took the purse of Lady by force and hit her with the flashlight, which could be considered a deadly weapon because it could seriously harm a person. Therefore, he meets all the elements and could be convicted.

   Felonious assault occurs with the intentional infliction of serious bodily harm of a person with a deadly weapon. Here, Robber inflicted serious bodily harm upon Lady with a flashlight and, therefore, could be convicted. This charge could merge with the more serious crime of aggravated robbery.

   Criminal trespass is the unlawful breaking and entering into the property of another. Robber was acting in complicity with Jogger to criminally trespass in Attorney's home. Jogger broke into the home with the brick, and Robber entered the house with him so they meet the elements, and Robber can be convicted. However, this offense would likely merge into Burglary because it is a lesser included offense in burglary.

   Vandalism is the intentional destruction of another's property. Robber did not have any intention of causing destruction to any of the property inside the house. The elements would likely not be met, and he likely would not be convicted.

   Burglary is entering an occupied (or likely occupied) habitation of another by force, stealth, or deception with the intent to commit a crime. Even though the intent to commit the crime may not be present upon initially entering the habitation, the intent can develop during the commission of the crime and the intent element will be met. Here, Robber entered in the home, which likely could have been occupied, by the force of breaking the window, to evade the police, but developed the intent to commit a crime once he was inside of the home. Therefore, all of the elements of Burglary are met and he could be convicted.

2. Here Jogger would not likely be convicted with Aggravated Robbery or felonious assault because he was unaware of the prior circumstances that led to Robber running. In order to be charged, there would had to have been an agreement between him and Robber to commit the crimes, and for Jogger to help him get away. Robber told him he was going on a nightly jog, so he had no idea of the events that previously transpired.

   Jogger can be convicted with criminal trespass. He intentionally broke and entered into Attorney's house with the intention of evading the police.

   Jogger would not likely be convicted of vandalism. He did not intend to destroy any part of Attorney's personal property.

   Jogger can be convicted of Burglary. Here, he entered the possibly occupied habitation of another by the force of breaking the window, and developed the intent to commit a crime of theft once he was in the dwelling. Therefore, Jogger met all the elements and could be convicted.

QUESTION 9

Corporate Creations, Inc. (Creations) is located only in the state of Delaware and is in the business of preparing Articles of Incorporation for any state in the United States. Dan wanted to establish an Ohio corporation. Using information provided by Dan, Creations prepared Articles of Incorporation (Articles) stating that the name of the corporation is Big Box Inc. (Big Box), that the purpose is the operation of retail businesses in Ohio, and that there are 1,000 shares of stock without par value. Creations appointed itself as the Statutory Agent. The Articles and Appointment were properly filed with and accepted by the Ohio Secretary of State and the required fee was paid. Creations sent copies of the filed Articles and Appointment of Statutory Agent to Dan.

Dan then contacted nine of his friends and asked each to purchase 100 shares of Big Box stock at $100 per share, for $10,000.

The nine friends each agreed, and Dan prepared a Subscription Agreement, which each signed. Eight of them paid $10,000 to Big Box in return for their stock, but Jones paid $5,000 and signed a Promissory Note for $5,000 payable to Big Box in return for his stock.

Dan also signed a Subscription Agreement, but, rather than pay $10,000, he agreed to work as an employee of Big Box with payment for his shares to be subtracted from his salary after three years. The other shareholders consented to this arrangement.

Dan designated himself the sole member of the Board of Directors. The shareholders and Dan then elected Dan as President, Treasurer, and Secretary.

Big Box commenced business with one store in Ohio. To increase working capital, Dan arranged for Big Box to borrow $200,000 from Bank, to be paid over a three-year period. Dan executed a Promissory Note and Security Agreement covering Big Box's assets, signing it as President of Big Box. Big Box paid the Bank for the first year and then opened a second store in Indiana, which resulted in significant losses. Big Box was then unable to make further payments to Bank.

1. Is Bank likely to succeed in holding all shareholders and Dan personally liable for the amount due on the loan by alleging that Big Box was defectively organized? Explain fully.
2. Are the shareholders likely to succeed in setting aside the Promissory Note to Bank and the Security Agreement by alleging that these documents were not validly authorized or executed? Explain fully.
3. What claims, if any, might the shareholders assert against Big Box and Dan regarding the following, and are they likely to succeed?

    a. The establishment of the Indiana store, which resulted in losses.
    b. Jones's Promissory Note, which is now in default.
    c. Dan's agreement to pay for his shares of stock out of his salary.

Explain each fully.

1. Bank will not succeed. To establish a de jure (by law) corporation in Ohio, one must file articles of incorporation with the Ohio Secretary of State. The articles must state the company's name, the address of its principal office in Ohio, its capital structure, and its stated capital, if any. In addition, one must also submit a written appointment of a statutory agent. The agent must be an Ohio resident or entity. Here, Big Box's articles were deficient because they did not state an address for Big Box's principal office in Ohio. In addition, Big Box appointed Creations, a Delaware entity, as agent and not an Ohio entity. Thus, Big Box is a defectively formed corporation.

   However, under the doctrine of de facto corporation where there is a good faith attempt to comply with the incorporation statutes, a defectively formed corporation, will be treated as a valid corporation and its shareholders, officers, and directors will be free from personal liability. In addition, under corporation by estoppel, where a third party contracts with a defectively formed corporation, they are estopped from later arguing that the company is not a corporation. Here, Creations and Dan attempted in good faith to comply with the incorporation statutes and failed. Thus, Big Box should be treated as a defacto corporation. In addition, Bank voluntarily contracted with Big Box to lend $200,000. Accordingly, Bank is estopped from arguing that Big Box is not a valid corporation. Therefore, Bank's argument will fail and Dave and the shareholders are not personally liable.

2. The shareholders are likely to succeed in setting aside the Promissory Note and Security Agreement. In Ohio, shareholders elect directors. There must be at least three directors. In addition, directors appoint officers and there must be at least a president, treasurer, and secretary. Here, the shareholders did not elect three directors. Rather, Dan appointed himself as the only director. Moreover, the shareholders, not directors, chose Dan to be president, treasurer, and secretary. Dan cannot serve in each of these positions. Acting as all three gives Dan unlimited power. Accordingly, Dan lacked the authority to enter into the Promissory Note and Security Agreement because the transaction was not approved by the board of directors, Dan was not a director, and Dan was not a validly appointed officer. Therefore, the shareholders will succeed in setting the transaction aside.

3. a) The shareholders will challenge the opening of the Indiana store as an ultra vires act. Where a corporation's articles of incorporation state a purpose, an act that departs from that purpose is ultra vires and may be set aside by an action by the shareholders, state, or directors. Furthermore, where a director purposefully approves an ultra vires act, he may be held personally liable for any losses. Here, Big Box's articles established the narrow purpose of operating retail businesses in Ohio. Thus, establishing a store in Indiana is an ultra vires act and the shareholders may hold Dan, who apparently authorized the act unilaterally, personally liable for the store's losses.

   b) The shareholders will challenge the promissory note as invalid consideration, but will fail. In Ohio, shares may be paid for with any consideration including a promissory note. However, the shares are not considered paid until consideration is actually received. Here, it was valid consideration for Jones to pay for his shares with $5,000 in cash and $5,000 via promissory note. To actually pay for the shares, Jones may need to make other arrangements.

   c) The shareholders will argue that Dan's agreement to pay is invalid consideration for his shares. In Ohio, agreeing to work for the company and pay for shares out of one's salary is valid consideration. Assuming Dan's salary is reasonable and he actually pays, the shareholders will fail.

QUESTION 10

Owner owns Salon, an upscale hair salon in Anytown, Ohio. Client, a 62-year-old business woman and long-time client, recently visited Salon to have her hair trimmed and dyed her usual shade of brown. Client's regular hairdresser was out sick, but Owner assured her that a new employee, Stylist, could provide the services that Client expected. Because Client had always been satisfied with Salon's services, she agreed to allow Stylist to trim and color her hair.

Just after Client was seated in Stylist's chair in the back of Salon, Owner left for lunch. Unbeknownst to Client, Owner had recently hired Stylist to increase Salon's appeal to younger customers. Stylist, who considered herself an artist, had a reputation for creating trendy hairstyles and using the latest hair products. Stylist had agreed to follow Owner's instructions to trim and color Client's hair as usual. Instead, Stylist decided to create an entirely new look for Client and use an untested product of her own invention. Client was reading a book and didn't notice what Stylist was doing.

While Client and Stylist were in the back of Salon, another Salon employee, Worker, mopped the floor near the front door. Although Owner had told Worker to wait until all customers had left Salon before mopping, he was hoping to go home early. After he finished mopping, he returned all equipment to the storage room and left Salon for the day. Client had not seen Worker mop the floor, nor was it apparent that the floor was still wet.

Unfortunately, the new product caused serious hair loss. That, combined with the new trendy style, caused Client to scream in outrage and run toward the front door where she slid on the wet floor and fell to the ground, sustaining head and back injuries.

Just after Client fell to the ground, Rob walked into Salon, did not see Client, and immediately fell over her, causing Client additional physical injuries and rendering her temporarily unconscious. Rob then grabbed Client's purse and ran away.

Client has filed a negligence action against Owner seeking damages for:

1. Her hair loss and undesired new style,
2. The physical injuries she sustained when she initially fell on the wet floor,
3. The additional physical injuries she sustained when Rob fell over her, and
4. The loss of her purse.

Under theories of primary and/or vicarious liability, for which claims, if any, is Client likely to recover? Discuss fully.

A

To sustain a claim for negligence, the plaintiff must show that the defendant owed a duty of reasonable care to plaintiff, that defendant breached that duty, that the breach was a cause in fact of plaintiff's injuries (but for causation), that the breach was a proximate cause of the plaintiff's injuries (foreseeability of the harm), and that the plaintiff has suffered actual damages.

Principals can be vicariously liable for their agent's torts that are committed within the scope of employment. Whether an agent is within their scope of employment is a question of fact.

1. Client will succeed in a negligence action against Owner for her hair loss both through vicarious liability and through her own negligence. First, Owner was negligent when she hired Stylist. Stylist had a reputation for creating trendy styles. Owner hired Stylist when she was aware of this reputation. Owner had a duty to hire people that were competent hair stylists. She breached that duty. That breach was a cause in fact and a proximate cause of Client's damages.

   Additionally, Owner is vicariously liable for the damages caused by Stylist. At issue is whether Stylist was inside or outside the scope of her employment. While it is true that she did not actually have authority to "create an entirely new look" and to use "untested products," she was being compensated by Owner for the work that she was performing for Client at Owner's salon. Thus, she was inside the scope of her employment. By using untested hair products on Client, Stylist breached a duty of care to perform her duties as a reasonable stylist would perform them; no reasonable stylist would use untested products on a client's hair. This breach is both the cause in fact and the proximate cause of the hair loss. But for the use of the untested products, Client would not have lost her hair. The hair loss was a foreseeable result of using an untested product. And Client was actually damaged by the use of the untested product. Both Owner and Stylist are liable for negligently causing Client's hair loss.

2. Owner is vicariously liable for the injuries caused by the wet floor. Worker owed a duty to mop in a reasonably prudent way and to leave the floor in a safe manner. Worker breached that duty and Client's injuries were caused by that breach. Again, even though Worker was not following the exact instructions of Owner, Worker was within the scope of his employment. He was performing a job function that benefitted Owner and was presumably being paid to do so. Thus, Owner is vicariously liable.

   Additionally, Owner is also liable for her own negligence regarding the condition of the premises. A property owner has a duty to warn business invitees of dangerous conditions on the property that are not obvious. There was no warning that the floor was wet, so Owner breached this duty. That breach was a cause in fact and a proximate cause of Client's injuries.

3. The issue regarding the injuries sustained by Rob's fall onto Client is a closer call. The issue is proximate cause. When considering if a breach is the proximate cause of a plaintiff's injuries, courts will consider if the injury is one that is a foreseeable consequence of the breach. A customer falling over a person that slips and falls on a wet floor is probably foreseeable. It is the type of harm that you would expect. Consequently, Client will recover for these damages too.

4. Client will not recover from the Owner for the loss of her purse. Owner's negligence is not the proximate cause of the loss of the purse because there was an intervening factor that caused that loss. Rob taking the purse was not a foreseeable consequence of Owner's negligence, and therefore, Owner's breach was not the proximate cause. Without proximate cause, there is no negligence. Client will not recover.

QUESTION 11

1. Mary issued a personal check for $1,000 to Sam for landscaping work that he had done at her home. In need of more landscaping supplies, Sam went to a local nursery. The owner of the nursery, Owen, agreed to accept the $1,000 check in exchange for supplies, so Sam indorsed the check to Owen. Later, Owen indorsed the check to Deborah, his daughter, as a birthday present for her on her 21st birthday. Subsequently, Mary discovered that Sam had inadvertently harmed several valuable trees while conducting the landscaping work and she stopped payment upon the check. When Deborah was unable to cash the check, she filed suit against Mary for the $1,000.

2. Bart hired Cal to do a major landscaping job at Bart's home for a total cost of $20,000. In exchange for Cal's promise to "create a Garden of Eden," Bart signed a negotiable, fully transferable, demand promissory note to Cal for the sum of $20,000 "in good faith" at the point when Cal was only half way through the project. The note stated that it was "payable on demand when Cal finishes the Garden of Eden project." Cal went to a tavern the same evening and, after making friends with Sue the barmaid, Cal indorsed Bart's note over to her in exchange for her fancy sports car. Unfortunately, Cal never finished the Garden of Eden. Sue demanded payment of the $20,000 note from Bart. Bart refused to honor the note because the Garden of Eden was only half-way finished and he had to hire another contractor to complete the job for $10,000 more than his entire original contract with Cal. Sue has filed suit against Bart to enforce the $20,000 note.

3. One Saturday night, when Michael was on his way to a party, Michael asked Steven if he would sell him $100 worth of cocaine. Steven gave Michael the cocaine, and Michael wrote Steven a check for the $100. When Michael thought more about it the next day, he felt that Steven had taken advantage of him and cheated him on the amount of cocaine, so he stopped payment on the check. Steven, however, had already indorsed the check over to Value Mart in exchange for groceries. Value Mart has filed suit against Michael to recover the $100.

4. Bill executed a promissory note to Karen for the value due to Karen for the nursing care she had provided to Bill's aging Mother. The note was payable on April 1, 2009. Karen demanded payment on May 1, 2009, but Bill refused to honor the note. Karen finally filed suit against Bill to enforce the note on April 29, 2015. Bill seeks to dismiss the case on the basis that the statute of limitations had expired.

What are the likely outcomes of the following actions:

1. Deborah v. Mary
2. Sue v. Bart
3. Value Mart v. Michael
4. Karen v. Bill

Explain each fully.

Articles 3 & 4 govern negotiable instruments. A negotiable instrument is an instrument that is: signed, in writing, unconditional promise to pay or order to pay, a fixed amount, on demand or at a definite time, no other undertakings, to order or bearer.

1. Deborah v. Mary: The issue is whether Deborah can recover the $1,000. Under the shelter rule, a person who takes an instrument from a holder in due course (HDC) may "shelter" under the previous HDC's status. A HDC is someone who in good faith takes a negotiable instrument for value with no notice of any claims or defenses on the instrument. A HDC takes free of all personal defenses, but takes subject to any real defenses the maker or drawer of the instrument has. Here, Mary gave the check to Sam in exchange for landscaping work. Sam then indorsed and transferred the check to Owen (Sam has indorser's liability). Owen is a HDC. He took the check in good faith, for value (the supplies), and with no notice of any defenses or claims on the instrument. Therefore, when Owen indorsed the check and gave it to Deborah, even though Deborah was not a HDC (because she did not give value, it was gratuitous because it was for her birthday), she can shelter under Owen's HDC status. This means that although Mary has a personal defense against Sam because Sam harmed several valuable trees, Deborah will take free of that personal defense. Therefore, Deborah will prevail against Mary.

2. Sue v. Bart: As described earlier, a HDC takes free of personal defenses. However, where the HDC has been given a promissory note (PN), the HDC may only recover from the maker the amount of value actually given in exchange for the note. Here, Bart gave Cal a PN for $20,000 when Cal was only half way through the project. Bart had to hire another contractor to complete the job for $10,000. Bart has a personal defense against Cal, which Sue should take free of because she is a HDC. Sue is a HDC because she gave, in good faith, value (her car), and had no notice of any issues with the PN. While she will be entitled to payment from Bart, she will only be entitled to the amount of $10,000 because that is how much value was given. Note: Indorsers can be held liable under indorsers liability or transferor warranties.

3. Value Mart v. Michael: The issue is whether Michael has to pay on the $100 check. Illegality is a real defense. HDCs take subject to real defenses. Here, Michael wrote a check to Steve to buy cocaine, which is an illegal substance. Steve indorsed the check to Value Mart (VM), and VM took without notice of any claims or defenses to the instrument, in good faith and for value (groceries). Although VM is a HDC, VM will not get payment from Michael because Michael can raise the real defense of illegality. HDCs do take subject to real defenses. The stop payment is valid (for 14 days if oral), and VM could possibly have an action against Steven under indorser's liability or transferor warranties.

4. Karen v. Bill: Bill will prevail. The statute of limitation to enforce a PN is six (6) years from the date the note was payable. Because here, the PN was payable on a definite date (April 1, 2009), it does not matter when the demand for payment was made. There was no demand needed because there was a definite date. The statute of limitations will run from April 1, 2009, and six years has passed, so the note will not be enforceable and Bill will prevail.

QUESTION 12

Q

Smith worked as a paralegal for a law firm (Firm) during her three years of law school. Upon graduation, her responsibilities at Firm were expanded and she was promoted to law clerk. Smith became an associate attorney when she was sworn in as an Ohio lawyer. As an associate, she was assigned to work on the cases of one of the four partners. She was not authorized to communicate directly with clients without express prior approval from that partner.

After one year as an associate, Smith decided that she would open her own law practice, planning to replicate Firm's business model. Prior to leaving Firm and opening her own practice, Smith went to Firm's office after working hours. She secretly duplicated Firm's list of clients and copied engagement letters, fee agreements, and various other forms that had been developed and were used by Firm. She then rented office space, agreeing to share it with a law school classmate (Classmate) who was beginning her own Bankruptcy practice. She incorporated "Smith, LLC," and had letterhead printed.

On the day she resigned from Firm, she sent a letter to all of Firm's clients announcing her move and identifying herself as the attorney who managed their files at Firm. Smith stated, in her letter, that she was familiar with their files and had worked on their matters for the past four years. She offered continuity of representation if the clients would discharge Firm and engage Smith, LLC. As additional incentive to change lawyers, Smith's letter offered "discount fees" if the clients acted within 30 days.

Smith's letter also announced that representation in Bankruptcy Court was available. Smith planned to refer all bankruptcy cases to Classmate for a referral fee. She did not intend to handle any bankruptcy work herself.

What Rule or Rules of Professional Conduct, if any, might Smith have violated? Explain fully.

It is not necessary to identify specific rules by number.

Copying Client Info/Documents: A lawyer owes a duty of confidentiality to his or her clients. This duty includes a responsibility not to disclose (except as permitted by the rules) any information given to the attorney by the client or use that information for the attorney's own benefit. The duty of confidentiality continues even after representation has ended. And that duty extends to all lawyers in a firm, even those that do not work directly on a case. Here, Smith used confidential information for her own benefits, because client names are confidential information and she used them to try to attract business to her new firm. This is a violation of the rules. Moreover, even after hours, lawyers are prohibited from engaging in any action tending to demonstrate dishonesty or bring disrepute to the profession. This certainly includes committing theft by stealing documents from her former firm.

Solicitation: A lawyer may not solicit clients in a manner forbidden by the rules. Although written advertisement letters are generally an acceptable form of solicitation, they must comply with the Rules. Smith's do not. First, her letters should have contained the phrase "ADVERTISMENT MATERIALS" or its substantial equivalent prominently on the envelope and on the letter itself. Second, an attorney may not include false or misleading statements in her advertisement materials. Here, Smith falsely claimed to have worked on all of Firm's client's cases when in fact she only worked on one partner's, that she was familiar with all their cases, and that she had worked on those cases. Third, since Smith lied about how she obtained the client's information, it is unlikely that this letter would be found to comply with the Rules' mandate that a solicitation explain how the attorney came to discover the client's need of legal services. Fourth, the claims made in the letter must be verifiable. In addition to being misleading, Smith's promise of discount rates is not verifiable and directly violates the Rules in its own right. Finally, Smith failed to include language indicating that she was not pre-evaluating the merits of the potential clients' cases.

Sharing Space: A lawyer may not share space with another attorney in a way that misleads clients into believing that there is a partnership. Smith might have violated that rule here. Although sharing office space alone is not prohibited, Smith is also referring cases to Classmate, which might be enough to place her in violation of this rule.

Improper Incorporation: In Ohio, a law firm must be incorporated as a Professional organization, like a PLLC or PLLP, not as a simple corporation or LLC. Thus, Smith violated the rules by incorporating as a simple LLC. Moreover, Ohio prohibits firm names that are misleading or confusing. Simply naming the firm "Smith" likely violates this Rule because there are presumably many attorneys with the last name Smith and it could be perceived as a trade-name (such as for a blacksmith) since there is no indication (such as a PLLC incorporation) that the organization is a law firm.

Referrals: Finally, the Rules prohibit soliciting clients just to refer them away, referral fees, and improper fee sharing. Smith has no intention of doing bankruptcy work and simply intends to refer clients to Classmate. That violates the Rules. Smith is obtaining a referral fee. That violates them too. Finally, even were the preceding issues not present, the Rules require that fees either (1) be split in proportion to the work completed or (2) split evenly, if all attorneys splitting the fee remain personally liable for the representation. And client consent is required to split fees. Smith has not done any work, agreed to remain responsible for the representation, or obtained the clients' consent, so this fee would violate the fee-sharing rule even if it were not an improper referral fee.

MPT 1

In re Whirley

In this performance test item, examinees are associates at a law firm representing Barbara Whirley. In January, Whirley began renting a house from Sean Spears. In the last few months, Whirley has had some problems with the house – a leaking toilet, a broken automatic sprinkler system, and a defective sliding door in the guest bedroom, which has allowed water to enter and cause the carpet to get mildewed and moldy. In addition, Whirley's dog has chewed on the baseboard in the laundry room. She has told Spears about the problems with the toilet, sprinkler system, and door, but he has failed to make any repairs. Whirley seeks the firm's advice regarding her options as a tenant. Examinees' task is to draft an objective memorandum identifying the options Whirley has under Franklin's landlord/tenant law to address each condition in the house and recommending which options are best, keeping in mind that Whirley prefers to continue living in the house. The File contains the instructional memorandum from the supervising attorney, a summary of the client interview, the lease agreement, an email exchange between Whirley and Spears, and a repair estimate. The Library contains excerpts from the Franklin Civil Code and two Franklin cases that discuss what conditions may constitute breaches of the warranty of tenantability and the tenant's potential remedies.

A

Della,

You asked me to analyze and evaluate Ms. Whirley's options with regard to each of the unrepaired conditions, specifically explaining the advantages and disadvantages of her available options for each of those conditions. My findings are outlined below.

I. Applicable Rights and Duties of Ms. Whirley and Mr. Spears.

The Franklin Civil Code codifies the Gordon decision, which outlined the landlord's warrant of tenantability. The Code also provides certain statutory remedies for the violation of these duties. Additionally, the Code explicitly states that the remedies provided by section 542 are in addition to "any other remedy provided by ... chapter [540], the rental agreement, or other applicable ... common law. Thus, the rental agreement between Ms. Whirley and Mr. Spears, as well as the common law, applies to this dispute. The rights and duties imposed by each of these sources are outlined below.

a. Franklin Civil Code

The Code imposes numerous rights and duties applicable in this dispute. Under section 540, "[t]he lessor of a building intended for human occupation must put it into a condition fit for such occupation and repair all subsequent conditions that render it untenantable." Section 541 defines "untenantable" as a dwelling that lacks effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors, plumbing or gas facilities maintained in good working order, heating facilities maintained in good working order, electrical lighting, wiring and equipment maintained in good working order, floors, stairways, and railing maintained in good working order, and interior spaces free from insect or vermin infestation.

The Code gives a tenant several remedies against a landlord-lessor who fails to render the leasing space tenantable. However, under section 542, a tenant must first give written notice to the landlord. If the landlord fails to correct or repair the conditions rendering the premises untenantable within a reasonable time after receipt of such notice, the tenant's right under section 542 vest. Under section 542, a tenant whose landlord fails to repair conditions rendering the premises untenantable after reasonable time of receiving notice of such is entitled to, for each condition, either make repairs and deduct the cost of repairs from rent when due (if the cost of repairs are lower than one month's rent), make repairs and sue the landlord (if the cost of repairs exceed one month's rent), vacate the premises, which discharges the tenant from further payment of rent, or withhold a portion of the rent until the landlord makes the relevant repairs, but the tenant may withhold an appropriate portion of the rent if the conditions substantially threaten the tenant's health and safety. The Code also contains several provisions applicable to eviction proceedings, but there is nothing here to suggest that Mr. Spears is contemplating bringing such an action.

The Code also imposes several duties on the tenant, Ms. Whirley. There is no duty under section 541 or 542 on the landlord if the tenant violates any of their obligations contained in section 543, provided the tenant's violation contributes materially to the existence of the conditions. The tenant must keep the premises clean and sanitary, must properly use and operate all electrical, gas, and plumbing fixtures and keep them clean and sanitary, and not permit any person or animal to destroy or damage part of the facility.

b. The Common Law

A few relevant cases add some gloss to Chapter 540's statutory rights and duties.

In Burke v. Harris (Fr. Ct. of App.), a landlord brought an ejection action. Pursuant to chapter 540, the tenant raised the above obligations as an affirmative defense to the eviction proceedings, as the code permits (however, which is not applicable here). The tenant complained of roof and window leaks, which caused damages to the premises and the

tenant's personal chattels, as well as a broken thermostat. The Court, applying a separate affirmative defense codified "substantial breach standard," applicable only to where the landlord's duties are raised as an affirmative defense to eviction proceedings, held the landlord breached the warrant of tenantability. The Court noted that, under chapter 540, to determine an appropriate reduction in rent, the trial court may either measure the difference between the fair rental value of the premises if they had been as warranted and the fair rental value as they were during occupancy in an unsafe or unsanitary condition, or reduce a tenant's rental obligation by the percentage corresponding to the relative reduction of use of the leased premises caused
by the landlord's breach.

Additionally, Shea v. Willowbrook Properties LP (Fr. Ct. App.) also added some insight. First, the case made it clear that a tenant has no rights regarding breach of the warrant of tenantability where he fails to give the landlord appropriate statutory notice as required under the code. Additionally, the tenant must submit proof/documentation of damages to be entitled to recover under chapter 540. Lastly, the tenant has the burden of proof in demonstrating that the conditions complained of were not the fault of the tenant.

c. The Rental Agreement

Lastly, the rental agreement between the parties also adds some duties between them. First, a tenant is liable for damages by any unauthorized animal. However, as you have mentioned, there was an addendum filed between the parties allowing Ms. Whirley to keep her dog on the premises. This addendum may contain important information about the duties of the parties regarding the damage caused by Ms. Whirley's dog. Additionally, Ms. Whirley paid a $1,200 security deposit, from which Mr. Spears may deduct charges at the end of the lease term for damage to the premises, excluding normal wear and tear, as well as all reasonable costs associated with repairing the premises. Additionally, if the premises become totally or partially destroyed during the lease, such that tenant's use is seriously impaired, either party may terminate the agreement upon three days' written notice. Moreover, if a tenant vacates the premises before the end of the lease, the landlord may hold tenant responsible for all rent payment due for the lease term; however, this is subject to applicable Franklin law. Lastly, the tenant has several additionally obligations under the lease. First, the tenant must keep the property clean, promptly dispose of all garbage, not leave windows or doors in an open position during inclement weather, and promptly notify landlord in writing of all needed repairs. Importantly, the lease also imposes a duty on tenant to water the yard at reasonable intervals and maintain the yard, at the tenant's expense.

II. The Conditions

You mentioned several conditions that Ms. Whirley complained of. These are the leaking toilet, the sprinkler system, guest bedroom carpet, and the damage to the baseboard caused by the dog. Under the code, we must analyze each of these conditions separately, applying the law to each.

a. The Toilet

As mentioned above, the landlord has a duty under 541 to maintain plumbing facilities in good working order, or else the dwelling is considered untenantable under section 540. Ms. Whirley promptly sent written notice to Mr. Spears on February 19, 2016. It is now July 26, 2016. Mr. Spears has yet to repair the leaky plumbing. Additionally the cost estimate of repairing the plumbing is $200. Assuming Ms. Whirley did not breach her duty under section 543 by improperly using or operating the toilet, she has several options. It should be noted that, under section 542, if a tenant make repairs more than 30 days after giving notice to the landlord, the tenant is presumed to have acted in a reasonable time. Thus, Ms. Whirley is entitled to 542's remedies because the faulty plumbing through no fault of her own is a breach of section 540's warrant of tenantability. She may, therefore, make the repairs herself and deduct the cost of repairs from her rent, because the cost of the repairs do not exceed her monthly rent of $1,200. Additionally, she may vacate the premises, which would discharge her from paying rent and from her obligation to pay rent under the lease.

However, this would be undesirable because Ms. Whirley has expressed her desire to stay on the premises. She may also withhold the relevant portion of her rent until Mr. Spears repairs the toilet if the condition substantially threatens her safety. This is probably not applicable under the common law, because substantially threaten means some danger to health or otherwise. The water damage caused by the toilet is probably not threatening to health and safety. Therefore, Ms. Whirley's best option is probably to make the repairs herself and withhold a portion of rent. Under the Burk case, Ms. Whirley may either withhold the value between the property as it is and as warrants ($1,200 for a 3 bedroom and $1,000 for a 2 bedroom (which is the cases here), so $200. Or, she may reduce the rent by her reduced use of the property, which would be a similar number.

b. The Sprinkler System

The only part of section 541 that could possibly apply to the sprinkler system is most likely the landlord's duty to maintain in good working order the electric equipment. Ms. Whirley properly sent notice to Mr. Spears regarding the sprinkler defect on March 31, 2016. It is now July 26 and he has yet to repair it. Ms. Whirley has, therefore, been watering the flower beds by hand, which takes her 15-20 minutes two or three times a week. There was no leak, leading Ms. Whirley to believe it was an electrical problem with the sprinkler. Even if the damage to the sprinkler was not caused by Ms. Whirley, she may not properly state a claim for repair or compel Mr. Spears to repair the sprinkler system under any source of applicable law, because the rental agreement controls. Here, under section 14.B. of the rental agreement, Ms. Whirley is obligated to water the yard at reasonable appropriate times, as well as maintain the yard, all at her own expense. Thus, although the premises may have initially contained a working sprinkler system as a sort of "bonus," the obligation to either repair the sprinkler system or water the yard falls entirely on Ms. Whirley. She must, under the lease, maintain the yard appropriately.

c. Guest Bedroom Carpet.

Under section 541, floors must be maintained in good working repair by the landlord. Here, Ms. Whirley properly notified Mr. Spears in writing of the water damage under the door May 26, 2016. It is now July 26, and he has yet to repair the damage. However, Ms. Whirley is not sure whether any of her houseguests may have caused the damage to the door that started the mold situation. Section 542 prohibits recovery where a tenant permits a guest onto the property who causes damage to the facility. However, mold is a very dangerous condition which can threaten the health and safety of a tenant. The lease agreement imposes a duty on Ms. Whirley to not leave windows or doors in an open position during inclement weather. If Ms. Whirley can prove that the damage to the door/floor was not caused by any fault of her own by violating these provisions, she has several remedies available. However, it will be difficult to prove that the damage was absolutely not her fault. Because the repairs to this condition are $1,800, Ms. Whirley may make the repairs and sue Mr. Spears for the repairs, vacate, or withhold a portion of the rent until Mr. Spears makes the relevant repairs because mold is a condition that substantially threatens the health and safety of Ms. Whirley under the Burk case. Mold is not merely a "cosmetic" defect; it can, in cases, be even life threatening. Additionally, under Burk, Ms. Whirley may be entitled to either measure of damages outlined in that case. Ms. Whirley's duties under the rental agreement to keep everything clean also may determine her right to recovery for this condition. She may also terminate the lease upon three days' notice of the rental agreement; however, she will not want to pursue this undesirable option because she has indicated she wants to remain on the premises. Additionally, if the court finds that this damage does constitute a substantial breach, Ms. Whirley may, under section 550, order the landlord to pay the repairs and correct the conditions which constitute the breach, and order that monthly rent be reduced until the repairs are completed. However, it is unclear whether these last rights under 550 are applicable only to eviction actions. Therefore, if Ms. Whirley can prove that this damage is not through her own fault, she has numerous sources of recovery. Her best option would be to make the repairs herself and sue Mr. Spears for the $1,800, because it would be advantageous to immediately remove the mold as well as prevent it from occurring. Additionally, the court process would help Ms. Whirley to establish that this condition was not through her own fault.

d. The Baseboard in the Laundry Room.

It should be first noted, that the pet addendum authorizing Ms. Whirley to keep her dog on the premises may be an additional source or restriction on her rights to recover for this damage. Additionally, Ms. Whirley never gave Mr. Spears notice of the baseboard damage in writing, as required by both the Code and her rental agreement. Moreover, section 543 specifically indicates that a tenant may not recover under the chapter for damages caused by an animal that the tenant permits on the premises and which causes damage. Here, Ms. Whirley permitted her dog on the premises and even put him in the laundry room, keeping him there, where he eventually caused damage by chewing. Therefore, even though Mr. Spears allowed Ms. Whirley to keep her dog on the premises, she may not recover under the code or common law for the damage caused by the dog. Unless the pet agreement addendum gives Ms. Whirley a right to recovery for the damage caused by her dog, she will not be able to recover for these damages.

III. Conclusion

I hope this memorandum helps resolve this dispute. As outlined above, Ms. Whirley may have claims for the toilet and mold/door conditions, but she will likely not have valid claims for the sprinkler and baseboard conditions.

Sincerely,

Applicant

MPT 2

Nash v. Franklin Department of Revenue

Examinees' law firm represents Joseph and Ellen Nash, a married couple who own land in Knox Hollow, Franklin, on which they raise Christmas trees for sale. While initially selling the trees was a casual endeavor, five years ago they made it a commercial tree-farming operation and began claiming tax deductions for expenses from a trade or business. The Franklin Department of Revenue recently reviewed the Nashes' income tax returns and has disallowed the Nashes' deductions for the last five years' farm expenses, as well as their claim for a home-office deduction. The Nashes appealed the new tax assessment, and the firm represented the Nashes at a hearing before the Franklin Tax Court. Examinees' task is to draft the legal argument for the post-hearing brief requested by the Tax Court, making the case that the Nashes are entitled to the full deductions that they claimed under Franklin law. [Franklin law uses the federal Internal Revenue Code and Regulations to calculate Franklin tax liability.] The File contains the instructional memorandum, the firm's guidelines for drafting briefs, the decision by the Franklin Department of Revenue, and a transcript of Joseph Nash's testimony before the Franklin Tax Court. The Library contains relevant excerpts from Internal Revenue Code §§ 162, 183, and 280A, and Internal Revenue regulations (26 C.F.R. § 1.183–2). The Library also contains two cases from the Franklin Tax Court addressing what it means for a taxpayer to be engaged in an "activity for profit," and the standard for whether a taxpayer has used a portion of his or her home "exclusively" as the principal place of business of a business.

The FDR limits deductions taxpayers may claim if their business lacks a profit motive. In order to determine whether an activity may be considered "for profit" – and thereby permit income tax deductions – the Code of Federal Regulations (CFR) outlines nine factors to be considered for whether the taxpayer "entered into the activity, or continued the activity, with the objective of making a profit." 26 CFR §1.183-2. However, "these factors are not exclusive, nor is one factor or combination of factors determinative on the issue of profit motive." Morton v. Franklin Dep't of Revenue. Below, in looking at the totality of the factors, it is clear that they weigh in favor of recognizing the Nashes tree farming business as an operation carried on for profit, thus entitling them to their claimed income tax deductions. Furthermore, because they exclusively used the room in their home for business purposes, the Nashes should also be entitled to a deduction for their home office.

The FDR Incorrectly Denied the Nash's Deductions for Expenses Paid or Incurred During the Taxable Year in Carrying on a Trade or Business

Manner in which the taxpayer carries on the activity

The first factor weighs in favor of the Nashes because they carry on their business as one designed to make a profit. For example, the CFR suggests that this factor is suggestive of a for-profit enterprise if the "taxpayer carries on the activity in a businesslike manner and maintains complete and accurate books and records." In Stone v. Franklin Dep't of Revenue, the Franklin Tax Court found this factor weighed against taxpayers who "produced no records of business activities...lacked a business plan and had no plan to recoup their losses." Here, the Nash family does keep records regarding their business in their home office. They also consulted with a farmer who talked to them about their plans for expansion and "showed us how to keep records about the trees and to keep good books." Moreover the CFR states that a change in operating methods, adoption of new techniques or abandonment of unprofitable methods...may also indicate a profit motive. Here, the Nashes worked with a farmer to get advice about how to create a "bigger operation." They also bought new equipment to help with additional planting and specialized equipment to trim and shape the trees. These new techniques suggest an intent to expand and develop a profit. As such, this factor weighs in favor of the Nashes.

The expertise of the taxpayer or his advisors

The second factor also weighs in favor of the Nashes because they extensively prepared for this new business venture. The CFR suggests that this factor is indicative of a profit-motive when the taxpayer prepares "for the activity by extensive study of its accepted business, economic, and scientific practices, or consultation with those who are expert therein." Again, in Stone, the court found this factor weighing against the taxpayer when they had no formal education in the business – breeding horses – and merely consulted with others without getting advice on how to make their business more profitable. Here, the Nashes did extensive research and consultation aimed at increasing the profitability of their business. Mr. Nash testified that he "researched how to raise Christmas trees in a more orderly way." Specifically that he, "read a lot of books on raising trees....took a whole series of classes on forest management" and consulted with a tree farmer. The consultation with the tree farmer was designed to prepare them for a "bigger operation" than they had previously had. As such, this factor weighs strongly in favor of the Nashes.

The time and effort expended by the taxpayer in carrying on the activity

The next factor also likely weighs in favor of the Nash family because of the extensive time investment of Mrs. Nash and the time invested by Mr. Nash during harvest. The CFR states that "the fact that the taxpayer devotes much of his personal time and effort to carrying on an activity...may indicate an intention to derive a profit." Furthermore, it states that a "taxpayer's withdrawal from another occupation to devote most of his energies to the activity may also be evidence that the activity is engaged in for profit." In Stone, the court found that this factor neither weighed for or against the taxpayers where both parties kept their full-time jobs, but spent 30-40 hours a week on their activity. Here, there is more substantial evidence weighing in favor of the Nashes. While it is true that Mr. Nash continues to work full-time at Knox County High School, his wife is retired from her previous employment. In addition,

Mr. Nash testified that his wife "has spent pretty much full time year-round" on their tree farming business while he spends "summers and weekends" and "a lot more time during the harvest." Thus, though this is not Mr. Nash's exclusive occupation, the factor still weighs in favor of finding a for-profit enterprise.

Expectation that assets used in activity may appreciate in value

This factor weighs in favor of the Nashes because they have an expectation that their assets used in the activity may increase in value. Mr. Nash noted that they have invested in new and specialized equipment and that their farm equipment is ensured. As such, this factor suggests that the assets used in tree farming have value and may continue to appreciate in value. Similarly, the land on which they farm may continue to increase in value, particularly as the trees mature and are ready for harvest.

The success of the taxpayer in carrying on other similar or dissimilar activities

This factor does not weigh in favor of the Nashes. The CFR states that a taxpayer may be engaged in a for-profit enterprise if they have "engaged in similar activities in the past and converted them from unprofitable enterprises." However, as mentioned above, no factor is dispositive. Here, the Nashes had previously sold trees on their property and have yet to be able to turn a profit on this business. Still, the Nashes are hopeful that they will be able to make more money as the trees on their land mature.

The taxpayer's history of income or losses with respect to the activity and the amount of occasional profits, if any which are earned

These factors likely weigh in favor of the Nashes because their losses are attributable to initial start-up activity and they have the possibility to turn a profit in the future. The CFR states that losses which continue to be sustained beyond the period which customarily is necessary to bring the operation to profitable status may be indicative that they are not carrying on a business for profit, but that "a series of losses during the initial or start-up stage of an activity may not necessarily be an indication that the activity is not engaged in for profit." In Stone, the court found the first factor to weigh against the taxpayers where their "history of losses over the entire existence of [the business] shows neither a history of profitability nor the potential for income to match losses." Here, it is true that the Nashes have not been able to turn a profit with their Christmas tree business. However, these losses are attributable to normal startup expenses and a bad economy. The Nashes believe that they will be able to make a profit once the trees they planted five years ago are large enough for harvesting. It is also worth noting that the Nashes' income has increased each year since they have been in business and their expenses – while high the first year – have remained relatively stable. If they are able to increase their income, the business could be profitable.

The financial status of the taxpayer

This factor possibly weighs against the Nash family, but again, is not dispositive. The CFR states that "the fact that the taxpayer does not have substantial income or capital from sources other than the activity may indicate that an activity is engaged in for profit." In Stone, the court found this factor to weigh against the taxpayers where they had their own salaries from full-time employment and where they never received a salary or relied upon an income from their activity. Here, Mr. Nash is still employed and Mrs. Nash receives her pension payments. The Nashes also have not taken a salary from the tree-farming business. However, there is the potential that if they are able to begin to turn a profit that Mr. Nash will be able to retire from his position and that they will come to depend more heavily on the revenue from the tree-farming business.

Elements of personal pleasure or recreation

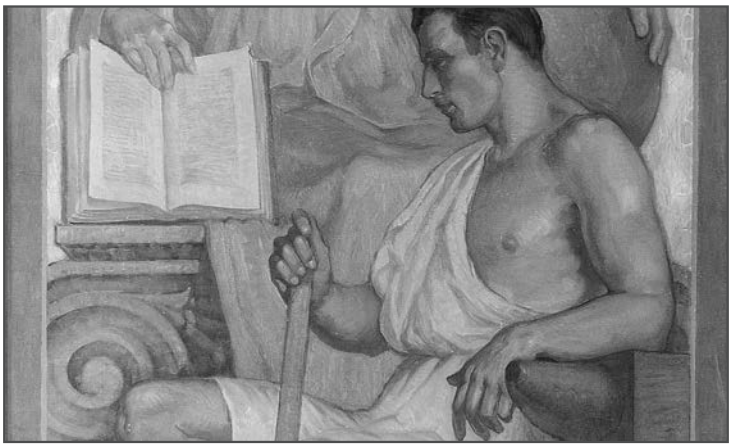
This factor weighs in favor of finding that the Nashes engaged in the tree-farming business for profit because there is not a strong recreational element to the work. The CFR states that "the presence of personal motives in carrying on an activity may indicate that the activity is not engaged in for profit." However, the CFR also notes that "an activity will not be treated as not engaged in for profit merely because the taxpayer has purposes or motivations other than solely to make a profit" and the "fact that the taxpayer derives personal pleasure from engaging in the activity is not sufficient to cause the activity to be classified as not engaged in for profit." In Stone, the court found this factor to weigh against the taxpayers where they engaged in rodeo events, enjoyed "riding and caring for horses," and carrying on other activities related to their ranch. Here, while it is true that Mr. Nash testified that he loves tree farming, simply enjoying the activity will not be enough to have it qualify as a not-for profit activity. There are not the same recreational elements to tree farming as there are to riding horses and participating in a rodeo. Therefore, this factor also weighs in favor of the Nashes.

Therefore, in looking at the totality of these factors, it becomes clear that the Nashes were engaged in carrying on a business for profit. As such, they are entitled to claim their income tax deductions. While it is true that every factor is not satisfied, no one factor is determinative and the list of factors is not exhaustive. Thus, the Nashes are entitled to their claimed deductions.

The FDR Incorrectly Denied the Nashes Deductions Related to the Business Use of their Home

The Nashes should be entitled to the tax deduction for their home office since it was used exclusively for business purposes. The Internal Revenue Code states that taxpayers are not entitled to deductions for the use of their home – which is used as a residence – unless it is "exclusively used on a regular basis as the principal place of business for any trade or business of the taxpayer." §208A(c)(1)(A). In Lynn v. Franklin Dep't of Revenue, the Franklin Tax Court considered when a dwelling is exclusively used for business – and consequently eligible for an income tax deduction. The court noted that the "exclusive use requirement is an 'all-or-nothing' standard." Citing legislative history, the Court explained that exclusive use requires that a portion of the taxpayer's home be used "solely for the purpose of carrying on his trade or business. The use of a portion of a dwelling unit for both personal purposes and for the carrying on of a trade or business does not meet the exclusive test."

In Lynn, the Court found that a taxpayer's use of the first floor of his home was exclusively for business purposes when it was converted to an office, had a separate entrance and an awning. However, it found that the taxpayer's use of a room in a later apartment was not exclusive where he used the computer for both personal and business tasks, would occasionally watch his infant daughter in there – allowing her to watch TV. The situation of the Nashes is distinguishable from the apartment room in Lynn and more similar to the first-floor office. Mr. Nash testified that there is a room in their home which is "just for busines." It is where their business records are kept, as well as catalogues and books related to the business. Furthermore, unlike in the apartment in Lynn, the computer in the Nash home is used "just for the business and nothing else." Moreover, the room has a desk and two chairs and "nothing happens there but the business." On cross-examination, Mr. Nash noted that there is a radio and TV in the room. However, the TV is kept turned to the Weather Channel for business reasons – something appropriate for a farming business which relies on the weather. Mr. Nash also noted that the couple removed a bed from the room, transforming it from a spare bedroom into an office. Such a transformation is more similar to the first-floor office noted in Lynn where they converted it from a mother-in-law suite to a busines space. Though opposing counsel noted that there is a fireplace in the room, Mr. Nash should not be expected to entirely remodel the room in order for it to be considered a busines space. Moreover, though Mr. Nash's dogs also will lie in the room, they do not require supervision and attention in the same way that the taxpayer in Lynn had to watch his young child. Therefore, since the activities carried on in the room are exclusively business activities, the Nashes should be entitled to the income tax deduction for their home office.



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.

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