July 2022

Ohio Bar Examination

Multistate Essay Examination
Questions & Selected Answers

Multistate Performance Test
Summaries & Selected Answers

Published January 2023

Board of Bar Examiners

Tiffany Kline, Secretary

Steve C. Coffaro
Lisa Weekley Coulter
Hon. Margaret Evans
Alexander J. Ewing
Patricia Gajda
Hon. Linda J. Jennings
Kevin J. Kenney
Edward F. Kozelek
Hon. Amy H. Lewis
Robert M. Morrow, *vice-chair*
Michael E. Murman
William J. O'Neill
Hon. Fanon A. Rucker
Robert G. Sanker
Thomas J. Scanlon
Suzanne Waldron
C. Michael Walsh
Hon. Mark K. Wiest, *chair*


THE SUPREME COURT OF THE STATE OF OHIO

OHIO BAR EXAMINATION

The July 2022 Ohio Bar Examination contained six Multistate Essay Examination (MEE) questions. Applicants were given three hours to answer a set of 6 essay questions. These essays were prepared by the National Conference of Bar Examiners (NCBE).

The exam also contained two Multistate Performance Test (MPT) items. These items were prepared by the NCBE. Applicants were given three hours to answer both MPT items.

The following pages contain the NCBE's summary of the MEE questions given during the July 2022 bar exam, along with the NCBE's summary of the MPT items given on the exam. This booklet also contains actual applicant answers to the essay and MPT questions.

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

Copies of the complete July 2022 MPT and its corresponding point sheet are available from the NCBE. Please check the NCBE's web site at www.ncbex.org for information about ordering.


THE SUPREME COURT OF THE STATE OF OHIO

Question 1

QUESTION

Four months ago, Victim was shot and seriously wounded in City. Defendant has been charged with attempted murder. The prosecution's theory is that Victim and Defendant were both members of a criminal street gang called "The Lions," which engages in drug dealing, robbery, and murder in City. The prosecutor alleges that the shooting was the result of a gang dispute.

Defendant has brought a pretrial motion objecting to the prosecutor's introducing the following anticipated evidence:

(A) Testimony by a City detective who will be offered as an expert in gang identification, gang organizational structure, and gang activities generally and as an expert on particular gangs in City. The detective is expected to testify as follows:

> I have been a detective on the police force for six years. Throughout that time, my primary assignment has been to investigate gangs and criminal activity in City. I have also worked closely with federal drug and firearm task forces as they relate to gangs. Prior to becoming a detective, I was a corrections officer in charge of the gang unit for City's jail for three years, and my duties included interviewing, investigating, and identifying gang members.
>
> Throughout my career, I have attended training sessions providing education and information on gang structure, membership, and activities. As I've gained experience and knowledge in this area, I've frequently been asked to lead such sessions. I would estimate that I've taught more than 75 such training sessions over the past three years.
>
> Street gangs generally engage in a wide variety of criminal activities. They usually have a clear leadership structure and strict codes of behavior. Absolute loyalty is required and is enforced through violent acts. Members of particular gangs can be identified by clothing, tattoos, language, paperwork, or associations.
>
> I am quite familiar with "The Lions." It is one of City's most violent and feared criminal gangs. Members of The Lions can be identified by tattoos depicting symbols unique to the gang.

(B) Testimony by a former leader of The Lions concerning a photograph of Defendant's tattooed arm. After the photograph is authenticated as a photograph of Defendant's arm, the witness is expected to testify in part as follows:

> I am certain that this is a Lions tattoo. I had a similar one removed. You'll notice that it has a shield containing the numbers for the police code for homicide, and Lions' members frequently include police codes in their tattoos to indicate crimes the gang has committed. The tattoo also has a shotgun and sword crossed as an "X," and a lion. Those are symbols frequently used by The Lions. This tattoo indicates to me, based on my experience, that Defendant is a member of The Lions gang.

These materials are copyrighted by NCBE and are being reprinted with permission of NCBE.
For personal use only. May not be reproduced or distributed in any way.

(C) Testimony by Victim, who is expected to testify for the prosecution in part as follows:

> I got into an argument with a gang boss at a meeting of The Lions. I said I wouldn't participate in an attack that was planned on another gang because my cousin was in that gang. The boss looked at Defendant and nodded to him.
>
> Next thing I knew, after the meeting, Defendant pulled a gun on me and shot me. I'm sure he did it because of that argument.

The jurisdiction has adopted rules of evidence identical to the Federal Rules of Evidence. Defense counsel's motion raises the following objections to the evidence described above:

1. The detective's anticipated testimony about gang identification, organization, and activities is improper expert testimony.
2. The photograph of Defendant's tattoo and the former gang leader's anticipated testimony about it is inadmissible character evidence.
3. Victim's anticipated testimony that Defendant shot him because of a gang dispute is irrelevant.

How should the trial court rule on each objection? Explain. (Do not address constitutional issues.)

These materials are copyrighted by NCBE and are being reprinted with permission of NCBE.
For personal use only. May not be reproduced or distributed in any way.

ANSWER

1. The detective's anticipated testimony about the gang identification, organization, and activities should be admitted. At issue primarily is whether the testimony is proper expert testimony. The objection raises no other grounds such as relevancy. When a witness offers an opinion, it is admissible in two different ways. It can be admissible as a lay opinion if helpful to the jury, based on rational observations, and not technical under FRE 701. However, this witness is offering expert testimony, and so, he must meet the requirements of FRE 702. First, he must be qualified as an expert, which is decided by the judge under FRE 104(a) by a preponderance of the evidence based on the witness's qualifications. Here, he has explained he is a police officer for six years and prior to that he was a corrections officer for three years. In both capacities, he has acquired information about how gangs operate that he has been able to attend training sessions and teach training sessions. Thus, there is ample reason for a judge to hold that he is qualified to discuss gang membership and activities in this situation.

Next, under FRE 702, the information must be helpful to a jury, which is often expressed as providing technical or specialized information without usurping the jury's role in determining credibility. This testimony meets that requirement because he is just providing background information about how gangs work, particularly how members of the Lions can be identified, without testifying that this defendant is actually a Lions' member or the perpetrator of the crimes.

Next, the expert must use reliable methods, which incorporate the Daubert factors. Those factors include whether the methods can be tested, its accuracy, if they are subject to peer review, and its overall acceptance. Here, he has explained that his methods of identification are based on 75 training sessions, which suggests these methods have been reviewed or have become accepted. Identification is also testable based on the actual facts, and so it should be held reliable under FRE 702 and Daubert. Next, he must have sufficient facts for his opinion. Here, he is building on his prior knowledge about how gangs operate as well as the identification of the Lions, which will provide enough for background expert testimony without opining on the actual defendant. Finally, that information must be reliably applied through the methods used. Here, he has reached the conclusion that gang members can be identified by their tattoos, including the Lions, which is a reasonable application of his knowledge about gangs and his method of identification.

Thus, this evidence should be admissible as expert testimony under FRE 702. Please also note that under FRE 703, the basis of the expert's testimony needs not to be actually admissible as long as it would be reasonably relied upon by an expert in that field. Here, the expert is relying on information from training sessions as out-of-court assertions of fact which are arguably hearsay, but because an expert in the field such as a detective or police officer would reasonably rely on that type of information, this expert can still base his opinions on that information.

2. The photograph of the tattoo and the testimony is likely admissible. As the objection is solely about character evidence, the only issue here is whether it meets the requirements of FRE 404 on character evidence, not whether the leader is qualified to opine on this evidence. The defendant has objected

The answers printed in this booklet were selected because they were among the better answers written at the exam. They are not model answers and are not necessarily complete or correct in every respect.

that this is inadmissible character evidence, which directly implicates FRE 404. Under Rule 404(b)(1), specific instances of conduct are not admissible to show that a defendant acted in propensity with that character trait on this specific occasion. In addition, under FRE 404(a), the prosecution may not introduce evidence of a defendant's character to show that he acted in accordance with that trait until the defendant has already opened the door, which has not occurred here. However, under FRE 404(b)(2), evidence of prior acts is admissible when used to prove some trait other than character, such as identity or motive. Here, the testimony would fall into that exception. It is not being used to show that Defendant has a character for violence or gang tendency. Rather, it has been offered because his tattoo makes it more likely that he is a gang member, which is probative to his identity as the shooter.

That conclusion is reinforced by the description of the tattoo in the testimony based on the shotgun, sword, and lion, which do not directly reference the defendant's character as a gang member, but instead to show that the circumstances point to his membership. This is similar to the use of modus operandi evidence, in which prior crimes or acts that are strikingly similar to the one at issue in this case are allowed under 404(b)(2) as they tend to prove the identity of the defendant. Thus, because this testimony tends to show he is a gang member, which is probative to his identity as the assailant, and not his character, it would be admissible. The recent revisions to FRE 404 require that the prosecution give reasons why this is being offered, in order to avoid trying to sneak in character evidence through the back door. Because the prosecution has apparently explained that it will use this testimony in this way, and it is clearly being used for identification purposes, the notice requirement of FRE 404(b)(3) should also be satisfied.

3. The anticipated testimony about being shot during a gang dispute is admissible. At issue from this objection is whether the testimony is relevant; and that the objection is not based on hearsay, opinion, or any other grounds. Under FRE 402, evidence must be relevant to be admissible. Under FRE 401, evidence is admissible if it tends to make more or less likely any fact of consequence to the ultimate case. In addition, under FRE 403, evidence is admissible unless there is a substantial risk of prejudice that outweighs the probative value. A substantial risk can include such concerns as the jury being too emotionally led by the evidence, the jury drawing improper inferences, or the testimony taking up too much of the court's time. This evidence will meet the requirement of FRE 401-402.

The testimony that the defendant shot the victim because of a gang dispute makes it more likely that the victim was shot based on gang membership as well as the defendant being the perpetrator of the crime. Both of these would tend to support the prosecution's case in chief. Note that FRE 401 only requires a minimal relationship or tendency, and the testimony about motive clearly exceeds that low bar. In addition, it is admissible under FRE 403. Again, the probative value is high given that the eyewitness and victim are testifying about these events, and that it is directly relevant to the identity and motive of the perpetrator. In contrast, the risk of unfair prejudice is low. There is nothing so extreme in this testimony to inflame the jury's passion or lead it to make unfair character judgments about Defendant, nor will it waste the court's time to have this testimony heard.

Even if there were a limiting instruction under FRE 106, one could easily cure that prejudice given that juries are deemed to follow instructions. Thus, as this evidence clearly tends to make the prosecution's case more likely, and as its probative value outweighs any unfair prejudice, it is clearly relevant.

The answers printed in this booklet were selected because they were among the better answers written at the exam. They are not model answers and are not necessarily complete or correct in every respect.

Question 2

QUESTION

Five years ago, Seller started a small winery that catered to a regional market. The winery became wildly successful. Two years ago, Seller decided to retire and sell the winery. Seller entered into negotiations with Buyer, who was interested in buying a winery. Seller was proud that the label for her red wines bore her picture so, during the negotiations, she told Buyer that she would not sell him the winery unless he agreed to continue using that label. Seller and Buyer orally agreed that if Seller sold the winery to Buyer, he would continue to use the label for as long as he sold red wines.

Buyer and Seller agreed that Buyer would buy the winery from Seller for a purchase price of $3 million plus a "fair share" of the profits generated by the winery during the first year after it was acquired by Buyer. While they did not agree on the precise share of the first-year profits that Buyer must pay to Seller, Buyer said that 20% would be fair, while Seller said that 25% would be fair.

Buyer and Seller entered into and signed a lengthy written agreement. It stated that, in exchange for the assets of the winery, Buyer would pay Seller $3 million at the closing and, 15 months later, a "fair share of the winery's profits" during Buyer's first year of ownership. It also stated that Seller was not permitted to own or operate a winery anywhere in the United States for 10 years after the closing, a term that Seller was happy to accede to because she intended to retire. The agreement did not include any provision about future use of the red wine label with Seller's picture and did not contain an "integration" or "merger" clause.

After Seller transferred ownership of the winery to Buyer, Buyer continued to sell red wines but discontinued using the label with Seller's picture. When Seller complained about this, reminding Buyer of his oral agreement to continue using the label, Buyer said, "The agreement we both signed doesn't say anything about the label."

Fifteen months after the closing, Buyer sent Seller $10,000, which was equal to 5% of the winery's profits during the first year of his ownership. Seller emailed Buyer, complaining about the low amount of the payment and reminding Buyer that they had both understood that a "fair share" of the first-year profits would be in the 20–25% range. In response, Buyer pointed out that the agreement that they had signed did not say that a "fair share" of the profits would be that high. Fed up with Buyer, Seller came out of retirement and opened and began operating a winery in another state in the United States far from her original winery.

In litigation between the parties:

1. Is Seller's and Buyer's oral agreement that Buyer would use Seller's picture on red wine labels enforceable even though it was not included in the written agreement? Explain. (Do not discuss any potential statute of frauds issues.)
2. Could Seller introduce evidence of the negotiations about what would constitute a fair share of the winery's first-year profits to help explain the meaning of that term? Explain.
3. Assuming that Buyer is not in breach of any of his obligations under the purchase agreement, would Buyer prevail on a claim that Seller breached her obligations under the agreement by opening her new winery? Explain.

These materials are copyrighted by NCBE and are being reprinted with permission of NCBE.
For personal use only. May not be reproduced or distributed in any way.

Assume for all questions that, in the jurisdiction whose law governs the dispute, the sale of an ongoing business is governed by the common law of contracts, not Article 2 of the Uniform Commercial Code.

These materials are copyrighted by NCBE and are being reprinted with permission of NCBE.
For personal use only. May not be reproduced or distributed in any way.

ANSWER

1. The oral agreement to use the picture is likely enforceable despite not being included in the written agreement. At issue is whether the writing is a complete integration of the party's intentions and, if so, whether this falls under a parol evidence exception.

The sale of the winery will be classified as a sale of services or a business, which is evaluated under the common law of contracts and not Article 2 of the UCC. The agreement to use the picture was also used in the oral negotiations as part of the consideration paid for in acquiring the winery, and so it can be part of a contract. At issue is whether it is enforceable as part of the written contract, which may have superseded the oral agreement.

When parties memorialize their contract in the form of a writing, they can indicate that the writing is completely integrated, which means that it is the complete agreement and no other terms are admissible to change its meaning. Under the parol evidence rule, extrinsic evidence is not admissible in evaluating an integrated agreement when that evidence would contradict the writing or treat a matter that would reasonably be expected to be included in the contract. However, parol evidence will not bar extrinsic evidence for other purposes such as when used to define ambiguities, show the existence of condition precedents, give an indication of subsequent deals, or if the matter is merely collateral. (The classic collateral example is that a contract for a sale of a painting cannot be modified with extrinsic evidence of another painting but can be modified by evidence that the frame was also included in the sale, as the frame is collateral to the painting.)

Here, the agreement does not contain an integration or a merger clause. While some jurisdictions may presume that all contracts are integrated even without such a writing, the modern trend is to presume that between sophisticated parties, such as the business people involved in this transaction, a writing that lacks an express integration clause will not bar the introduction of extrinsic (parol) evidence. Thus, most likely, this contract will be considered not to be integrated and the evidence of the oral agreement on the labels will be admissible.

In a jurisdiction that does presume integration even in this case, likely due to the comprehensiveness of the other terms of the written agreement, this evidence might also be considered admissible under the parol evidence rule. This is not a specific exception about an ambiguity or a condition precedent to the agreement. However, the agreement is entirely about the sale of the winery, and so it would not contradict any written terms to say that a label must be included. It is also not clear that the label agreement would ordinarily be expected in a contract for a sale of a winery and distribution of the profits. Finally, it could be deemed collateral, as it involves something entirely distinct from the ownership or operation of the winery. Thus, it is likely that this deal will not be deemed integrated and so this evidence is admissible. Even if the agreement is held to be integrated, the oral agreement could still be enforceable as part of the original contract under the parol evidence rule.

2. The seller can introduce evidence about the negotiations to explain the "fair share" term. At issue once again is how parol evidence can be used to modify an ambiguity.

The answers printed in this booklet were selected because they were among the better answers written at the exam. They are not model answers and are not necessarily complete or correct in every respect.

No matter if an agreement is integrated or not, there may be ambiguities in a contract. As long as the ambiguity is not so overwhelming that a court would conclude the parties did not intend to be bound to the agreement, the court will have to determine the meaning of the ambiguity. Even in an integrated contract, the parol evidence rule admits the use of extrinsic evidence to decipher an ambiguity. In some states, courts look only to the "four corners" of a contract to determine the meaning of an ambiguity and will not admit extrinsic evidence. However, the modern and majority rule is that courts can look to evidence outside of the contract to evaluate the meaning of an ambiguous term. This is the preferred approach today as it allows the court to look to what the parties likely intended and not rely on the judge or jury's own expectations or limited knowledge. Such evidence can include the course of performance between the parties, trade usage, and the oral discussions carried out during negotiations between the parties.

Here, the meaning of "fair share of the winery's profits" is deemed to be ambiguous as it is not clear what a fair share means in this context. Using the majority approach, understanding what the parties meant by that term will require looking to material outside of the agreement, which can include its use in the course of their negotiations. Here, the Buyer had said that 20% is fair, while the Seller indicated that 25% would be fair. That conflicts with the 5% that Buyer claims is fair based on their current agreement and course of dealing. Thus, in order to show what the parties meant when they used the phrase "fair share" a court should likely look to evidence of their negotiations and conclude that something in the 20-25% range is fair.

3. Assuming that Buyer is not in breach, Buyer likely will not prevail on her claim that Seller breached by opening the new winery. At issue is how a court will interpret a non-compete term in a contract and enforce it based on the reasonableness of its terms.

Non-compete agreements are common when one business acquires another, as there is a reasonable concern that the seller could then start a new business and thereby prevent the buyer from getting the benefit of his bargain. Non-competes are also common when there is a concern about someone with special knowledge or skills after they sell goodwill or a business to another person. However, non-competes also can deprive someone of their livelihood or make the public face monopolies or other forms of unfair competition. Thus, the standard rule is that a non-compete agreement must be reasonable in scope, geography, and duration. While the definition of reasonableness has varied across time and jurisdictions, contemporary courts tend to say that a restriction in the line of business is normally valid; a duration of one to two years is valid, and a geographical limit of a state is normally valid.

Here, the non-compete is part of the agreement between Buyer and Seller and so could be enforced as part of the contract if it is valid. On its face, it looks as though Seller did violate this term. The non-compete said that Seller would not own or operate a winery anywhere within the United States for 10 years, but Seller has opened a winery sooner than that. However, a court will also ask if this restraint was reasonable before declaring it breached. It is reasonable to restrict the Seller's ability to open a new winery given that she is selling a winery and Buyer would not have agreed to this deal if Seller could have competed by setting up a new company using Seller's special expertise. However, a 10-year limitation is far in excess of the 1-2 years that most courts would deem reasonable, and a restriction on the entire United States is also

likely to be deemed infeasible as it would deprive Seller of any ability to earn a livelihood in Seller's profession without leaving the country for that time. Thus, it is likely that this non-compete agreement would be held as an invalid restraint of trade and thus void against public policy. Moreover, it appears that Seller has waited at least 15 months and maybe 2 years since closing the sale to resume selling wine, and Seller has begun selling wine in another state that is far from the original winery. Thus, any reasonable conditions that the non-compete could have imposed have been satisfied: Seller did not compete for 1-2 years and refrained from selling wine in that state.

In conclusion, although the non-compete is part of the contract, it is doubtful a court would find it reasonable, and thus it is likely not enforceable against Seller.

The answers printed in this booklet were selected because they were among the better answers written at the exam. They are not model answers and are not necessarily complete or correct in every respect.

Question 3

QUESTION

Brian, a home builder, and Danielle, a land developer, properly formed a corporation. The articles of incorporation state that the corporation's purpose is to pursue property development opportunities and any other lawful business. Brian owns 20% of the corporation's shares, and Danielle owns 80%. Under their shareholders' agreement, Brian and Danielle serve as directors on the corporation's three-member board of directors, and Danielle selects the third director. Shortly after the corporation's formation, the corporation (following unanimous board approval) purchased a parcel of land for $5 million for the purpose of dividing it into residential lots and constructing a single-family home on each lot.

The board also decided that (1) Brian would be responsible for the construction of all homes on the parcel, (2) Danielle would be responsible for securing the financing necessary to build the homes, and (3) the proceeds from home sales would be paid to the corporation. After setting a reasonable salary for Brian during the home-construction period, the board agreed to periodically consider whether to issue dividends. The board unanimously authorized Danielle to hire Carol, a consultant, to negotiate financing agreements on behalf of the corporation with several banks. Danielle asked Carol to act on behalf of the corporation to obtain the loans, and Carol agreed to do so.

The first bank that Carol contacted declined to provide financing to the corporation but offered instead to buy the parcel for $6 million. Without discussing any of this with any of the corporation's directors, Carol signed a written agreement with the bank on behalf of the corporation to sell the parcel to the bank for $6 million. The next day, Carol informed Danielle about the terms of the sale agreement with the bank. Danielle agreed with Carol that the deal was in the corporation's best interest and properly called a special meeting of the board to approve it.

At the special meeting three days later, Carol described to the board the terms of the agreement. Danielle and the third director voted to approve the land sale under the terms of the written agreement signed by Carol. Brian voted against approving the sale. Danielle and the third director then voted to distribute all the sale proceeds to Danielle as a "bonus payment." Brian, who would receive no payment from the sale, properly made a request to see all accounting records related to the purchase and sale of the parcel. But the board refused Brian's request, with Danielle and the third director voting against it.

The corporation was incorporated in a jurisdiction whose corporation statute is modeled on the Model Business Corporation Act (MBCA). Did Amy and Bill have the authority as members of the board to vote to approve their trip to Belgium at corporate expense? Explain.

1. Is the corporation bound by the land-sale agreement with the bank signed by Carol? Explain.
2. Was the bonus payment made to Danielle, which was approved by a majority of the board of directors, proper? Explain.
3. Does Brian have sufficient grounds to seek the judicial dissolution of the corporation? Explain.

These materials are copyrighted by NCBE and are being reprinted with permission of NCBE.
For personal use only. May not be reproduced or distributed in any way.

ANSWER

1. The issue is whether Carol had authority to bind the corporation to the land-sale agreement with the bank. An agency relationship exists when the principal and agent mutually assent, the agent acts on behalf of the principal, and the principal controls the agent. Under an agency relationship, the agent may bind the principal to a contract if the agent is acting with authority. An agent may have either actual or apparent authority to bind a principal to a contract. Actual authority is created by the principal's express words or conduct to the agent, authorizing the agent to act. An agent has apparent authority when the principal manifests to a third party that the agent has authority to bind the principal. Here, Carol was an agent of the corporation. Carol and Danielle agreed that Carol would act on behalf of the corporation and the corporation had control of Danielle's actions. When Carol entered into a written agreement with the bank to sell to the bank the parcel of land for $6 million, Carol exceeded the scope of her actual authority as agent of the corporation, since she was only expressly told she had the authority to obtain a loan for the corporation from the bank.

Further, it would appear that Carol did not have apparent authority to bind the corporation to this contract. While Carol signed the agreement with the bank on the corporation's behalf, there is nothing in the fact pattern would point to the corporation manifesting to the bank that Carol had the ability to enter into such agreement. When an agent exceeds the scope of their authority, the contract entered into with the third party may still be binding to the principal if the principal ratifies the agreement. Ratification occurs when the principal agrees to be bound by the entirety of the contract after the principal was given information on the material provisions of the contract in question. Here, Carol informed Danielle about the full terms of the sale agreement with the bank the day after the agreement was entered into. At that point, Danielle agreed to the terms and properly called a special meeting to approve the sale, which was approved by a majority of board members of the corporation. As such, the corporation would be bound to the land-sale agreement entered into by Carol with the bank through ratification.

2. The issue is whether the bonus payment made to Danielle was an improper breach of Danielle's duty of loyalty. The board of directors of a corporation owe the corporation a fiduciary duty of care and loyalty. Under the duty of loyalty, the director must act in the best interest of the corporation.

To do this, the director must not engage in self-dealing, compete with the corporation, or usurp corporate opportunities. A director is deemed to have engaged in self-dealing when an agreement or act entered into with the director and the corporation benefits the director directly. Here, Danielle receiving the full sale proceeds from the land-sale contract with the bank would be a self-dealing transaction. When a director engages in self-dealing, their acts may still be proper if the director falls under a safe-harbor provision.

For a self-dealing act to be proper, the act must either (1) be approved by a majority of disinterested shareholders or directors after material disclosure of the facts, or (2) must be fair to the corporation. Here, Danielle did not receive approval of her bonus payment from a majority of disinterested directors

or shareholders. Danielle herself voted to receive the bonus payment. If she had not voted, the act would not have received majority support. As Danielle was not a disinterested shareholder or director, the majority vote in favor of her receiving the bonus payment does not meet the safe-harbor provision. Additionally, it is highly unlikely that the distribution of the entire sale proceeds going directly to Danielle's bonus was fair to the corporation. The board had previously determined that the proceeds from home sales would be paid to the corporation, not to a specific director or shareholder. Further, the sale proceeds could have been used to purchase more property or issue dividends. These actions would be more fair and reasonable to the corporation as a whole. As such, it would appear that the bonus payment to Danielle was an improper breach of Danielle's duty of loyalty to the corporation.

3. The issue is whether Brian may seek the judicial dissolution of the corporation when the corporation is acting in bad faith or improperly using funds. When a corporation acts in bad faith, improperly uses funds, or otherwise engages in activity that is not in the best interest of the corporation, a shareholder of the corporation may seek the judicial dissolution of the corporation. Here, the corporation issued $6 million in sales proceeds to one director as a bonus payment. This misappropriation of funds is sufficient grounds for a shareholder such as Brian to seek the judicial dissolution of the corporation. The disbursement of these funds to Danielle as a bonus payment, instead of the funds being used for the benefit of the corporation, is a strong indicator that the corporation is acting in bad faith and mismanaging its finances.

The answers printed in this booklet were selected because they were among the better answers written at the exam. They are not model answers and are not necessarily complete or correct in every respect.

Question 4

QUESTION

Ten years ago, Arlene Doe, age 34, signed and dated a "Declaration of Trust," the pertinent part of which provided as follows:

> I, Arlene Doe, do hereby create the Arlene Doe Trust (AD Trust). I name myself sole Trustee of the trust. I reserve the right to all trust income during my lifetime. Upon my death, all trust assets shall be paid in equal shares to my three nieces Carla, Donna, and Edna. I declare that this trust applies to all assets listed in Schedule A, attached hereto.

In Schedule A, Arlene wrote, "I have not transferred any assets to this trust yet, but I will before I die." The trust instrument had no provision regarding whether it was revocable or irrevocable.

Four years ago, Arlene bought bonds with her personal funds and revised Schedule A to list them as assets of the trust. Two years ago, Arlene wrote across the face of the Declaration of Trust for the AD Trust, "This AD Trust is revoked" and "I'm taking back the assets." One year ago, Arlene gave her friend a package containing a valuable necklace and the bonds. As she handed her friend the package, Arlene said, "This package contains a valuable necklace and bonds. I revoked the AD Trust because I decided that I want my niece Donna to have everything I own except what I'm giving to a worthy cause in my will. Hold this package as trustee for Donna. When Donna reaches age 18, sell the necklace and bonds, use the proceeds to pay for Donna's college education, and then give her what's left over when she reaches age 22." The friend said, "Okay." Later, Arlene properly executed a will naming a bank as executor of her estate and as trustee of a perpetual trust created under her will. This testamentary trust directed that "all of my worldly goods not otherwise validly disposed of during my life, I leave in trust for the Political Party. I direct the trustee to pay all income from this trust, annually, to the Political Party and not to any other person." The Political Party's exclusive mission is to support candidates for public office who accept its political views.

Last month, Arlene died. At Arlene's death, she owned a bank account with a balance of $300,000. The bonds in the package given to Arlene's friend were worth $200,000, and the necklace was worth $50,000. Arlene was survived by her younger brother Bob, her three nieces Carla, Donna, and Edna (the only children of Arlene's deceased sister), and her nephew Fred (the only child of Arlene's deceased older brother). Donna is 16 years old. The jurisdiction in which Arlene died has adopted the Uniform Trust Code. It also applies the common law Rule Against Perpetuities. Another statute in this jurisdiction provides, "If a decedent died intestate without a surviving spouse, issue, or parent, the decedent's property is distributed to the issue of his or her parents per stirpes."

1. (a) Was the AD Trust validly created, and if so, when was it created? Explain. (b) Assuming that the AD Trust was validly created, was it effectively revoked? Explain.
2. Was the trust for the benefit of Donna valid? Explain.
3. Was the testamentary trust for the benefit of the Political Party valid? Explain.
4. Assuming that the testamentary trust to Political Party is invalid, to whom should the bank account be distributed? Explain.

These materials are copyrighted by NCBE and are being reprinted with permission of NCBE. For personal use only. May not be reproduced or distributed in any way.

ANSWER

1a. In determining whether the AD trust was validly created, at issue is whether Arlene satisfied the requirements of a trust either 4 or 10 years ago. A trust requires several conditions. There must be a settlor, who provides the assets to put into the trust; a trustee, who oversees the management and distribution of the trust; beneficiaries, who will receive the proceeds of the trust; and assets, which are legally owned by the trust and equitably owned by the beneficiaries. Here, Arlene's trust raises several issues about how to create a trust. First, ten years ago, she attempted to be the settlor, trustee, and life (income) beneficiary of the trust. A settlor is permitted to reserve a life interest in the assets of the trust for herself. However, it is generally not allowed for a settlor and beneficiary to also serve as the trustee of the trust, as such conduct will raise severe conflicts of interest between the interests involved.

Arlene's Declaration also raises issues about if a trust needs assets before becoming valid. The normal rule is that a trust does need some assets to come into existence; some pour-over trusts defined in wills operate differently as they need only have the assets upon death, but this trust was established while she was alive and so will not follow those rules. When Arlene set up the trust 10 years ago, she named the assets of the trust as those listed in Schedule A, but Schedule A was blank at the time she wrote this Declaration except to say that she will transfer assets before she dies. As noted above, that pour-over strategy is ineffective for an inter vivos trust. Arlene only added assets to the trust four years ago when she added the bonds to Schedule A. Assuming that she made a valid transfer of those assets by recording the bonds onto Schedule A, they would have become property of the trust. Her transfer of those assets to the trust would also show present intent to create the trust, which is another aspect of trust formation. As the trust only would have assets at that point, it would come into existence at that time. Thus, the AD Trust was likely not validly created, and her attempt to add assets 4 years ago cannot overcome that she was settlor, trustee, and beneficiary of the trust as well.

1b. If the AD Trust were validly created, it was effectively revoked. At issue is whether it was revocable or not. The modern presumption is that trusts are revocable and amendable unless there is evidence to suggest they are irrevocable, which is the opposite of the old common law presumption that they are irrevocable unless shown otherwise. If a trust is irrevocable, a trust can be revoked when two conditions are met. First, all of the beneficiaries must agree to terminate the trust. Second, there must be no material purpose remaining for the trust to perform. While there have been suggestions that the material purpose can be read broadly, the majority rule is that a court must stick to the purpose actually indicated in the trust even if it is becoming harder to achieve. Here, the AD Trust does not say it is revocable or not, so the modern presumption is that it is revocable. As a result, Arlene would be able to revoke the trust as the Settlor of the Trust, even though her nieces would also have a beneficial (principal) interest given they had a vested remainder in the trust and the material purpose to care for them had not yet been achieved.

2. The trust for the benefit of Donna was valid. At issue is whether a trust was created and if it meets the Rule Against Perpetuities. As noted in 1a, a trust requires a trustee, beneficiary, and assets (and a settlor to provide the assets). There must also be an intent to create the trust, and the trustee must understand that she is being asked to be trustee of the trust when the transfer

is made. The trustee must also reasonably signal acceptance of that position as trustee. Here, Arlene gave her friend the necklace and asked her to hold it as trustee for Donna. Thus, Arlene had the present intent to create a trust and the friend would have understood she was being asked to serve as the trustee of the trust. The friend also said "OK" which shows she understood and accepted what was asked of her. The necklace and bonds would have constituted assets of the trust, and the trust identified Donna specifically as the beneficiary. It doesn't matter that there was no income beneficiary of the trust, as a trust is permitted if it will accumulate assets for the trustee. Here, the assets are to remain in the trustee's possession till Donna turns 18, at which point they should be sold to pay for her education and then be given to Donna at age 22.

While this trust was made orally, trusts do not have to be in writing unless there is a state requirement for that, and no such requirement is stated here. In addition, the trust would satisfy the Rule Against Perpetuities in naming Donna. Donna is already alive at the time the trust is created, and so she is a life in being. We know she is at least 9 years old, but even if she were under 21, it would be known within 21 years of her death whether she reached 18 and graduated from college by age 22. Thus, the Rule is not implicated to invalidate this trust.

3. The testamentary trust for Political Party is not valid. At issue is whether the Political Party qualifies as a charitable institution. Trusts must have some identifiable beneficiary in order to be valid. That beneficiary is normally a person, and it cannot be an indeterminate class of individuals. However, it is also possible to establish a charitable trust that will serve the public at large for some valid charitable or philanthropic goal in perpetuity. These purposes include education, arts, culture, and religion, but the modern rule is that political parties cannot serve as the identifiable beneficiary of a trust. That is because the purpose of a political party is political, not charitable, as understood under trust law, and so it does not count as an identifiable beneficiary.

Here, Donna attempted to make a pour-over trust in favor of Political Party. As noted above, a pour-over trust is a type of trust that is created under a will in which the testator's assets are poured over into the trust upon death. Under normal probate rules, a pour-over trust is valid, as long as, the trust will come into existence by the time of death even if it does not have all the formalities of a will. Here, Arlene properly executed the will to create this pour-over trust, and she named bank as executor. However, the sole beneficiary of her trust is Political Party, which has an exclusive mission of supporting candidates for public office who accept the political views of the Political Party. That purely political focus will not be deemed a valid charitable purpose under trust law, as opposed to giving the money to an affiliate group of the Political Party which advocates for its social or political mission through education or other quasi-philanthropic purposes. Thus, while the instrument of the pour-over trust was otherwise valid, the beneficiary of Political Party was not, and so the testamentary trust should be held invalid.

4. Assuming the trust is invalid, the property should be distributed to Bob, the nieces, and Fred. At issue is how per stirpes intestate succession operates. There are several common methods of distribution of intestate assets, that is, those assets not provided for under a valid will. This jurisdiction retains the traditional approach of per stirpes, which gives an equal share to each possible

The answers printed in this booklet were selected because they were among the better answers written at the exam. They are not model answers and are not necessarily complete or correct in every respect.

line from the earliest potential taker of those assets, no matter if all members of that generation are deceased. As such, it contrasts with the generation's approach, which distributes the assets so that the survivors at each level have equal shares; and by representation, which modifies per stirpes to be based on the first generation where someone can take. Here, Arlene has already put the bonds and the necklace in trust for Donna, so that will not be considered part of her intestate succession. Instead, she has a bank account with a value of $300,000. The state law says that since she died without a surviving spouse, issue, or parent, her property is given per stirpes to the issue of her parents. Arlene had three siblings, of whom only Bob is living. That means Bob will take a 1/3 share, $100,000. Fred's father (Arlene's brother) is entitled to another 1/3 share, and so Fred will take that share, another $100,000. Finally, the three nieces are entitled to the 1/3 share of Arlene's deceased sister, which means each should take $33,333.33.

The fact that Donna already has assets in the trust probably will not result in a hotchpot scenario: even if assets placed in trust could be considered an advance, the modern presumption is that a gift is not deemed an advance without some other indication otherwise. There is no clear indication here that the trust was meant in lieu of what Donna was to be given. Thus, the bank account should be distributed per stirpes as $100,000 to Bob, $100,000 to Fred, and $33,333.33 to each niece.


THE SUPREME COURT OF THE STATE OF OHIO

Question 5

QUESTION

Developer LLC is a limited liability company organized in State A, with its principal place of business in State A. Its only two members are Amy, a domiciliary of State A, and Barbara, a domiciliary of State B. Amy is the managing member of Developer. Developer entered into a written construction contract with Builder Co., a State B corporation with its principal place of business in State B. Builder agreed to build an office building for Developer on a vacant lot owned by Developer in State A. Lender Corp., a finance company, agreed to lend Developer up to $2 million to finance the construction project. Lender is incorporated in State A with its principal place of business in State A. Lender disbursed $250,000 of the loan amount to Builder to cover the down payment on the construction contract. The loan agreement between Developer and Lender provided that any funds disbursed by Lender under the loan agreement would be added to Developer's loan balance and repaid, with interest, over a five-year period.

As construction of the office building proceeded, Lender made disbursements to Builder pursuant to the loan agreement between Lender and Developer. But when Builder finished construction of the office building, Lender refused to make the final $100,000 disbursement to Builder even though Developer had occupied the building and had begun leasing space to tenants. Lender told Developer that it was refusing to authorize the final disbursement because Builder's construction was "substandard." Developer also has not made final payment to Builder.

Builder has sued Lender in federal district court in State A, invoking the court's diversity jurisdiction. Builder's complaint alleges that Lender's withholding of the final payment of $100,000 violated the loan agreement with Developer. Builder claims to be a third-party beneficiary of Lender's promise to Developer, entitled to payment of $100,000 from Lender. Lender has moved to dismiss the action on the ground that Developer is a required party to the action and has not been joined as a defendant.

1. Is Developer a person "required to be joined if feasible" to the Builder v. Lender action under Federal Rule of Civil Procedure 19(a)? Explain.

2. Would joinder of Developer deprive the court of subject-matter jurisdiction? Explain.

3. Assuming that Developer cannot be joined, how should the court rule on the motion to dismiss? Explain.

These materials are copyrighted by NCBE and are being reprinted with permission of NCBE.
For personal use only. May not be reproduced or distributed in any way.

ANSWER

Is Developer a Necessary Party?

Developer is in fact a required party under Federal Rule of Civil Procedure 19(a). The question posed here is does Developer have important interests that are at stake that require it to be joined to the ongoing *Builder v. Lender* lawsuit. Rule 19 sets forth the requirements for a necessary party to join an action. This requirement is defined by when a party's interests is being adjudicated but is not present to the litigation at hand. This is more than the party having a simple interest in the litigation (we often have litigants interested in outcomes as it affects their decision making), this involves intimate details such that resolution would implicate an actual right currently held by the absent party that would be determined and could adversely and directly affect the party if they are not present. Effectively Rule 19 applies if a party could bring a lawsuit, related to the questions at stake, himself, because his actions are directly implicated. The issue between Builder and Lender is a dispute over the disbursement of monies that the Lender was allegedly obliged to deliver to Builder because of a loan agreement Developer negotiated with Lender. The original contract in question was between Developer and Lender and only implicated Builder because Builder was using those funds on a contract between Developer and Builder to construct the office building in question. As a result, the clear implication of this is although Builder is alleging that he is a third-party beneficiary of the loan agreement, the two primary parties on that agreement are Lender and Developer.

Moreover, whichever way the court rules on the question of whether Builder is entitled to the money in question, it may directly implicate Developer's actions. What this means is that if the court rules for Builder, Lender may seek money from Developer, because Lender may allege that its not truly due on the contract and that it should be reimbursed by Developer who engaged Builder. If instead, Lender wins, Builder may sue under his contract and allege that there was an insufficient disbursement owed to him by Lender and Developer should be on the hook. Either way, as a principal party on the loan agreement, and seeing as Developer continues to hold an obligation to pay on that loan agreement given the debt it took on, the resolution of the lawsuit directly implicates Developer's rights (not just his interest). Thus, under Rule 19, Developer is a necessary party.

Would joinder deprive the Court of Subject Matter Jurisdiction?

Developer's joinder would defeat subject matter jurisdiction. The question is whether or not the court would lose subject matter jurisdiction if Developer is joined to the lawsuit. Federal courts are courts of limited jurisdiction and thus are require to satisfy certain statutory requirements. These requirements usually are met by either a lawsuit that invokes a federal question or one that satisfies diversity of citizenship and an amount in controversy for more than $75,000. The federal question jurisdiction must be plead on the face of the pleadings and cannot be used in anticipation of the litigation. The fact presented here is that this lawsuit is one related to a contract dispute over the requirements of a loan agreement. The Builder already is invoking diversity jurisdiction and so adding another party will not change the question raised in the lawsuit's complaint, as Builder will still want to raise issues related to the contract. Thus, federal question is out. Subject matter jurisdiction requires perfect diversity amongst all parties as well as satisfying the amount in controversy.

At stake here, is $100,00 well plead, and certainly relatively strongly established by the fact that the Lender withheld $100,000. Thus, the amount claimed in good faith is more than $75,000 (it will not matter whether the amount recovered is less).

Thus, the next question is regarding citizenship. Individuals are the citizens of the state in which they are domiciled, while businesses (with the exceptions of partnerships and LLCs) are found to be domiciled in the state in which they are incorporated and their principal place of business. Partnerships and LLCs are companies that are created by law but found to be citizens of the citizenship of all its members – namely the partners or in the case of limited liability companies, the limited members. At stake here is Developer who is organized as an LLC, which is operated by multiple limited partners. As a result, the facts indicate that one member is a domiciliary of State A and another of State B. Thus, the LLC will be treated as a citizen of both state A and state B for jurisdiction purposes. Because of this Builder (who is both incorporated in B and principal place of business in B) is a citizen of State B. Originally, diversity of citizenship was met because Lender was wholly a citizen of State A (incorporated in A and principal place of business in A), but with the addition of Developer, we have a citizen of State B on both sides of the lawsuit. As a result, the lack of complete diversity destroys the court's subject matter jurisdiction.

How Should the Motion to Dismiss be Decided?

The court should dismiss the lawsuit in question. The question posed is what must be done on a motion to dismiss for failure to join a necessary party who cannot be joined to the lawsuit.

When a party is necessary but cannot be joined because jurisdiction would be lost, the court must evaluate factors as to whether or not the lawsuit should proceed regardless. The court looks to a variety of factors including the prejudice to the necessary party's interest, the availability of another forum to permit the plaintiff to achieve the results he wants, as well as the ability for the court to craft a remedy to limit the harm to the absent but necessary party. If all of these facts point away from granting relief in the instant case, the court must dismiss the lawsuit. At stake here as noted above, is Developer's responsibilities on the loan agreement and contract. Although the issue is the disbursement of funds from Lender to Builder, requiring or withholding such disbursement could implicate the requirements that Developer contributed to certain parties. Further it may affect the ongoing responsibilities and obligations on the loan agreement that Developer might have to make given that Developer is still owing and will have to repay it. Because of this, the prejudice to Developer might be quite large even if Builder just wants money in the short term. Further, because Developer and Lender are both also citizens of State A as noted in the previous part, Builder would be able to bring the contract suit in question in State A state courts without issue–state courts are courts of general jurisdiction and can issue relief so long as they have personal jurisdiction over the parties (state courts have personal jurisdiction over their own citizens).

Thus, there is no loss of remedy because another forum is available. Finally, it is less than certain how the federal court could remedy or structure the relief without implicating Developer's interests. Resolving who owes what on the lawsuit will necessarily implicate the other party to the contract (loan agreement), i.e., Developer, and will affect his rights, there is not much

The answers printed in this booklet were selected because they were among the better answers written at the exam. They are not model answers and are not necessarily complete or correct in every respect.

the court could do to curb the harm to the absent party. It is not a scenario where the interests/rights are divisible, and relief can be granted to one without touching on the other's interest. Developer as noted above may have obligations under the contract that attach or are intimately connected to Builder's demand to be paid by Lender.

Thus, because the evidence shows that relief cannot be crafted around Developer, and there is an alternate forum, the harm to Developer necessitates a dismissal for failure to join a necessary party.


THE SUPREME COURT OF THE STATE OF OHIO

Question 6

QUESTION

In 2015, Oscar validly conveyed an apartment building that he owned to my grandson Frank and his heirs so long as at least four apartments in the apartment building are rented to families with incomes below the state median income for a family of their size. If at any time fewer than four apartments are being rented to below-median-income families, the apartment building automatically reverts to Oscar.

In 2017, Oscar died owning the family home. His valid will included the following provisions:

1. I give my family home to my new wife, Wanda, for life, and upon her death to my daughter, Adele, and her heirs.
2. I give the entire residue of my estate to my wife, Wanda.

In 2020, Adele died. Pursuant to her valid will, Adele left her entire estate to Frank.

Before her death, Adele had regularly paid the property taxes on the family home because she believed that Wanda could not afford them. After Adele died, Frank told Wanda that he would not pay the property taxes because "they are your responsibility, Wanda."

Wanda accurately asserts that she cannot afford to pay the $6,000 annual property tax out of her limited income. Frank accurately observes, however, that if Wanda moved out of the home and rented it to another, she could generate at least $1,500 per month in rental income, more than enough to pay the property tax.

Until Feb. 1, 2021, Frank had leased four apartments in the building to below-median-income families. On that date he validly and lawfully terminated the leases of all tenants in the building to begin his plan to convert all the apartments in the building to luxury apartments. As a result, beginning Feb. 1, 2021, no apartments in the building were being rented to below-median-income families.

On Feb. 7, 2021, Wanda learned what had happened and immediately told Frank, "I now own the building."

The jurisdiction has adopted the Uniform Statutory Rule Against Perpetuities.

1. As between Wanda and Frank, who is obligated to pay the property taxes on the family home? Explain.
2. Upon conveying the apartment building to Frank, what if any interest did Oscar have in the apartment building, and was that interest valid? Explain.
3. Upon Oscar's death, what if any interest does Wanda have in the apartment building, and is that interest valid? Explain.
4. After Feb. 1, 2021, who owns the apartment building? Explain.

These materials are copyrighted by NCBE and are being reprinted with permission of NCBE.
For personal use only. May not be reproduced or distributed in any way.

ANSWER

(1) Wanda is obligated to pay the property taxes on the family home. This issue is, as between the holder of a life estate and the remainderman who is obligated to pay the property taxes. Under common real property law, a life estate is created by a grant containing the words " for life." Also under real property law, a remainder interest is freely devisable. Also under real property law, a life tenant is responsible for the payment of property taxes during the time that they are in possession. Here, Oscar gave the family home to Wanda "for life," and upon her death to his Daughter, Adele, and her heirs. This grant created, in Wanda, a life estate and a future interest in the form of a remainder in Adele and her heirs. When Adele died in 2020, she validly devised her future interest in the family home to Frank; thereby making Frank the remainderman to Wanda's life estate. Because Wanda is still alive, and in possession of the family home, she is required to pay all the property taxes. The fact that Wanda cannot afford the property taxes is immaterial because the potential income generated by the property would more than sufficient to pay the taxes. Therefore, because Frank is the remainder to Wanda's life estate, Wanda is in possession of the home, and the potential income generated by the property would be sufficient to pay for the taxes, Wanda is obligated to pay the property taxes on the family home.

(2) Upon conveying the apartment building to Frank, Oscar retained a future interest in the form of a valid Possibility of Reverter (POR). The issues are: what future interest is created by a Fee Simple Subject to a Condition Subsequent (FSSCS), and whether a POR is subject to the common law rule against perpetuities. Under common real property law, a FSSCS creates in the grantor a future interest in the form of a POR unless the right of re-entry is specifically stated, and such PORs are not subject to the common law rule against perpetuities. Here, Oscar conveyed the apartment building to Frank "so long as at least four apartments are rented to families with incomes below the state median," and did not specifically reserve the right of re-entry. This language created a FSSCS in Frank and a POR in Oscar where if the condition was not met, the property would automatically revert back to Oscar. Therefore, because the grant by Oscar to Frank was on a condition and did not specifically create the right of re-entry, upon conveying the apartment building to Frank, Oscar retained a future interest in the form of a valid Possibility of Reverter (POR).

(3) Upon Oscar's death, Wanda has a valid POR in the apartment building. The issue is whether a POR is freely devisable and subject to the rule against perpetuities. Under common real property law, a POR is freely devisable and is not subject to the rule against perpetuities. Here, Oscar's will devised to Wanda the residue of his estate, which would include the POR in the apartment building because the POR was not otherwise specifically devised. And because a POR is not subject to the rule against perpetuities, Wanda takes a valid POR in the apartment building. Therefore, because a POR is free devisable and not subject to the rule against perpetuities, Wanda has a valid POR in the apartment building.

(4) After Feb. 1, 2021, Wanda owns the apartment building. The issue is whether upon the failing of a condition subsequent a POR automatically vests in its holder, or whether some affirmative step is needed to vest the POR. Under common real property law, unlike the right of entry, the POR vests in

its holder automatically upon the failure of the condition subsequent and no affirmative step is needed for its vesting. Here, Wanda had a valid POR in the apartment building as discussed in part (3) above. As soon as Frank decided to terminate the leases of all the tenants in the building, including those that were families of income below the median, Frank violated the condition to which he held the property in fee simple, and activated Wanda's POR.

Therefore, because Frank violated his condition subsequent by not leasing four apartments to below median income families, and a POR automatically vests in its holder the right to the property in fee simple, After Feb. 1, 2021, Wanda owns the apartment building.

The answers printed in this booklet were selected because they were among the better answers written at the exam. They are not model answers and are not necessarily complete or correct in every respect.

MPT 1

IN RE MARRIAGES OF WALTER HIXON (JULY 2022, MPT-1)

In this performance test, the client, Walter Hixon, seeks legal advice regarding his recent discovery that his first wife, whom he had not divorced, was still living when he married a second time. Hixon wants to annul the second marriage and to resolve claims to certain real property acquired during that second marriage. The examinee's task is to prepare an objective memorandum addressing whether Columbia or Franklin law governs the grounds for annulling the second marriage, the process for obtaining an annulment, whether a Franklin court would have jurisdiction to annul the marriage and to dispose of the parties' property, and where Hixon should file an action given that the couple's real property is located in Columbia. The File contains the task memorandum, a transcript of the client interview, and an investigator's memorandum. The Library contains an excerpt from Walker's Treatise on Domestic Relations, selected Columbia and Franklin statutes dealing with void and voidable marriages, sections of the Restatement (Second) of Conflict of Laws, and two Franklin appellate cases.

These materials are copyrighted by NCBE and are being reprinted with permission of NCBE.
For personal use only. May not be reproduced or distributed in any way.

ANSWER

To: Marianne Morton

From: Examinee

Date: July 26, 2022

Re: Walter Hixon matter

Ms. Morton,

You have asked me to research several questions related to Mr. Hixon's desired annulment of his marriage to Frances Tucker and the division of marital property jointly owned by them in Cornith, Columbia. Below are my conclusions and supporting research. Please contact me if you need further clarification or research.

Does Columbia or Franklin law govern the grounds for annulling Mr. Hixon's marriage to Ms. Tucker?

Columbia law likely governs Mr. Hixon's grounds for annulment. Franklin law holds that the validity of a marriage should be determined by the law of the state with the most significant relationship to the spouses and the marriage. *Fletcher v. Fletcher*, Franklin App. (2014) citing Restatement (Second) of Conflict of Laws 238 (1971). If a state does not have such a relationship, the state must then apply the law of the state that does. *Id.* To determine which state has the most significant relationship we look to the principles outlined in Section 6 of the Second Restatement. These factors include: the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; the protection of justified expectations; certainty, predictability, and uniformity of result; and ease in the determination and application of the law to be applied. Restatement 6. Upon examination of these factors, as explained below, it is likely that Columbia has the most significant relationship to the marriage between Mr. Hixon and Ms. Tucker.

a. Relevant Policies and Interests

All states have legitimate policy interests in defining how a relationship as fundamental as marriage can be initiated and ended. *Fletcher.* The fact that Columbia and Franklin recognize different reasons for annulling a marriage indicates the strength of the policy interests involved. *Id.*

b. Protection of Justified Expectations

A justified expectation is shown through evidence such as the place of marriage, the primary domicile of the spouses during the marriage, and the location of jointly owned property. *Fletcher.* Given that Mr. Hixon and Ms. Tucker were married in Columbia in 2012, have jointly owned marital property in Columbia since 2015, and have lived together as spouses in Columbia from 2012-2019, there is strong evidence that the expectation would have been for Columbia law to govern the marriage. Conversely, the only contact that Franklin has with the marriage is that Mr. Hixon has been living there since 2019 for his new job. Otherwise, there are no indications that either party owns property in Franklin, nor that Ms. Tucker has ever even visited Mr. Hixon in Franklin.

c. Certainty, Predictability, and Uniformity of Result

Interstate travel and relocation between states creates a need for a system of well-defined rules to govern which state's laws apply to the creation and termination of marriages. *Fletcher*. Given that Mr. Hixon has moved across state lines and now seeks an annulment from Ms.Tucker, the courts must apply past case law to determine which law governs to maintain consistency and uniformity of results. The closest case to Mr. Hixon's is *Simeon v. Jaynes* (Fr. Sup. Ct. 2009), which held that Columbia law should govern an annulment action filed in Franklin court because: the couple was married in Columbia, had lived together only in Columbia, owned property in Columbia, and incurred debts in Columbia. Another similar case is the previously cited Fletcher, which found that Franklin law should govern divorce proceedings for the couple filed by Mr. Fletcher in Columbia because: the couple was married in the state of Franklin, owned property in Franklin, lived in Franklin for the entirety of their married lives and had children in Franklin. *Id*. Given these two precedential cases, the court would likely find that Columbia has the most significant relationship between Mr. Hixon and Ms. Tucker and would thus apply Columbia law for consistency.

d. Ease in Determination and Application of Law.

Where all or most important events occur in a particular state, that state is likely to be the most efficient forum for hearing the action. *Fletcher*. Here, as mentioned above, Mr. Hixon and Ms. Tucker were married in Columbia, own property together in Columbia, and have only lived together as spouses in Columbia. Thus, Columbia would likely be the most efficient forum for the administration of law. Must Mr. Hixon file a lawsuit to annul his second marriage, and if yes, would he be able to obtain an annulment under applicable law? Mr. Hixon likely must file a lawsuit to annul his second marriage but would likely be able to obtain an annulment under the applicable law, being that of Columbia. Columbia law requires that, for a voidable marriage to be declared void, a court must issue an annulment decree. *Columbia Revised Statutes 718.02*. This differs from Franklin law, which does not require a decree of annulment or any other legal proceeding to void a marriage wherein either party was lawfully married to another person. *Franklin Domestic Relations Code 19-5*. However, as explained above, Columbia law would govern the marriage between Mr. Hixon and Ms. Tucker because it has the most significant relationship to the marriage. Regardless, the annulment should be granted. Columbia law states that a marriage is voidable if, at the time of marriage, "the spouse of either party was living and the marriage with that spouse was then in force and that spouse was absent and not known to the party commencing the proceeding to be living for a period of five successive years immediately preceding the subsequent marriage for which the annulment decree is sought." *Columbia Revised Statutes 718.02*.

Mr. Hixon's situation meets this criteria, as his spouse (Ms. Prescott) was living and their marriage was still in force at the time of his subsequent marriage to Ms. Tucker–but Mr. Hixon had believed Ms. Prescott to have been dead since 2001 when his friend told him that she had died in a car accident. The requirements of Franklin law would also be satisfied since Mr. Hixon was lawfully married to another person at the time of his marriage to Ms. Tucker. If Mr. Hixon files an annulment action in Franklin, would a Franklin court have jurisdiction to annul the marriage and to dispose of the parties' property? Franklin would likely have jurisdiction to annul the marriage, but not to

The answers printed in this booklet were selected because they were among the better answers written at the exam. They are not model answers and are not necessarily complete or correct in every respect.

dispose of the parties' property. The United States Supreme Court has held that "each state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent." *Williams v. North Carolina,* 317 U.S. 287, 298-99 (1942).

Accordingly, Franklin case law has long held that in personam jurisdiction over the absent spouse is not required to terminate the marriage relationship, whether through divorce [...] or by annulment. *Daniels v. Daniels*, Franklin App. (1997). All that is required is jurisdiction over the rest of the marriage, which occurs when one of the parties has been domiciled within the state for the requisite period. *Id.* In Franklin, the requisite period is six months. *Id.* Since Mr. Hixon has been domiciled in Franklin for three years, Franklin trial courts may exercise jurisdiction over the marriage relationship between him and Ms. Tucker. However, jurisdiction over the distribution of property can only be accomplished by a court with in personam jurisdiction or in rem jurisdiction. *Id.* citing *Shaffer v. Heitner*, 433 U.S. 186 (1977).

Since Ms.Tucker does not have minimum contacts with Franklin to sufficiently create in personam jurisdiction, and because the property owned by the couple is located in Columbia rather than Franklin, the courts of Franklin would not have jurisdiction to dispose of property in which Ms.Tucker has a marital interest. This is supported in Walker Treatise, which is clear that in Franklin an annulment action may address the same issues as those raised in a divorce, including property rights of the spouses, "provided it has jurisdiction." Should we advise Mr. Hixon to file in Columbia or Franklin? We should advise Mr. Hixon to file an annulment action in Columbia. While Mr. Hixon could file for annulment in Franklin, given their jurisdiction as explained in the previous part, any distribution of marital assets relating to the division of property would need to take place in the courts of Columbia, Further, as discussed above, the law of Columbia would govern the annulment proceedings since it has the most significant relationship to the marriage. Accordingly, it would be most efficient to file the case in Columbia and have all pertinent issues related to the annulment of the marriage and distribution of marital assets handled in one proceeding.


THE SUPREME COURT OF THE STATE OF OHIO

MPT 2

IN RE NINA BRIOTTI (JULY 2022, MPT-2)

This performance test requires the examinee to draft an objective memorandum that the supervising partner can use to advise attorney Nina Briotti, a sole practitioner, on the legal and ethical issues presented by her concern that one of her clients might commit a criminal act. Briotti fears that her client, a financial adviser, might invade a trust that he administers in order to cover investment losses in other accounts that he manages. As Briotti intends to telephone her client and counsel him that such a use of trust funds would be illegal, she wants to know whether recording the telephone call would be legal and ethical under applicable state law and the rules of professional conduct, as well as whether she must inform him that she is recording the call. The File contains the instructional memorandum from the supervising partner, a transcript of the client interview, and Briotti's notes of her last telephone conversation with her client. The Library contains excerpts from the Franklin and Olympia criminal codes dealing with recording of telephone conversations, excerpts from the American Bar Association's Model Rules of Professional Conduct, an opinion of the ABA Standing Committee on Ethics and Professional Responsibility, commentary of the Franklin State Bar Ethics Committee on Franklin Rule of Professional Conduct 8.4 (which is identical to the ABA Model Rule), and an Olympia District Court case addressing the legality of recording a telephone conversation with only one party's consent.

These materials are copyrighted by NCBE and are being reprinted with permission of NCBE.
For personal use only. May not be reproduced or distributed in any way.

ANSWER

Memorandum

1. Under Franklin law, Briotti may lawfully record her conversation with X without informing him of what she is doing. With regard to recorded phone conversations, Franklin is a "one-party consent" state. FCC 200 provides that an "interception" of a wire communication is not unlawful if it is "made with the prior consent of one of the parties to the communication." "An interception of a wire communication includes the recording of the communication." *FCC 200*. Here, Briotti is seeking to record a phone conversation with X to which she is a party and to which she consents. Thus "one of the parties" – Briotti – to the conversation will have consented to the recording and the recording will not be unlawful under Franklin law. That conclusion is fairly straightforward. But there is another problem that could potentially give Briotti pause. Although it will be lawful in Franklin for her to record her conversation with X without telling him, it could potentially be unlawful in Olympia, where X is located. But after further examination, Briotti need not be concerned with that possibility because Franklin law will govern her actions.

In *Shannon v Spendrift*, the Olympia District Court was asked to determine whether the Olympia Criminal Code applied to a recording that was made outside of Olympia between one party in Olympia and another party in Columbia. Specifically, the party in Columbia recorded a conversation with a part in Olympia. The party in Olympia then brought an action against the party in Columbia alleging that the call was unlawful and caused him damage. The Olympia District Court disagreed. Unlike Franklin, Olympia is an "all-party consent" state in which phone conversation may not be recorded absent consent by all the parties involved. *Shannon* (citing OCC 500.4). But like Franklin, Columbia is a "one-party consent" state. *Shannon*. The Court in *Shannon* thus had to decide whether Olympia or Columbia law applied. It ultimately applied Columbia law because the act of interception – the recording – took place in Columbia. *Shannon* (citing *Parnell* ("interceptions and recordings occur where made"). The Court then determined that Plaintiff's suit should be dismissed because the call, in question, was lawful under Columbia's "one-party consent" regime. *Shannon* should provide adequate cover for Briotti. Here, as in *Shannon*, Briotti is seeking to record a call with a party located in Olympia. Briotti, though, is located in Franklin, which is a "one-party consent" state like Columbia. And she is seeking to record her conversation with X "from Franklin." Because "recordings occur where made," Franklin law will apply to determine the lawfulness of Briotti's actions. And as explained, Briotti's secret recording would be lawful under Franklin law.

2. Brotti would likely violate the Rules of Professional Conduct should she record her conversation with X. In general, the mere act by a lawyer of secretly but lawfully recording a conversation is not inherently deceitful. ABA Opinion 01-422; FRPC Rule 8.4 Commentary ("Franklin has adopted ABA formal Opinion 01-411"). But that rule changes when lawyers record conversations with clients. For good reason, lawyers often record conversations with clients. But in almost all scenarios lawyers must tell their clients that they are doing so. ABA opinion 01-422. This is so because lawyers owe clients a duty of loyalty. Part of the duty of loyalty requires lawyers to preserve the confidentiality of communications made with clients. *Model Rule 1.6*. And if a secret record of a

conversation was leaked; it could cause a client much harm.

ABA Opinion 01-422.

This concern is not as grave in which a lawyer may memorialize conversations, such as by taking notes or writing a memo. Further, should a client learn that his or her lawyer has secretly recorded a conversation, it would erode the clients trust and confidence in the lawyer's representation.

ABA Opinion 01-422.

Still, there are some situations in which a lawyer may secretly record a conversation with a client. (Although some members of the ABA committee believe that there are no such scenarios, the Franklin Ethics committee concluded that some exceptions do exist. FRPC 8.4 commentary) First, it might be permissible if the lawyer has no reason to believe that the client might object. That scenario is helpful in this case because Briotti may well believe that X would object to the recording; he will likely be listing damaging information about his business failing and he may be talking about possibly committing a crime. Further, Briotti seemingly knows that he wants this information to be confidential because she has not revealed even to us X's name.

Second, a lawyer might be permitted to secretly record a conversation with a client if "exceptional circumstances exist." *ABA Opinion 01-422*. For example, lawyers have no obligation to keep confidential the plans of a client to commit a "criminal act that is likely to result is likely to result in imminent death or serious bodily injury." *ABA 01-422*. Franklin's Ethics Committee has similarly said that a lawyer might be able to secretly record a conversation in which a client "discloses a plan to commit a serious crime." Moreover, a lawyer need not keep confidential information that is necessary for the lawyer to establish a defense by the lawyer to charges based on conduct in which with the client. In considering all of these exception, the Franklin Ethics Committee made clear that lawyers must be sure to act only on facts and well-grounded judgment, not speculation, about what a client might do. In the end, a lawyer who secretly records a client must do so with full awareness of the risks and must reasonably believe that the recording is necessary.

Here, Briotti likely should not secretly record her conversation with X. X is Briotti's client. So Briotti owes him a duty of loyalty. Therefore, she must ensure that her communications with X are kept confidential. That means she should not secretly record her conversation with him unless, based on facts and good judgments, she reasonably believes that the recording is necessary because of exceptional circumstances.

The first exceptional circumstance based on the possibility of a serious crime likely doesn't apply. The ABA said the potential crime by the client must pose a risk of imminent death or serious bodily harm. X's potential illegal use of trust funds would not pose such a risk. Likewise, it probably does not rise to the level of "serious crime" mentioned by the Franklin ethics committee. The other problem with this exception is that Briotti likely does not have enough facts before her to suggest that X really will commit the crime. Her concerns are closer to mere speculation. In particular, she noted X's explanation of how he might use the trust funds to pay his clients. She also noted his "silence" when she told him that using the trust funds to pay his clients would be illegal and that his silence made her think "there's at least a possibility" that he'll commit a crime; what's more she said that she's simply "not really sure"

The answers printed in this booklet were selected because they were among the better answers written at the exam. They are not model answers and are not necessarily complete or correct in every respect.

whether X will commit the crime. She last noted that he repeated may times that he doesn't know what to do about his current "desperate" crisis and that he keeps mentioning the trust funds. I would not advise Briotti to secretly record her conversation with X on such loose facts.

Second, Briotti mentioned that she wants to record the conversation with X in order to create evidence that she properly advised him should she ignore her advice. This could potentially meet the exception of Briotti establishing a defense. But there are likely less extreme ways to so establish the defense, such as taking notes or sending written communications to X advising against using the trust to pay his clients. So this likely is not an "exceptional circumstance" that would permit Briotti to record her conversation with X.

3. If X asks Briotti whether she is recording the conversation, she must say that she is doing so. ABA model Rule 8.4, which Franklin has adopted, says that it is professional misconduct for a lawyer to engage in conduct involving "dishonesty, fraud, deceit or misrepresentation." While the ABA has opined that sometimes a lawyer may secretly record a conversation with another person, it has made very clear that such power "does not mean that a lawyer may state falsely that the conversation is not being recorded." *ABA Opinion 01-422*. Indeed, such a false statement would like be direct "dishonesty" or "fraud" that would violate Rule 8.4. I thus would advise Briotti that she must inform X that she is recording the conversation if he asks. Otherwise she risks violating Rule 8.4.

On the cover:

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

PUBLISHED BY
The Supreme Court *of* Ohio
Office of Bar Admissions
614. 387. 9340
sc.ohio.gov