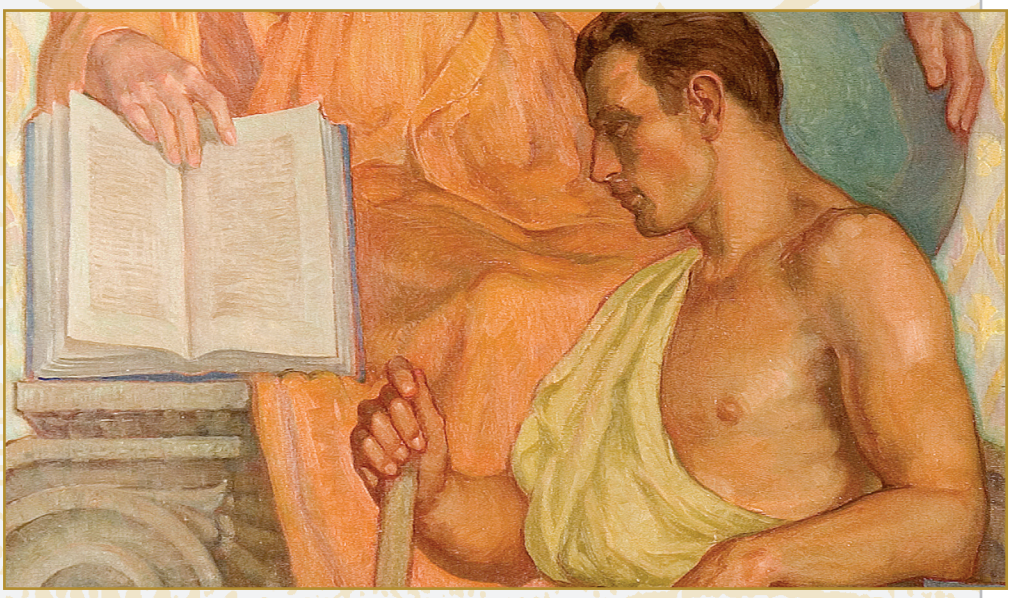
THE SUPREME COURT *of* OHIO

February 2020 Ohio Bar Examination

Essay Questions & Selected Answers

Multistate Performance Test Summaries & Selected Answers



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FEBRUARY 2020 OHIO BAR EXAMINATION

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OHIO BAR EXAMINATION

FEBRUARY 2020 OHIO BAR EXAMINATION

Essay Questions and Selected Answers

MPT Summaries and Selected Answers

The February 2020 Ohio Bar Examination contained 12 essay questions. Applicants were given three hours to answer a set of six essay questions. The length of each handwritten answer was restricted to the front and back of an answer sheet. The length of a typed answer was restricted to 3,900 characters.

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

The following pages contain the essay questions given during the February 2020 exam, along with the NCBE's summaries of the two 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 merely illustrate above average performance by their authors and, therefore, are not necessarily complete or correct in every respect. They were written by applicants who passed the exam and have consented to the publication of their answers. See Gov. Bar R. I, Sec. 5(C). The answers selected for publication have been transcribed as written by the applicants. To facilitate review of the answers, the bar examiners may have made minor changes in spelling, punctuation, and grammar to some of the answers.

Copies of the complete February 2020 MPTs and their corresponding point sheets are available from the NCBE. Check the NCBE's web site at www.ncbex.org for information about ordering.

QUESTION 1

Pam caught the heel of her shoe on a loose carpet and fell down a flight of stairs in a common area of the apartment building where she resided. She suffered injuries to her back and a broken nose, for which she was treated at the emergency department of the hospital by several physicians. Believing she was entitled to compensation from Landlord for negligent maintenance of the common area, she contacted Solo, an Ohio lawyer, for advice, and he referred her to Ursula, another Ohio attorney who concentrates her practice on representing injured individuals with claims against property owners. In return for the referral, Ursula agreed to pay Solo 30 percent of any fee collected in Pam's case.

After meeting with Pam in her office, Ursula sent her several forms to fill out, sign, and return so Pam could pursue her claim against Landlord. Among the forms was a power of attorney that purported to appoint Ursula as Pam's attorney-in-fact to represent her in a case against Landlord and to receive checks on her behalf, but that document expressly stated that Ursula did not have authority to cash those checks. A second form was titled, "Fee Agreement," which stated only that Pam agreed to pay Ursula a contingent fee of 33 and one-third percent if her case settled before trial. Pam signed the forms and mailed them back to Ursula's office.

After evaluating her case, Ursula concluded that Landlord's liability was questionable and Pam's preexisting medical conditions made it difficult to place a value on her case. In order to prompt Landlord's insurance company to negotiate, Ursula sent a letter stating, "My client authorized me to make a settlement demand of $100,000." In fact, she had never discussed settlement with Pam but believed Pam would be thrilled if they could obtain a settlement in that amount.

As the statute of limitations for filing a lawsuit against Landlord was about to expire, the insurance company and Ursula finally agreed to settle the case for $25,000. The insurance company issued a check payable to "Pam and Ursula, her Attorney," and a release of claims for Pam to sign before a notary public. Ursula signed Pam's name on the check and release, signed her own name as a witness to Pam's signature, and directed her secretary to notarize the signature on the release as Pam's before returning it to the insurance company.

Ursula sent Pam a letter with a check from her client trust account and an unsigned distribution sheet that detailed how the settlement had been distributed, including the 33 and one-third percent attorney fees which had been divided, 30 percent to Solo and 70 percent to Ursula.

What Ohio Rules of Professional Conduct, if any, has Ursula violated in her representation of Pam?

State the rules violated and the specific facts that constitute a violation of each rule.

A. **Referral/Fee splitting With Solo**

Under the Ohio Rules of Professional Conduct (ORPC), a lawyer may not pay another lawyer for a referral of a client. A lawyer may split fees with another lawyer in their firm (if the fees are proportional to the lawyer's work). For fee splitting with a referring lawyer, it is only permissible under the ORPC to do so if the referring lawyer remains involved in the client's case and also is responsible for the representation.

Solo seemed to properly refer Pam to Ursula, since her practice focused on the type of law relating to Pam's case. However, there is nothing in the facts that indicate that Solo remained involved in the case through Ursula's representation of Pam, nor are there any facts to suggest that he would have been responsible for Pam's representation, as Ursula is. The only facts here indicate that Solo referred Pam and received 30 percent of the attorney's fees collected by Ursula. Therefore, Ursula violated the ORPC by essentially paying another attorney, who did not stay involved in the client's representation, for a referral.

B. **Fee Agreement Disclosures to Pam**

A lawyer is required to disclose in writing to a client the details and allocation of any fee rate, contingent-fee amounts, and expenses for the attorney's representation of the client. It should include a breakdown of expected fees, how they will be deducted, and who is responsible for paying the fees. The fee arrangement must be signed by the client who did so with informed consent. Contingent fees are allowed under the rules for cases other than criminal cases or domestic relations cases where the fee is contingent on procuring a divorce or particular support award. In the event that the attorney representing the client is going to be splitting fees with any other attorney (as permissible above), the fee-arrangement disclosure must include the names of any other attorney, the fee amount that will be paid to the attorney, and the extent to which they will be involved in the client's representation. The client must sign and give informed consent to the proposed fee splitting arrangement.

Ursula did provide Pam with a written agreement showing the percent of a settlement award that she would collect. It did not include expenses and how they would be deducted from the settlement amount, nor did it include who would be responsible for paying any expenses. The agreement did not state the fee arrangement if Pam's case went to trial. As mentioned above, since Pam's case is not a criminal or domestic relations case, the contingent-fee arrangement is proper. As mentioned above, Ursula would only be allowed to pay or split fees with another attorney if she provided informed consent to Pam, including the attorney's name and details of the specific fees paid to that attorney. She did not provide Solo's name nor did she provide any details that he would be paid. Pam did sign the agreement, as required under ORPC. Therefore, Ursula violated ORPC.

C. **Settlement With The Insurance Company**

A client is in control of their representation and has full control over offering and accepting a settlement. An attorney can, within their professional reasoning, execute the means to achieve the client's goals in accordance with the rules. The attorney should communicate all reasonable offers to the client, and communicate with the client regarding settlement or trial. A lawyer should not offer or accept a settlement without a client's consent.

Ursula violated the rules by falsely telling the insurance company that she had authority to offer the settlement and accepting the $25,000 without discussion with Pam.

D. **Ursula's Direction of Nonlawyer Secretary**

A lawyer is responsible for a nonlawyer's violation of the law or rules when in a direct supervisory role. Ursula violated the rule by directing her secretary to notarize the document when Ursula forged Pam's signature.

QUESTION 2

Landlord entered into a written lease (Lease) with Tenant for a 10th floor apartment at Hightop Apartments (Hightop) located in Anytown, Ohio. Lease commenced on April 1, 2018. Lease required Tenant to pay rent of $3,000 monthly in advance and a security deposit of $6,000. Lease required Landlord to provide "essential" services (including utilities) and otherwise maintain Tenant's apartment and Hightop's elevator in good repair.

On March 25, Tenant paid April's rent and the $6,000 security deposit. Tenant moved in on April 1.

In December, Landlord failed to provide essential services. On Dec. 1, heat was interrupted and was not restored until Dec. 7. During that time, water service was interrupted when pipes froze and broke in Tenant's apartment for lack of heat. Tenant incurred a $2,000 loss to furniture due to the water damage, and mold developed on drywall throughout the apartment, causing Tenant to have respiratory distress. On Dec. 8, elevator service was interrupted and was not restored until Dec. 13.

On Dec. 16, Tenant complained to Landlord and filed a complaint with the proper municipal housing code enforcement department (Code Enforcement) about the constant interruptions of essential services and the mold, and Tenant informed Landlord that a complaint had been filed with Code Enforcement.

On Dec. 23, Inspector from Code Enforcement inspected Tenant's apartment and determined that the mold was a hazardous condition. Inspector ordered Landlord to remediate the mold and replace the water-damaged drywall in Tenant's apartment by Dec. 31.

On Dec. 25, Red, Landlord's repair person, used a master key and entered Tenant's apartment without any prior notice to Tenant. Tenant, who was in bed asleep, was awakened and frightened by Red's entry. Red apologized and stated that Landlord had sent him to inspect the apartment for mold and water damages. After inspecting the apartment, Red left without making any repairs.

On Feb. 1, 2019, since Landlord had not addressed the mold or damages in Tenant's apartment, Tenant filed a follow-up complaint with Code Enforcement and timely deposited February's rent with the rent-escrow clerk (Clerk) of the appropriate municipal court. By Feb. 10, Landlord had been notified of a newly-lodged Code Enforcement complaint and the rent-escrow deposit. On Feb. 11, Landlord sent Tenant a text stating, "You have not paid rent. You have reported me to Code Enforcement again. I want you out of my apartment immediately, or else!"

Frustrated, Tenant moved out on March 1. While moving, Tenant negligently caused $500 in damages to the front door of the apartment. Otherwise, Tenant left the apartment in good condition, other than the conditions caused by Landlord. On March 7, Tenant sent Landlord an email with Tenant's forwarding address and requested that Landlord forward the $6,000 security deposit and pay $2,000 for the damage to Tenant's furniture.

Tenant timely received a letter from Landlord, refusing to return the security deposit and refusing to pay Tenant $2,000 for the damaged furniture. Also, Landlord sent Tenant an invoice demanding $500 for the damage to the apartment door and charging Tenant rent for the balance of Lease, inclusive of February rent that had been placed in rent escrow. Tenant refused to pay Landlord any amount of money.

Landlord filed suit against Tenant seeking to recover $500 for the damaged door and rent for the balance of Lease, inclusive of the rent deposited with the Clerk. Tenant filed a counterclaim seeking a return of the security deposit, the rent money deposited with the Clerk, and $2,000 for the damaged furniture.

Q

1. **Did Landlord breach any duties owed to Tenant relative to providing essential services to the apartment?**
2. **Did Landlord breach any duties owed to Tenant by Red entering the apartment on Dec. 25?**
3. **What remedy, if any, did Tenant have when Landlord told Tenant to leave the apartment?**
4. **As between Tenant and Landlord, who has a right to the $3,000 rent payment that Tenant deposited with the clerk of court?**
5. **What remedy, if any, does Tenant have regarding the recovery of his security deposit and the $2,000 for the damage to his furniture?**
6. **What arguments can Tenant make in defense of Landlord's claim that Tenant owes rent for the balance of Lease term and who is likely to prevail?**

   Explain your answers fully.

A

1. Landlord breached the contract and duties to Tenant. Essential services and utilities were expressly included in the contract, but under Ohio law, heat, water, and electricity are already considered necessary utilities under the Implied Warranty of Habitability. Under the Implied Warranty of Habitability necessary utilities must be provided. In depriving the Tenant of heat for a week, the Landlord violated duties to Tenant. Since keeping the elevator in good working order was an essential term of the contract, as Tenant was moving to the 10th floor, Landlord violated the duty to Tenant and breached the contract by not having the elevator in good working order for five to six days.
2. Yes, Landlord breached duties. Under Ohio law, Landlord is typically required to give at least 24-hour notice before entering an apartment, unless it is an emergency. While the mold may have constituted a hazardous condition, Landlord was already aware of it and sending a repairmen "to inspect" without correcting the condition was not conduct consistent with that of an emergency. Landlord gave Red a master key, Red did not knock, and it was a holiday, Dec. 25, making it all the more intrusive. Therefore, Landlord breached his duty of notice to Tenant by sending Red into the apartment, without notice, on Dec. 25.
3. Tenant could have remained in the apartment while continuing to deposit rent in escrow. The Landlord's text, to leave immediately, was improper for being retaliatory and not giving Tenant proper notice. Tenant had properly given Landlord reasonable time since the first inspector told Landlord to fix the conditions by Dec. 31, and waited until Feb. 1 to complain again and correctly withheld rent by depositing it in escrow. Because retaliatory evictions are not allowed, Tenant could have stayed, and continued depositing rent in escrow until the conditions were corrected.
4. While the condition was not fixed, Tenant remained in the apartment for the entire month of February. The court will likely weigh the value of the apartment with damage and mold conditions in its decision. Since there was likely still some value to the apartment, the court can subtract the conditions and determine what a fair rent would be considering the continuation of repairs. The court, however, may decide that if conditions were uninhabitable, and that Landlord had had sufficient notice to correct them, Landlord is not entitled to the $3,000 in escrow at all. Since Tenant remained, even with the respiratory issues, there is likely some rent owed for what value was left, and the court can determine it.

5. Tenant has a right to the return of the security check provided they leave a forwarding address for the landlord within a reasonable time of 30 days. If there is damage or repairs that must be made and deducted from all or some of the security deposit, a landlord must send an itemized receipt to the tenant to show what repairs were needed and how much they cost. Here, Tenant timely gave a forwarding address to Landlord within the week. Since the facts indicate that Tenant left the apartment in good condition other than the conditions caused by Landlord, Tenant should be entitled to the return of the $6,000 security deposit, minus the $500 in damages Tenant negligently caused to the front door while moving out. In regards to the furniture, since it was likely caused by the Landlord's negligence of failing to provide heat, resulting in the burst pipes, Landlord will likely owe Tenant for the damages to Tenant's furniture.
6. As for the remaining balance, Landlord wrongfully evicted Tenant by retaliating for the complaints Tenant filed. Landlord materially breached his duties repeatedly by failing to provide heat, elevator service, and allowing the mold condition that was deemed hazardous. Since Landlord materially breached the contract and did not make repairs even after given multiple notices and reasonable time to correct the issues, Tenant is not liable for the remaining balance. Tenant can also assert defenses that Landlord violated the Implied Warranty of Habitability by allowing the mold to continue and that it also constituted a constructive eviction.

QUESTION 3

Ben recently became a shareholder in ABC Company (Company), an Ohio corporation. He currently owns 24 of the 100 outstanding shares of the common stock of Company, along with Alice who owns 40 shares, Mike who owns 25 shares, and Cal who owns 11 shares. Company's current Board of Directors consists of Alice, Mike, Sam, Cal and Matt. Ben met with all the directors and shared his ideas for growing Company. He is satisfied with the vision for Company that he received from most of the directors, but is troubled by what he perceives as Sam's unwillingness to embrace growth and change.

Ben reviewed the Articles of Incorporation and Code of Regulations of Company and knows that the Annual Shareholders' Meeting is held on April 20th. The members of the Board serve staggered terms, and the term for the Board seats held by Sam and Matt expires in April of the next year. The Code of Regulations of Company does not address the removal of, or replacement of, a director of Company, and does not address the number of votes required to elect a director. The Articles of Incorporation do not prohibit cumulative voting by the shareholders.

Ben wants to remove Sam as a director and replace Sam with Renee, a business acquaintance of Ben. Renee served on several private company boards and currently is a Vice President at an investment bank. Ben is not interested in being a director himself. Ben feels that Renee is highly qualified and would be an asset to Company. He talked to Cal and Mike about his feelings and he knows that they also are unsatisfied with Sam's performance on the Board and vision for Company. Cal and Mike told Ben that Alice likes Sam and they think that Alice would be unwilling to remove Sam as a director. Ben also learned that all of the shareholders are happy with Matt's service on the Board, and will vote for Matt at the next election.

1. **If Ben takes no immediate action with regard to Sam's board seat, at what point in time, if ever, might he be able to affect Sam's position on the Board and what, if anything, might he do to elect Renee?**
2. **If Ben wants to act immediately, what action or actions might he take on his own to remove Sam from the Board and what reasons, if any, must he assert for the removal?**
3. **Would the removal of Sam as a director be affected if Company's shareholders have a right to vote cumulatively in the election of directors?**

Explain your answers fully.

A

1. If Ben takes no immediate action with regard to Sam's board seat, he will have to wait until the Annual Shareholder's Meeting on April 20th next year to vote his shares to remove Sam, since that is when Sam's seat expires. At the meeting, there are a few options for Ben as to how he might go about electing Renee. First, generally speaking, cumulative voting is used. If so, Ben can vote 48 shares to elect Renee and remove Sam and hope that is enough. (Cumulative voting is calculated by the number of shares multiplied by director seats up for election.) Second, Ben can form a voting agreement with Cal and Mike (which is 120 shares since it's 60 shares multiplied by two director seats open) where they agree to vote their shares in a certain way, or they can form a voting trust in which case they will transfer their shares to a trustee who will vote their shares accordingly.
2. Ben can try to call a special meeting in order to remove Sam immediately. Under general corporate law ("GCL") only shareholders who own more than 25 percent of outstanding shares can call a special meeting. If such a meeting is called, seven to 60 days notice must be given. Here, since Ben only owns 24 percent of the stock (24 shares out of 100) he is unable to call for a special meeting by himself. However, if he is able to pool together his shares plus Cal's and Mike's shares, Ben could call a special meeting since that will account for 60 percent of the shares outstanding. Once a meeting is called, Ben will have to give the proper notice and state the purpose of the meeting. In order to remove Sam from his director's seat, Ben does not have to give a reason as to why he wants Sam removed.
3. Sam's removal will not be affected under cumulative voting. As explained above, under cumulative voting, 120 shares are held between Ben, Cal, and Mike. Alice holds 80 shares under cumulative voting. Even without a cumulative vote, Ben, Cal, and Mike own 60 shares compared to Alice's 40 shares. Either way, since the removal of a director is not a fundamental change to the corporation (and therefore doesn't require two-thirds shareholder approval), Sam can be removed as a director based on a simple majority vote, so long as there is a quorum of shareholders present. It is immaterial if cumulative voting is used in this situation.

QUESTION 4

Butch and Mary Ann were married in Franklinton, Ohio in 1980, and were the parents of twins, Skip and Megan, who were born in 1985. Butch and Mary Ann created valid wills in 1998 (1998 Wills), each of which provided that all property would pass to the surviving spouse, and if there was no surviving spouse, all property would pass to Skip and Megan in equal shares.

Mary Ann passed away in 2007 and all property that Mary Ann owned passed to Butch under her 1998 Will. Butch began dating Ginger, an old high school sweetheart. Ginger had one minor child, Annie, from a prior marriage. Butch and Ginger married in 2008. Megan was extremely upset that her father married again, and she had no contact with Butch after his marriage to Ginger. Skip remained close to Butch throughout the same time period.

At Ginger's urging, Butch destroyed his original 1998 Will and told Ginger he would draft a new will. Butch thereafter drafted a 2012 document (2012 Document) that provided as follows:

1. I name Ginger as Executor of my estate. If she does not survive me, I name Skip as Executor.
2. I give all property that I own to Ginger if she survives me. If she does not survive me, I give all my property to Skip and Annie in equal shares. I intentionally make no provisions for my daughter, Megan.

Butch signed the 2012 Document in the presence of Ginger and Annie, who was 16 at the time. Both Ginger and Annie attested Butch's signing and both signed below his signature as witnesses.

In 2019, Butch and Ginger were in an automobile accident and Butch was killed instantly. Ginger was seriously injured and died four days later.

In looking through Butch's desk, Skip located the 2012 Document. Skip presented the 2012 Document to the Franklinton Probate Court and notified Megan and Annie of the filing. At the time of Ginger's death, she did not have a Will. Skip, Megan, Annie and the administrator of Ginger's estate (Administrator) have all claimed an interest in Butch's assets which consisted of the following:

1. A house titled in the name of Butch and Ginger as tenants in common;
2. An old Certificate of Deposit from 2007 in the face amount of $20,000 with a beneficiary designation to Skip and Megan;
3. An ABC bank account in the amount of $200,000 titled solely in Butch's name;
4. A Life Insurance Policy for $20,000 on Butch's life naming Ginger as primary beneficiary and Annie as the contingent beneficiary.

Who is entitled to receive each of the above assets and in what share?

Explain your answers fully.

A

To destroy a will in Ohio, one must do so 1) by executing a new will that complies with will formalities, 2) by destructive act (obliteration, tearing, cancelling), or 3) by operation of law (usually divorce). Here, Butch "destroyed" the former will, which is somewhat ambiguous but it appears he destroyed it as stated in prong 2.

To comply with will formalities, in Ohio, a will must be 1) in writing, 2) signed at the end by the testator, or by another in the conscious presence of testator and at testator's direction, and 3) witnessed and signed by two competent witnesses in the conscious presence of the testator, or they must hear the testator state that the signature is his. Here, Butch drafted the 2012 document, which was in writing and signed by him. However, Annie is only 16 years old. To be competent, a witness must be at least 18 years old. Since she is not competent, the will does not comply with formalities. Further, Ginger and Annie are both interested (they stood to inherit from the will) witnesses. In Ohio, interested witnesses do not render a will invalid, but interested witnesses will only take the lesser of what they would have taken through intestacy or from the will.

The Harmless Error doctrine may save a will not executed in compliance with formalities, if the 1) testator created the document s/he purports to be the will, 2) signed it with the intention that the document be his/her will, and 3) two competent witnesses witnessed the testator sign. Here, again, Annie is not competent because she is a minor. The 2012 document is not a valid will and so does not revoke the 1998 will.

However, if the 1998 will was legitimately destroyed and gone, Skip and Megan should first attempt to prove to a probate court that Butch did not mean to destroy the 1998 will to enforce its terms. Parties can do this if they can prove by a preponderance of the evidence that 1) a valid will was in existence, 2) there was no undue influence, and 3) the testator had capacity at the time of the will's execution. If they cannot prove this, his estate will pass through intestacy.

In Ohio, to receive property through intestacy, probate, or non-probate succession, one must survive the decedent by at least 120 hours. If a beneficiary does not survive the decedent by that long, the anti-lapse statute may save the gift, if 1) the deceased beneficiary is a grandparent, descendant of a grandparent, or stepchild of the decedent and 2) the deceased beneficiary has a descendant who survives the testator by at least 120 hours, that descendant will take the gift "intended" for the deceased beneficiary. Here, Ginger did not survive Butch and she is not in any of the categories in prong 1. Since she does not have a will, her estate will pass through intestacy to Annie.

1. House Title: Houses held among parties as tenants in common are devisable and descendible. Skip and Megan would inherit part interest in the house, each having one-quarter share, and Annie would inherit one-half share from her mother's estate.
2. CD for $20,000: Skip and Megan would share equally. Although Butch attempted to disinherit Megan in his 2012 document, since it was not a validly executed will, she will still inherit from his estate.
3. ABC Bank Account: Skip and Megan share equally.
4. Life Insurance Policy: Annie would receive the policy amount. Life insurance policies, like joint tenancies and trusts, are non-probate assets.

QUESTION 5

Case A: Susan, owner of several automobile dealerships in central Ohio, was having trouble with one particular dealership. She contacted Bob, a successful general manager at a competing dealership, to ask if he would be interested in taking on the same position at her troubled dealership. Bob quickly declined, indicating that he was very happy in his current position. Undaunted, Susan called him several times over the following weeks. During those conversations, Susan offered four incentives: four weeks paid vacation; bonuses based upon sales; a guaranteed contract term of 10 years; and complete control over hiring and firing of employees. Finally, Bob agreed to leave his current employment for the new position at Susan's dealership.

Within a week, Susan sent Bob an agreement signed by her as owner of the dealership. The agreement stated with specificity Bob's salary, health, and retirement benefits and attached an exhibit entitled Job Description. While the job description did state "oversight of all dealership employees," the agreement was silent as to all of the other discussed incentives. Bob questioned the lack of additional information but was met with Susan's reply that it was their standard agreement and that everything would be fine.

During the first six months, Bob was told that he had two weeks paid vacation, all bonuses were discretionary, his contract would be reconsidered annually, and that Susan controlled the hiring and firing of employees.

Bob quit and sued Susan and the Dealership, alleging that Susan and the Dealership had breached their contract by not providing the four incentives mentioned to him.

Susan raised as a defense the parol evidence rule and claimed that none of the incentives, nor any statement she had made, could be presented at trial.

1. **How should the court rule on Susan's parol evidence rule defense? Explain your answer fully.**

Case B: Assume the above fact pattern with the following additional facts: prior to Bob's hire, Susan told another dealership employee that she believed that Bob's success was the reason that her dealership was failing. She further told the employee that she planned to hire Bob away from the competing dealership and then force him to quit after six months.

Additionally, assume that the agreement ended with the following integration clause: "This Agreement, along with any exhibits, addenda, and amendments hereto encompasses the entire agreement of the parties and supersedes all previous understandings and agreements between the parties, whether oral or written."

2. **(a) What impact, if any, does Susan's plan have on her parol evidence rule defense?**

   (b) What impact, if any, does the integration provision have on Bob's claims? Explain both fully.

Case C: Assume the fact pattern of Case A, but also assume that the agreement that Susan sent to Bob included the following: the term of this contract, any bonuses, and all paid vacation time shall be based upon previous discussions between Bob and Susan and upon industry custom.

3. **What is the impact, if any, of this provision on Susan's parol evidence rule argument?**

Explain your answer fully.

1. The parol evidence rule precludes the inclusion of extrinsic evidence to prove supplemental or conflicting terms to a completely integrated agreement. A completely integrated agreement is one in which the parties intended the agreement to be complete. If an agreement is completely integrated, extrinsic evidence may not be used to prove supplemental or conflicting terms; if the agreement is partially integrated, then a party may use extrinsic evidence to prove only supplemental terms; it cannot conflict with the terms of the agreement.

   The employment agreement is likely intended to be a complete integration; it is not the type of agreement normally intended to have collateral agreements (future or additional agreements) and ordinarily would contain the complete agreement as to employment. While a completely integrated agreement may not include extrinsic evidence for the aforementioned purposes, a court may consider extrinsic evidence to clarify ambiguities in the contract where the four corners of the agreement do not clarify a vague term. The provisions regarding vacation, sales, and the contract term may exclude extrinsic evidence, but a court may look at prior negotiations to determine whether "complete control over hiring and firing" is the meaning for "oversight of all dealership employees." If a court cannot determine the terms based on the text of the agreement, then the court may include the negotiation's definition of the term.

   If the parties did not intend the agreement to be fully integrated, which is likely, given that Bob requested additional information and Susan said it "would be fine" (anticipating further provisions in their absence on the "standard agreement"), then Bob could introduce supplemental terms. The four weeks, guaranteed 10 years, and bonuses would be supplemental to the contract.

   Bob might argue that fraud occurred, as well. Susan fraudulently misrepresented the material terms of the contract and induced Bob to act (to quit his job and become employed by Susan) based on those misrepresentations, and would be harmed by not realizing the full extent of the promised terms. Bob would be able to use all extrinsic evidence for this defense. If shown, the contract would be voidable and Bob could sue for damages based on his reliance on Susan's proposed employment.

2. (a) The merger provision would raise a rebuttable presumption that the agreement was intended to be a full and complete integration of the agreement. With the written provision, it would be much more difficult for Bob to argue that the agreement was not intended to be a full integration given the absence of the terms raised during negotiation. For the completely integrated contract, Bob would not be able to argue against the absence of the vacation, bonuses, and term as supplemental terms.

   (b) Bob could still argue as to the ambiguity present in the contract regarding the scope of his responsibilities with other employees. The scope of an employee's duties would be an essential term requiring clarification, and clarification would be needed (often using a hierarchy - the contract writing, written/typed over print, defined terms, course of performance, course of dealing, usage of trade). If the contract or course of performance would not clarify, then Bob could use extrinsic evidence to determine the scope of employment.

3. The parol evidence rule would not bar inclusion of extrinsic evidence. The agreement expressly contemplates that collateral agreements will define the full terms or that the agreement explicitly incorporates the negotiations; the agreement is at most a partial integration. If the new provision is interpreted as providing a standard by which future agreements will be "based on," then the negotiations and statements will be the basis for future agreements. If the agreement is determined to include those terms, the parties will use extrinsic evidence to determine its meaning.

QUESTION 6

Emily, a resident of Ohio, was terminated from employment by Employer, Inc. (Employer), which is located in Ohio. Emily believes that she may have been illegally discriminated against by Employer and, more specifically, by her immediate supervisor, Sam Supervisor (Supervisor), who also is a resident of Ohio.

At the time of her termination, Emily was not considering filing a lawsuit against either Employer or Supervisor. Nevertheless, Emily obtained written statements from some of her former co-workers at Employer regarding comments that Supervisor made to them that Emily thought indicated possible discrimination against her.

Emily had a friend, Susan, who was previously represented by Alex Attorney (Attorney). Susan recommended that Emily retain Attorney and consider filing a lawsuit against Employer and/or Supervisor. Emily and Susan met with Attorney and discussed the relevant facts regarding Emily's allegations of discrimination. Emily provided to Attorney the written statements that she obtained from her former co-workers. During the meeting, Emily agreed to retain Attorney. Susan did not attend any additional meetings with Attorney and Emily.

Attorney subsequently filed a Complaint on behalf of Emily against Employer in the Court of Common Pleas of AnyCounty, Ohio. The Complaint included a claim for gender discrimination and sought compensatory damages. The Complaint also included a claim for intentional infliction of emotional distress. Dan Defense (Defense) was retained to represent Employer in this litigation.

Defense filed an Answer and served written discovery, including 55 Interrogatories, 45 Requests for Production of Documents, and a Request for Medical Examination of Emily. One Request for Production specifically requested copies of any written statements that Emily obtained from any witnesses as well as communications that Emily had with Attorney.

Attorney also served written discovery, including 25 Interrogatories, one of which was a request for information regarding any insurance policies of Employer, and a Request for Inspection of Employer's Premises.

1. **What grounds, if any, does Attorney have to object to Defense's discovery requests and how is the court likely to rule on each?**
2. **What grounds, if any, does Defense have to object to Attorney's discovery requests and how is the court likely to rule on each?**

Explain your answers fully.

Objections to Defense's Discovery Requests

1. 55 Interrogatories Exceeds the Ohio Limit of 40

Generally, in Ohio, a party may only serve 40 interrogatories on an individual without permission of the court. Since Defense did not obtain permission to send 55, the court should limit Defense to 40.

2. Request for Medical Examination of Emily

In Ohio, a court must order a party to submit to a medical examination. The decision to issue such an order is in the sound discretion of the court and generally can only be made when good cause is shown and the medical condition of the party is at issue. Since her claims include IIED, her medical condition may be at issue. However, Defense cannot directly request one with the opposing party, and should submit the request to court. The court should determine whether Emily should submit to a medical exam.

3. Communications with Attorney

Generally, a party cannot request discovery of information protected by attorney-client privilege. Attorney-client privilege applies to confidential communications made to an attorney by an individual for the purpose of obtaining legal advice. Such communications may only be discovered by an opposing party with good cause and a showing that they cannot be obtained from another source. During the initial meeting with Alex Attorney, Emily may have waived her attorney-client privilege by having Susan attend the meeting. Because a third party was there, the communications were not confidential. Conversations after that initial meeting were likely subject to the privilege. The court should limit the request for discovery to communications made in the presence of a third party, such as Emily. The court should partially sustain this objection.

4. Written Statements from Co-Workers

Generally, attorney work product is prevented from discovery. Such work product is made in anticipation of litigation. Here, however, Emily obtained the statements before she decided to pursue litigation and they were not made by an attorney. The fact that she later gave them to her attorney does not turn them into attorney work product. An opposing party is generally entitled to discover the names of parties who may have relevant evidence concerning the case. Attorney could argue that while they are entitled to the names of witnesses that may have relevant information, they should be required to do their own interviewing. However, the court should deny this objection.

5. Requests for Documents

Attorney should object because this request is overly burdensome. If the opposing party can go to some location to inspect the documents themselves, the court should grant this objection.

Objections to Attorney's Discovery Requests

1. Insurance Information

Defense could try to argue that this information is not relevant. Generally, a party may request discovery of information that may reasonably lead to the discovery of relevant evidence. However, a party is generally permitted to request information related to insurance companies that may be required to indemnify the opposing party in the event of a judgement against the opposing party. The court should deny this objection.

2. Request for Inspection of Employer's Premises

Defense should try to argue that this is not relevant, without some additional stipulation as to what Attorney hopes to discover. Generally, a court must order an inspection of a party's premises. Attorney has not shown any good cause for such an inspection. The court should consider granting an inspection but should likely grant this objection.

3. 25 Interrogatories

In Ohio, a party may send up to 40 interrogatories to an individual. This is within the limit and the court should not grant the objection.

QUESTION 7

Paul stored his valuable baseball card collection in a storage locker at Store-All, Inc. (Store-All), a self-service storage facility located in Anytown, Ohio. He selected Store-All because it offered a state-of-the-art security system and guaranteed to protect property from theft.

On March 23, opening day of the new baseball season, Paul took the just-released set of baseball cards to his locker to add them to his collection. Ed, a Store-All employee, opened the parking lot gate to allow Paul to enter. When Paul reached his unit, he unlocked the door and discovered that the storage locker was empty. Paul sued Store-All in the Anytown Ohio Common Pleas Court for breach of contract. The case was scheduled for a jury trial before Judge.

During jury selection, Ed sat at the defense table with Store-All's attorney as its representative and Paul sat with his attorney at the plaintiff's table. After the jury was selected, and before the first witness testified, both Paul and Store-All moved to separate witnesses. Paul asked that Ed be required to leave so he could not hear any testimony. Store-All asked that Paul be excused from the courtroom for the same reason. Judge denied both motions.

Just after opening statements concluded, Store-All asked Judge to allow it to call Ed to testify first. Store-All presented documentation that Ed was scheduled to depart the next day for a family reunion and he would be unavailable to testify later for Store-All. Judge granted the request over Paul's objection.

Store-All's examination of Ed began as follows:

Store-All: Your name is Ed, right?

Ed: Yes.

Store-All: You work for Store-All, correct?

Ed: Yes.

Store-All: You were working on March 23 at Store-All in Anytown, Ohio, correct?

Ed: Yes.

Paul objected to Store-All's leading questions. Judge overruled the objection.

Ed further testified that he allowed Paul to enter the Store-All facility to access his unit. He explained that everything was locked and monitored by security cameras installed by Carl. Ed also testified that he never saw anybody, other than Paul, access Paul's storage unit.

Paul's attorney cross-examined Ed. He asked about the family reunion, who would be attending, where it was being held, and how long he had known about it. Store-All objected to every question. Judge overruled the objections.

At the conclusion of Ed's testimony, Paul's attorney called Paul to testify. He explained that he had the only key to the locker, that he had not removed anything from his locker, and that when he asked to review the security video, he was told that the equipment did not work. Store-All did not cross-examine Paul. Before excusing Paul from the witness stand, Judge asked several questions:

Judge: Did the stolen baseball cards hold sentimental value to you?

Paul: Yes.

Judge: Did you trust Store-All to protect them for you?

Paul: Yes.

Judge: And did they let you down by failing to do that?

Paul: Yes.

Q

Judge then excused Paul. Store-All objected to the questions. Judge overruled the objection.

Before Paul could call his next witness, Judge told the parties that he was calling Carl, who had been watching the trial from the gallery, as a witness. Judge asked Carl to describe the security cameras, where they were installed, and how the recordings were made. Judge offered the parties the opportunity to cross-examine Carl, which they declined, and then excused Carl from the witness stand and dismissed the jury for the day. After the jury left the courtroom, Paul objected to Judge's calling Carl to testify. Judge overruled the objection.

Did Judge err by:

1. **Denying the motions requesting separation and exclusion of witnesses?**
2. **Allowing Store-All to call Ed to testify first?**
3. **Overruling Paul's objection to Store-All's leading questions?**
4. **Overruling the objections to Paul's cross-examination of Ed?**
5. **Overruling Store-All's objections to Judge's questions to Paul?**
6. **Overruling Paul's objections to Judge calling Carl as a witness?**

Explain your answers fully.

A

Judge did not err by denying the separation of witnesses motions.

Parties may move to separate witnesses to combat the fabrication of consistent testimony between witnesses. The parties to the litigation have a right to be present in the courtroom. The judge has discretion to grant or deny motions to separate witnesses.

Here, both parties moved to separate and exclude witnesses including Paul and Ed. Paul is the plaintiff, so he is a party to the litigation and has a right to remain in the courtroom. Ed is the representative of Store-All, a party to the litigation, so Ed also has a right to remain in the courtroom. Therefore, the Judge properly denied both motions.

Judge erred by allowing Store-All to call Ed first.

Generally, at trial, the prosecution presents its case and then the defense presents its case. However, the Judge has discretion to change the structure of the trial when it is in the interest of justice and the parties can show good cause.

Here, Store-All is the defendant, and usually would have to wait until the plaintiff, Paul, has presented his case. Ed would be unavailable because of a family reunion, which is probably not a sufficiently good reason to restructure the trial, as opposed to the death of a family member or other emergency. Therefore, Judge probably should not have allowed Ed to testify first.

Judge did not err by overruling the objection to leading questions.

Leading questions are allowed on cross and on direct when the witness is providing background information.

Here, Store-All was asking Ed leading questions on direct examination. The leading questions were proper because they only asked for background information, including his name, where he worked, and whether he worked on the day at issue. Judge properly overruled the objections.

Judge erred by overruling the objections to Ed's cross examination.

The questions were proper on cross-examination. In Ohio, the scope of cross is not limited to what was asked on direct, so the focus of the questions was proper. To be admissible, however, evidence must be relevant. Relevant evidence gives the factfinder an indication that an issue in the case is more or less likely to have occurred.

Here, the cross-examination of Ed consisted of questions regarding his family reunion. Ed's family reunion is not at issue in the case and is not likely to aid the factfinder in determining whether Store-All is responsible for Paul's baseball cards. The judge had already decided the order of the witnesses, so this also is not relevant to that issue. Therefore, the evidence was not relevant, and Judge erred by overruling the objection to it.

Judge did not err by overruling the objections to Judge's questions to Paul.

The judge may call a witness and examine that witness as long as each party has an opportunity to cross-examine the witness. A party may object to the calling of a witness by a court outside the presence of the jury and still make a timely objection.

Here, Judge called Carl as a witness and examined him. Afterwards, Judge gave each party the opportunity to cross-examine Carl, so Judge's examination of Carl was proper. Paul's objection was properly timed because it was directly after Carl's examination at the first opportunity that he could object outside the jury's presence. Since the examination was proper, Judge properly overruled the objection.

QUESTION 8

1. The Ohio General Assembly has enacted the following laws:

   A. A law providing salary supplementation to parochial school teachers who only teach secular subjects (e.g. math, science, accounting, statistics) in otherwise parochial schools. The intent of the law is to achieve salary parity between the salaries of those teaching these subjects in parochial schools and their public school counterparts. In order to make sure that state money is not being used to advance sectarian (religious) purposes, all parochial schools with teachers participating in this program must agree to periodic inspections by the state.

   B. A law creating a scholarship fund to assist academically gifted students with college education expenses. To be eligible, a student must enroll at least half-time in an eligible post-secondary institution. This includes public, private, and religiously-affiliated college institutions. However, students receiving the scholarship may not pursue a degree in devotional theology — a requirement that codifies the State's constitutional prohibition on the expenditure of State funds for the pursuit of degrees that are "devotional in nature or designed to induce religious faith." The recipient may, however, take classes on religion. The institution determines whether the scholarship recipient's major is devotional.

2. Kaleidoscope is a public high school in Ohio. It receives both state and federal financial assistance. The school permits student religious groups as well as non-religious groups to hold meetings before and after school hours. One very popular religious studies group meets every Tuesday after school. Principal White attends all of these meetings as a non-participant faculty member to the group but has been known to chime in with his own points of view.

3. Hearing about the popularity of the religious studies meeting at Kaleidoscope, the local public elementary school, which also receives state and federal funding, decided to allow student religious groups to meet on the same before/after school basis as several non-religious extra-curricular groups. Children as young as 6 years old regularly attend the religious studies group meetings. The meeting is staffed by a school faculty member who does not participate in any of the discussions.

   The state laws and the religious studies meetings have been challenged, as violative of the First Amendment of the United States Constitution, by parties who have brought lawsuits and who have standing to challenge the laws and activities.

   How should the Court rule in each of the lawsuits?

   Explain your answers fully.

1. A. The court should uphold the law as it does not create an excessive entanglement under the Establishment Clause. Under this clause, the government is not allowed to be perceived as endorsing any religion over another, or religion over non-religion. The Lemon test is used in order to gauge the severity of the action in terms of its constitutionality. Under the Lemon test, there must be: (1) an important government interest: (2) the action neither promotes or inhibits religion; (3) there is a secular (non-religious) purpose; and (4) the government action does not create the guise of excessive entanglement between the government and a religious institution. Here, Ohio is providing salary supplementation to parochial teachers who teach secular subjects like math, science, and statistics. Ohio stated that their intent is to achieve salary parity between the parochial and public schools, which is an important interest as it leads to healthy functioning of the system. The funds may be allocated to a religious organization; however, the action neither promotes nor hinders religion as there is a clear secular purpose and neutral applicability – the funds are only being given to secular subjects. The action also does not create an excessive entanglement. Ohio is applying these funds to particularly secular subjects and conducting random inspections to ensure the neutrality of their actions. As such, the court should uphold the law as it ;does not violate the Establishment Clause.

   B. The court should overturn the law as it violates the Free Exercise clause. Under this clause, the government is not allowed to hinder or prohibit religious conduct directly. Laws that are passed with general applicability that have a subsequent effect on religion may be upheld if they are narrowly tailored to an important government interest. Laws that directly hinder or prohibit religious conduct must pass strict scrutiny. Under strict scrutiny, the government must prove the law is the least restrictive means to achieve a compelling state interest. Here, Ohio passed a law to give high-achieving students funds to help with college expenses, but refuses to give the scholarships if the student pursues a degree in devotional theology. This is a direct hindrance to religious conduct, which is not the least restrictive way to achieve the compelling interest of assisting students with college expenses. The state prohibition on expenditure of funds for religious degrees can be easily overcome by creating a law of general applicability. Laws of general applicability may result in some students using the government money to pursue religious degrees, however, that is allowed under the Constitution so long as the deciding criteria was neutral in both determination and allocation. As the law hinders religious conduct unnecessarily as compared to the compelling interest of aiding in school costs, the court should overturn this law.

2. The court should rule for the challengers of the religious meetings as they represent an excessive entanglement under the Establishment Clause (see rule outlined above). Here, while the non-religious and religious groups are using a limited-public forum for their meetings before and after school, the Principal of the high school attends and contributes to the conversation. Principal is a public employee with great public powers. His actions may be seen as an endorsement of religion. Based on his status as a public employee and public official, this may amount to an entanglement.

3. The court should rule for the religious meetings as they do not represent an excessive entanglement under the Establishment Clause (see rule outlined above). This is not an endorsement or entanglement as the public faculty members do not participate in any of the group meetings, nor does the state funnel funds directly to the religious organizations.

QUESTION 9

Donny Dealer (Dealer) is an automobile dealer located in Anytown, Ohio. Dealer borrowed money from Good Bank (Bank), and Dealer and Bank signed a Security Agreement to secure the payment of the loan. The Security Agreement granted a security interest in "All of Dealer's inventory, equipment, accounts, chattel paper, instruments, and general intangibles, now owned or hereafter acquired and wherever located." After the Security Agreement was signed, Bank filed an unsigned Financing Statement with the required governmental authorities describing the collateral as "All of Dealer's personal property, now owned or hereafter acquired and wherever located." After Bank filed its Financing Statement, Dealer entered into the following transactions in the following order:

1. Dealer purchased a sports car from Race Driver (Driver) and agreed to pay for the car when Dealer was able to re-sell it. In order to secure payment, Dealer and Driver signed a Security Agreement describing the sports car and Driver filed a Financing Statement describing the sports car with the appropriate government office. Driver thereafter delivered to Dealer the sports car and the Certificate of Title for the sports car.
2. Ace Finance (Ace) made a loan to Dealer to enable Dealer to purchase furniture for Dealer's showroom. Dealer and Ace signed a Security Agreement and Ace filed a Financing Statement in the appropriate government office on the 11th day after Debtor took delivery of the furniture. The collateral was described in the Financing Statement and in the Security Agreement as "All of Dealer's furniture, now owned or hereafter acquired."
3. Dealer borrowed money from Jeweler, and as security for the payment of the loan, Dealer signed a Security Agreement granting Jeweler a security interest in his 10 Rolex watches and agreed to deliver the watches to Jeweler to hold as collateral until the loan was paid. Dealer delivered one watch to Jeweler, but failed to deliver the other nine watches to Jeweler.
4. Dealer purchased a computer from Friend to modernize his accounting and inventory control processes at his dealership and agreed to pay Friend at the end of the year. Friend delivered the computer to Dealer and Dealer signed and delivered to Friend a Promissory Note for the agreed purchase price.

Dealer recently become insolvent and defaulted on all of his loans.

What are the secured parties' respective security interests and priorities in the following assets:

a. The sports car?

b. The furniture?

c. The watches?

d. The computer?

Explain your answers fully.

A

This question is governed by Article 9 of the Uniform Commercial Code. Security interests in personal property are created when the debtor gives value, the secured party gives the debtor rights in the collateral, and the parties attach the interest by forming a security agreement. If a party wants to perfect its security interest by giving it priority against others who may stake claim to the property, the party must perfect by one of five methods: control, possession, automatic, notation of an auto lien, or filing a financing statement. The filing of a financing statement is the primary method of perfection; it includes notice, the debtor's name, the secured party's name, description of the collateral, and an extra description if the collateral involves real property. Then the debtor authenticates and it is filed at the secretary of state's office or appropriate public records office. Priority is determined by rules such as the first to file or perfect.

Bank attached and filed a financing statement in Dealer's "inventory, equipment, accounts, chattel paper, instruments, and general intangibles, now owner or hereafter acquired and wherever located." Attachment occurred when Dealer borrowed money from Bank, Bank acquired rights in the quoted collateral, and Dealer signed a security agreement. Perfection has not properly happened as Bank filed an unsigned financing statement, but the financing statement is still technically filed. Bank will lose priority in any properly perfected security interest in the quoted collateral.

a. **Bank has priority in the car.**

Dealer and Race Driver have an attached security agreement: Dealer pays money for the car, Race Driver gives Dealer possession of the car, and there is a properly signed security agreement between the parties. There is no perfection between Dealer and Race Driver, as a sports car is an automobile. Perfection of an automobile requires a notation of a lien on the title. Here, Driver files a financing statement. Driver's attempt at perfection fails as a financing statement is not a notation of a lien. Therefore, under the rules, Bank has priority because Bank was first to file.

b. **Ace has priority in the furniture.**

Ace Finance ("Ace") and Dealer have a proper security agreement in the furniture for Dealer's show room. Ace gives Dealer a loan, Dealer purchases furniture for Dealer's showroom, and Dealer and Ace sign a Security agreement. The furniture properly attached as equipment for Dealer. Ace properly files a financing statement within 20 days of Dealer taking delivery of the furniture. Not only has Ace properly perfected, but because Ace properly filed a financing statement within 20 days of Dealer possessing the furniture, Ace has perfection and a PMSI. Ace's perfected PMSI in equipment gives Ace priority over Bank's unperfected interest in Dealer's furniture.

c. **Bank has priority in nine watches and Jeweler has priority in one watch.**

Dealer and Jeweler have proper attachment: Dealer borrows money from Jeweler, Dealer gives Jeweler a security interest in the 10 Rolex watches and agrees to deliver them, and there is a security agreement. There is no perfection between Dealer and Jeweler as Dealer only delivers one watch of the 10. Jeweler has possession of one watch, but lacks possession of nine. As possession is perfection in consumer goods and a watch is a consumer good in the hands of a jeweler, Jeweler has perfection of one Rolex. The other nine Rolexes, however, belong to Bank as Bank attached and filed, even though Bank failed to perfect.

d. **Bank has priority in the computer.**

Dealer and Friend have not properly attached or perfected the computer. Dealer agreed to pay Friend at the end of the year, but that does not count as having given value for the steps to attachment. Lack of attachment here means Bank wins as first to attach to the computer.

QUESTION 10

Buyer, a men's clothing retailer in Anytown, Ohio experienced a steady growth in sales and thus began looking for a new location for his business. Buyer located an abandoned storefront for sale. After looking at the building and lot, Buyer contacted Seller about the property.

On Aug. 15, 2019, Buyer arranged for a walkthrough of the building with Seller. Although the building required a significant amount of structural improvements, Buyer felt the central location and potential to attract new clientele far outweighed the costs of improvements. Buyer immediately made a verbal offer of $250,000. Seller accepted.

As a sign of good faith, Buyer paid Seller $25,000 toward the purchase price. The parties agreed that the remaining balance would be paid by Oct. 15, 2019. Meanwhile, Seller gave Buyer keys to the building. Buyer was excited to take immediate possession and begin renovations in anticipation of a November grand opening.

On Sept. 1, 2019, Buyer had his contractor begin constructing dressing rooms, a tailor shop, and the sales floor area. Buyer also executed a contract with a local business, Luminous Lights (Luminous), for custom lighting. Seller periodically stopped by during the renovation phase and complimented Buyer on the progress. Buyer made $50,000 worth of improvements by late September that had substantially increased the value of the building, and Seller liked what Buyer had accomplished in such a short time.

During his last visit, Seller overheard Buyer complaining about Luminous. After installing the light fixtures, Buyer was supposed to receive two deliveries of specially ordered bulbs. Buyer paid and the first delivery arrived as agreed, but Luminous held the second delivery until it received payment in full. Buyer currently was running short on cash, but he needed the bulbs installed in order to complete the rest of the renovations.

Immediately after leaving the Building, Seller called Luminous and assured Luminous that Buyer was good for the remaining payment. In addition, Seller told Luminous that if it agreed to deliver the bulbs and Buyer did not pay, Seller would. Luminous immediately delivered the bulbs and left an invoice with Buyer requesting payment no later than Oct. 1, 2019. The invoice included a note that read: "If payment is not received by Buyer, Seller will pay." The note was signed by Luminous. Luminous has not been paid.

On Oct. 15, 2019, Buyer called Seller to arrange a time to meet and pay the balance owed for the building. Seller hesitated and then declared that he was no longer interested in selling Buyer the building. Seller had been approached by Developer who offered $400,000 for the building. Seller intends to accept Developer's offer.

1. **Can Buyer enforce against Seller the oral agreement for the purchase and sale of the building?**
2. **Can Luminous enforce against Seller the promise to pay for the balance of the bulbs because Buyer did not pay?**

Explain your answers fully.

***Buyer v. Seller* – Buyer can enforce the oral agreement for the purchase and sale of the building.**

Under the Statute of Frauds, a contract for the sale of land must be in a writing, signed by the party against whom enforcement is sought, and describe the property and price. However, there is an exception where an oral agreement for the sale of the land can be enforceable based on partial performance. To succeed and enforce the oral agreement, Buyer must show that at least two of the following are present: 1) Buyer made improvements to the property; 2) Buyer paid all or a substantial amount of the purchase price; and 3) Buyer is in possession of the property. If at least two of the three are present, Buyer can enforce the oral agreement. Here, Seller orally agreed to sell the abandoned storefront to Buyer for $250,000. The agreement was never reduced to a writing, so the Statute of Frauds is not satisfied, and Buyer can only succeed if he shows at least two of the above requirements.

Buyer satisfies element one because he made improvements to the property. Buyer made $50,000 worth of improvements during the month of September that increased the value of the building, thereby satisfying element one. Buyer also satisfied element two because he paid or tendered a substantial amount of the purchase price. After the initial agreement, Buyer gave seller a check for $25,000. Although it may not be a substantial amount, Buyer tried to tender the remainder of the purchase price to Seller on the date the remaining balance was to be paid. The $25,000 could be consistent with the lease of the building, but with the other surrounding facts, is, in fact, payment of at least a substantial part of the price at the time, and the tender was for the balance of the price. Buyer also satisfied element three. After the agreement was made on Aug. 15, Seller gave Buyer keys to the building. This shows constructive possession of the building because Buyer possessed the keys. Seller also only periodically stopped by during Buyer's renovation phase. Buyer had possession by making the improvements and possessing the keys. Seller is just trying to back out of the deal because he was approached by Developer who offered $400,000. Buyer satisfied all three elements needed to enforce the oral agreement, even though he only needed to satisfy two. Thus, Buyer can enforce the oral agreement against Seller.

***Luminous v. Seller* – Luminous cannot enforce Seller's promise to pay for the balance of the bulbs.**

Under the Statute of Frauds, a surety contract (a third party's promise to pay out of his own funds if another party does not pay) must be in writing, signed by the party against whom enforcement is sought, and must sufficiently describe the agreement. Unless this is met, the oral surety agreement will not be enforced. Here, Seller called Luminous and assured Luminous that if Buyer was not able to pay for the remaining bulbs, Seller would. This created a surety agreement between Seller and Luminous that must be in writing under the Statute of Frauds. Luminous tried to put this agreement into writing with a note on the invoice delivered to the Buyer. The note stated: "If payment is not received by Buyer, Seller will pay." This language is sufficient to satisfy the Statute of Frauds because it is in writing and memorializes the agreement between Seller and Luminous. However, the note was signed by Luminous, not Seller, the party against whom Luminous is trying to enforce the writing. Because the note was not signed by Seller, the Statute of Frauds is not satisfied and Luminous cannot force Seller to pay for the balance of Buyer's bulbs.

QUESTION 11

Boyfriend and Girlfriend resided together in Anytown, Ohio. During a summer afternoon, Boyfriend decided to leave work and arrive home early to surprise Girlfriend. On his way home, Boyfriend stopped at the local bar and consumed several beers. When Boyfriend arrived home, Girlfriend was not there.

Boyfriend called Girlfriend on her cell phone and discovered Girlfriend was at her Mother's house. Boyfriend and Mother do not have an amicable relationship, and Boyfriend had forbidden Girlfriend from speaking to or visiting Mother.

During the telephone call, Boyfriend insisted Girlfriend return home, but Girlfriend ignored his pleas. Boyfriend immediately drove to Mother's house and beat on the front door with a baseball bat while yelling obscenities and threatening to kill Girlfriend if she did not let him inside and leave with him. Mother yelled to Boyfriend from an upstairs window, telling Boyfriend he was not welcome there and that if he did not leave, she would call the police. Boyfriend continued to beat on the door and gained entrance into Mother's home.

Upon entering the residence, Boyfriend hurled insults at Girlfriend and demanded that she leave with him. He threatened to inflict harm upon Mother if she did not stay out of their lives and attempted to grab Girlfriend as she ran upstairs. Mother continued to tell Boyfriend to leave the residence and threw several objects at Boyfriend, some of which struck Boyfriend and caused injury.

Neighbor heard the commotion and entered Mother's house. Neighbor tried to control the situation by putting his hand on Boyfriend's shoulder and telling him to calm down. Boyfriend wrestled Neighbor to the ground and placed a choke hold around his neck. Boyfriend then began punching Neighbor on the face and head.

During the skirmish between Boyfriend and Neighbor, Girlfriend started stabbing Boyfriend with a large kitchen knife. Boyfriend eventually released Neighbor, but Neighbor sustained substantial injuries. Boyfriend's injuries were serious but not life threatening.

The State brought the following charges:

1. Boyfriend for assault against Neighbor.
2. Girlfriend for assault against Boyfriend.
3. Mother for assault against Boyfriend.

What defenses, if any, might each of the charged parties reasonably assert, and what is the likely outcome of each defense?

Explain your answers fully.

Battery and assault crimes are all merged into one "assault" category. Assault is the intent to physically harm another or the intent to cause the reasonable apprehension in another that they are going to cause physical harm.

Boyfriend: Boyfriend can attempt a self-defense and voluntary intoxication claim, but he will lose. Self-defense allows a party to use the force necessary if he has a bona fide belief that it is needed to prevent harm and was not the first aggressor. Non-deadly force can be used when a party has a bona fide belief that force is necessary to stop physical harm or defense of property. Deadly force is permissible when a party has a bona fide belief that deadly force is needed to stop an attack that will cause substantial physical injury or death. A party cannot escalate a fight of nondeadly force to one with deadly force. Voluntary intoxication is a defense only to specific intent crimes (assault is specific), and in Ohio only to show the person was not physically capable of performing. Here, Neighbor was trying to control the situation by putting his hand on Boyfriend's shoulder and telling him to calm down. If Boyfriend had a bona fide belief that this was going to cause harm he may have been able to use non-deadly force. Although it is not reasonable for Boyfriend to believe he needed to use force to ward off Neighbor's attack because he just touched his shoulder and told him to calm down. However, Boyfriend also escalated the fight to deadly force by wrestling him to the ground and placing him in a chokehold and punching him in the face and head. Also, Boyfriend was clearly physically capable even if he was drunk because of his fighting, driving, and swinging the bat. Thus, Boyfriend's self-defense and involuntary intoxication claims will fail.

Girlfriend: Girlfriend can assert the defense called defense of others and will win. Defense of others allows a party to use the force they reasonably believe the person they're protecting would be permitted to use. In Ohio, a party using this defense must be correct in that the party they are defending was not the initial aggressor and would be permitted to use force. A party can only use the force reasonably necessary for the situation. Non-deadly force can be used when a party has a bona fide belief that force is necessary to stop physical harm or defense of property. Deadly force is permissible when a party has a bona fide belief that deadly force is needed to stop an attack that will cause substantial physical injury or death. Here, Girlfriend stabbed Boyfriend with a kitchen knife while he was choking and punching Neighbor in the face. This is obviously deadly force because she used a knife. She was justified in protecting Neighbor because Neighbor was not the first aggressor because he simply placed his hand on Boyfriend and told him to calm down. Boyfriend then wrestled Neighbor to the ground and placed a chokehold on Neighbor and started punching him in the face and head. Boyfriend was using deadly force because it was likely to cause substantial physical injury to Neighbor, or even death if he choked him to death. Neighbor even sustained substantial injuries. Thus, Girlfriend was justified in using deadly force to stop Boyfriend and will not be guilty of assault.

Mother: Mother can assert defense of property and self-defense claims. The elements for self-defense are the same as above. Defense of property allows a person to use force that is reasonably necessary to defend one's property. Deadly force cannot be used to defend property. Threat of future harm is not proper for self-defense. Here, Mother threw several objects at Boyfriend when he refused to leave the house, which was nondeadly defense of her house and was proper. He also threatened harm to Mother if she didn't stay out. The self-defense claim will not work because only future harm was threatened. Win on property defense.

QUESTION 12

Dana recently moved into a home adjacent to one owned by Neighbor in Anytown, Ohio. Dana and Neighbor's homes sit on small lots and the homes are close to each other. Neighbor, who has lived in his home for 20 years, spends much of his time in the spring and summer tending to his yard and flower garden or sitting on his backyard patio.

Dana also is a lover of the outdoors, but she prefers feeding and watching wildlife. Dana hung 10 bird feeders around her property. Unaware of the property line, she hung one bird feeder from a tree in Neighbor's yard. Dana spends her days at home and fills the bird feeders four times a day. She also pours extra seed on the ground under each feeder to attract squirrels, chipmunks, skunks, and other rodents, which she likes, to her yard.

A few months after Dana moved in, Neighbor noticed that the neighborhood had become inundated by a very large number of birds and rodents, which caused a great deal of noise and produced a large amount of excrement. During his many years living in his home, Neighbor had never before been bothered by such noise, and his porch was now continually covered with bird and rodent droppings. Additionally, the animals destroyed his garden and outdoor furniture and mice, squirrels, and raccoons had invaded his shed and garage and chewed through wiring and items stored there. Neighbor's attempts to catch the rodents and/or repel them with ultrasonic devices did not alleviate the problem. Several others living nearby also noticed the increased noise, but none had suffered the same physical damage to their property as Neighbor.

Because Neighbor was no longer able to enjoy his porch and garden, he attempted to resolve the problem with Dana. Dana refused Neighbor's pleas to decrease the number of bird feeders, stop pouring seed onto the ground, and/or decrease the frequency that she put out the feed. Neighbor contacted the city, only to learn that Dana was not violating any health or zoning ordinances.

Consequently, Neighbor has filed an action in an Ohio court. He has alleged that Dana's actions of excessively feeding the birds and other creatures constitutes a public and/or private nuisance and a trespass to his property, for which Neighbor seeks damages and/or to abate the nuisance through an injunction.

What must Neighbor show to prevail on:

1. **His nuisance claim against Dana?**
2. **His trespass claim against Dana?**

Explain your answers fully.

1. Nuisance

   There are two types of Nuisance under Ohio law: Public and Private.

   In Ohio, to prevail on a Private Nuisance Claim a person must prove that there is a (1) substantial and unjustified disruption to their use and enjoyment of their property and (2) this disruption has caused them damages. Noise and smell can constitute a disruption for a nuisance action.

   To prevail on a Private Nuisance claim, Neighbor must prove that Dana's use of birdfeeders and pouring seed on the ground has directly caused him a substantial and unjustified disruption into his use and enjoyment of his property. Neighbor has evidence that the birdfeeders and spread of birdseed have significantly increased the number of birds present in the neighborhood and that has resulted in a large amount of noise and excrement. Specifically, on Neighbor's porch, there is a large increase in the amount of excrement. Further, the birds and rodents destroyed his beloved garden and outdoor furniture as well as chewed wiring in his shed and other items. This would all constitute a substantial disruption of Neighbor's use and enjoyment of his property and he has clear proof of damages.

   Neighbor has a strong claim for Private Nuisance and can prove all the elements to prevail on the claim.

   A Public Nuisance claim requires proof that there is a (1) substantial disruption to the community as a whole; and (2) that this particular person has suffered a unique and special harm that is different from the others in the community.

   For public nuisance, it is less likely that Neighbor has a strong claim. There is evidence that the whole neighborhood has seen an increase in birds and rodents as well as the associated noise and excrement, but it is not clear that the neighborhood as a whole would find this to be a substantial disruption. Other neighbors have noticed the noise but no one else has endured the same level of physical damage. Thus, there is evidence that Neighbor's damages are unique, but he would first need to prove disruption to the community as a whole to prevail on a public nuisance action.

2. Trespass

   Under Ohio law, a trespass to land occurs when there is (1) intentional (2) physical invasion (3) onto land (4) without consent of the owner (5) by either a person or a person's property. The landowner need not prove damage to property for a trespass action. The trespasser need not have the specific intent to trespass upon the land – the intent to physically enter the land will suffice.

   Neighbor can prove a trespass claim for Dana's (1) birdfeeder placed in his tree on his property and (2) for the birdseed she places below that birdfeeder on his land. The birdfeeder is Dana's property and she hung it from the tree intentionally. Her unawareness that the tree was on neighbor's property is irrelevant to the trespass claim. Further, the birdseed placed on the ground also is her property and she intentionally placed it on neighbor's property – her ignorance of the property ownership is irrelevant. Further, Dana's personal presence on the land while hanging the birdfeeder, laying the birdseed, and refilling both will constitute a trespass as well.

   Neighbor can prevail on trespass claims for Dana personally, Dana's birdfeeder, and Dana's birdseed.

   Neighbor cannot prevail on a trespass claim for the birds and rodents that enter his property because of the birdseed. Those are wild animals - not under Dana's ownership and control - and therefore cannot constitute a trespass.

MPT 1

Downey v. Achilles Medical Device Company
(February 2020, MPT-1)

The examinee's law firm, Betts & Flores, represents Achilles Medical Device Company (AMDC) in a products liability action alleging that AMDC negligently manufactured and sold defective walkers. There currently are five named plaintiffs; the trial court has yet to rule on the plaintiffs' motion for class certification. The examinee's task involves a professional responsibility issue regarding contacts with represented persons. An investigator employed by the plaintiffs' lawyers wants to question one former AMDC employee and four current employees about the facts surrounding the Downey litigation. The investigator has not asked for permission from AMDC's counsel to do so. The examinee must address whether this investigator can speak to AMDC's current and former employees without the advance permission or presence of Betts & Flores. Second, the examinee is to analyze whether Betts & Flores attorneys can speak to current or prospective members of the plaintiffs' proposed class without the prior permission of plaintiffs' counsel. The File contains the instructional memorandum from the supervising partner, a file memorandum describing the client's concerns, and a file memorandum that summarizes the interviews of the AMDC employees. The Library contains excerpts from the Franklin Rules of Professional Conduct (identical to the ABA Model Rules of Professional Conduct), an ethics opinion from the Franklin Board of Professional Conduct, and one Franklin Court of Appeal case.

A

Memorandum
To: Hiram Betts
From: Examinee
Date: Feb. 25, 2020
Re: *Downey v. Achilles Medical Device Company*

This memo addresses the Franklin Rules of Professional Conduct (FRPC), and whether the attempts of plaintiff's lawyers to contact various employees and a former employee of AMDC are appropriate. Plaintiff's contact with some of these individuals is appropriate under the rules, but not for Elise Dunham and Penny Ellis. It will be within the rules for our firm to reach out to any potential litigant in this class action as long as they are not named by the plaintiff as a member of the class. Analysis for each individual follows.

Ron Adams

Plaintiff's contact with Ron Adams is acceptable under the FRPC. The rules specify that it is unauthorized for a lawyer to communicate about the subject of representation with a person the lawyer knows to be represented by another lawyer. Communication with agents or employees of an organization are prohibited in three situations: (1) where the agent or employee of the organization "supervises, directs, or regularly consults with the organization's lawyer concerning the matter;" (2) where the agent or employee of the organization has "authority to obligate the organization with respect to the matter;" and (3) where the agent's or employee's "act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." However, the Franklin Board of Professional Conduct Ethics Opinion 2016-12 clearly states that "counsel may communicate freely with former agents and employees of an organization without the consent of the organization's lawyer regardless of the role the agent or employee may have played in the matter. Ron Adams was in charge of the quality control department during the time the potentially defective walkers were sold, and while his actions may be in question under what created potential liability for the organization, he no longer works for AMDC. As a former employee he can be freely communicated with by the plaintiffs unless he gets his own independent attorney. If Ron gets his own attorney then plaintiff will have to communicate or get authority to communicate with Ron through his own attorney.

Any communications that Ron has with the plaintiff's attorney must still refrain from infringing on any information that would be protected by attorney-client privilege. Ron does not have this relationship with us at this time, but it did exist while he was employed at the organization.

Gus Bartholomew

Plaintiff's communication with Gus Bartholomew is acceptable under the FRPC. The three prongs of the rules regarding prohibited communications with an organization's agents or employees do not apply to Gus. Gus is the executive assistant to the president of the company. For the first prong, Gus needs to consult with the lawyer or supervise the lawyer in some meaningful way to meet the prong. While Gus does sit in on meetings, is privy to large amounts of information, and works closely with those who do make decisions, Gus has no authority in the capacity to supervise or direct with the lawyers. As to the second prong, Gus is not an agent able to bind the organization, either with actual authority or apparent authority. Gus cannot "bind the corporation" as explained in the Ethics opinion, and would not meet this prong. There could be an argument for apparent authority, in that Gus's position and exposure may create the illusion of authority and meet the second prong that way. If it were reasonable to an outsider that Gus did have the authority to bind the organization then he would meet this prong. This is unlikely to be a reasonable conclusion given the role of Gus at the organization. Finally, Gus is not an actor in the context of the litigation as he did not have an act or omission to create the liability that is the context of this suit, so contact with Gus by the Plaintiffs is acceptable under the FRPC.

However, Plaintiffs may not ask Gus about anything that would compromise attorney-client privilege. Ethics Opinion states that "if a lawyer seeking to speak with an employee or former employee has reason to believe that the employee or former employee is privy to communications protected by the attorney-client privilege, counsel must make every reasonable effort not to breach that privilege. Indeed, counsel is prohibited from asking directly or indirectly about any of those communications." Much of the information that Gus knows would be protected by that privilege. All communications with the lawyer and the president in some way passed through or around Gus. So, while plaintiffs may speak to Gus without going through our firm, they cannot ask anything that would violate attorney-client privilege.

Agnes Corlew

Agnes Corlew may be protected by apparent authority under the second prong of the FRPC rule, but it is likely that plaintiffs may communicate with Agnes. Agnes is not a decision-maker at AMDC with any authority to bind the organization in settlements. In the public relations department Agnes does not communicate directly with or direct the lawyers. Also, Agnes is not an actor such that she would fall under the third prong of the FRPC rule. However, Agnes does have a very public position where she speaks with authority to the public on decisions made at AMDC. This public holding out of authority for the organization may create the illusion of authority in the eye of outsiders sufficient to meet the apparent authority element of the second prong of the FRPC Rule. It is likely that Agnes' apparent authority will make the Plaintiff's communication with her inappropriate under the FRPC. Again, even if there is insufficient apparent authority, any content communicated will still have the protection of attorney-client privilege.

Elise Dunham

Communication with Elise Dunham is inappropriate for the plaintiffs, and any further communication will have to go through Elise's personal attorney. While Elise is not directing or supervising attorneys sufficient to reach the first prong of the FRPC rule, and she does not have either apparent or actual authority to bind the company, Elise is an actor under the third prong of the rule. This prong covers anyone whose "act or omission with the matter may be imputed to the organization for the purpose of...liability." Elise was in a position of authority over the quality control portions of the company when the potentially defective walkers were made. Her actions as agent for the organization make her an actor under the rules. The Plaintiffs may not have communications with Elise for this reason.

However, the rules also state that "if a constituent is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule." (FRPC Rule 4.2 Comment 7). Elise indicates that she has hired her own lawyer since Ms. Parks' contact. Her own lawyer may therefore authorize communications over our objections.

Penny Ellis

Penny Ellis is protected under the FRPC rule from contact by the Plaintiffs. Penny is a member of the board for AMDC. While this is not enough to prohibit communications under the first prong of the rule, as she is not directing or supervising the attorneys, she does have authority in that communication is important under the rules to look beyond merely being a board member, but to look at if there is actual direction or supervision of the legal team. More appropriately, however, Penny does have actual authority to make decisions for the company as a voting member when it comes to settlements. She has actual authority to act for the company. Penny is not an actor under the third prong, but communications are still prohibited.

Issue 2. Communicating with potential class members.

We may reach out to and communicate with potential class members. Communication is prohibited when a lawyer knows the individual contacted is represented by another lawyer. In the case of class actions, the court in *Mahoney v. Tomco Manufacturing* came to a clear conclusion on this

matter. The court states that in the case of a class action, even when the class is open and during the "opt-out" period, potential class members are not considered represented, or in an "attorney-client relationship" with counsel until they are named in the lawsuit. During the time before class certification, especially if there is an opt-out time for the class, or until the class is clearly defined, only plaintiffs named by counsel meet the high standard the court set in *Mahoney v. Tomco Manufacturing* to meet the "knowing" standard." To meet this standard there must be "actual knowledge" of the representation. Therefore, it is acceptable under the FRPC to contact any purchaser of these walkers provided they are not a named member of the current litigation.

MPT 2

In re Eli Doran (February 2020, MPT-2)

This performance test requires examinees to draft the written closing argument in support of two consolidated petitions: one to annul a marriage and one to set aside a will. The examinee's law firm represents Carol Richards, the niece and recently appointed legal guardian of Eli Doran, Carol's elderly uncle. For about two years, Eli, who has dementia, has been living in an assisted living facility operated by Paula Daws. A few months ago, Carol learned that Paula had secretly married Eli and then, almost nine months later, had prepared a will for Eli that left his entire estate to her. Although a court has determined that Eli is now legally incompetent, that determination does not address whether Eli had the capacity to consent to marry in January 2019 or whether he had testamentary capacity when he signed the will later that year. The examinee's task is to prepare a written closing argument persuading the court that the Doran-Daws marriage should be annulled based on Eli's lack of capacity to consent to marry and that the will should be set aside based on his lack of testamentary capacity at the time it was executed. The File contains the instructional memorandum, the office guidelines for drafting written closing arguments, and excerpts of the hearing testimony of Carol Richards, Paula Daws, and other witnesses. The Library contains two Franklin appellate cases, one discussing the legal capacity to consent to marry and one addressing the standard for testamentary capacity.

A

CLOSING STATEMENT

In re Eli Doran

Introduction

This case concerns our petition to annul the Jan. 15, 2019 marriage of Paula Dews and Eli Doran, and to set aside the will that was signed by Eli Doran on Oct. 7, 2019. Eli Doran did not have the capacity to consent to marriage when he married Paula Dews and did not have testamentary capacity when he signed the Oct. 7, 2019 will.

1. **Because Eli Doran's Illness Prevented Him From Consenting to Marriage, the Jan. 15, 2019 Marriage of Paula Daws and Eli Doran Should Be Annuled.**

   As claimants, we bear the burden of proving Eli Doran did not have testamentary capacity to enter into a marriage. A marriage that complies with the officiating requirements of the Franklin Uniform Marriage and Dissolution Act (FUMDA) are presumptively valid. The presumption comports with the strong public policy favoring the validity of marriage. It can only be overcome with clear and convincing evidence. Evidence is clear and convincing in a case if it establishes that it is substantially more likely than not that a party lacked capacity to consent to marriage. *In re the Estate of Carlo Mason Green*. The capacity to consent to marriage, a requirement of a valid marriage, is defined as the ability to understand the nature, effect, and consequences of marriage and its duties and responsibilities. Each party to the marriage must freely intend to enter the marital relationship and understand what marriage is. Capacity is measured at the time of the marriage. *In re the Estate of Carlo Mason Green*.

   In *In re the Estate of Carlo Mason Green*, Mason, who had terminal cancer, had taken medications to control the pain from the cancer. On the morning of Oct. 10, Mason and Leslie Beck discussed treatment regarding the cancer and hospice care in her home. Mason was alert and participated in the conversation. On that same day, the respondent, Michael Green, arrived at the hospital with a marriage license. Mason signed the marriage application and the minister married Mason and Green. Mason's oncologist testified that the prescribed pain medication has a high probability of creating mental changes in any patient. These changes could interfere with the patient's thought processes, including the decision to marry. He also stated that patients can and do have periods of lucidity and alertness. The doctor believed that on the morning of Oct. 10, Mason had the ability to communicate and make decisions regarding her care. Mason and Green had been engaged to be married for two years. They had planned for marriage and a life together. They had discussed where to live in retirement. Mason broke off the engagement when she moved to another town, but contacted him again once the cancer returned. The evidence in *In re the Estate of Carlo Mason Green* supported the trial court's finding that Mason had the capacity to consent to marriage. The court found that Mason understood what marriage was and what it involved.

   On the contrary, In *In re Marriage of Simon*, the court annulled the marriage of Henry and Nancy Simon after Henry married Nancy when she lived in a residential facility. Prior to the marriage, Nancy suffered from four strokes that impacted her ability to make decisions. Further, Simon and Henry knew each other only for a few weeks prior to Nancy's fourth stroke. Henry was a medical technician employed at the facility where Nancy lived and he administered a few treatments to her before her final stroke. Prior to this care, the two never had a romantic relationship. The court found that not only was Nancy incapable of consenting to marriage but at the time of the marriage, she had no understanding of what marriage was.

   Similar to *Simon*, Paula and Eli met each other only because Paula was caring for him because he was unable to do so on his own. Paula did Eli's laundry, cooked him meals, and provided a clean house for Eli. Prior to this care, the two had never had a romantic relationship prior to Eli moving into the home. They only knew each other because of the care Paula provided to Eli. When Eli first moved into the home, Carol Roberts told Paula that Eli had serious memory loss and could no longer make his own decisions. Paula was aware and on notice that he was suffering from memory loss.

Paula was not the only person Eli asked to marry. Carol Roberts testified that once Eli had asked Vera, his cleaning lady and cook, to marry him. You also heard from Dr. Bush, Eli's clinical psychologist. She states that Eli associates marriage with being cared for. Paula provides a clean home, three meals a day, has a laundry service, and provides medications. On Jan. 14, 2019, Eli stated to Paula as she was giving him his laundry, "You take good care of me. We should get married." This is consistent with Dr. Bush's belief that Eli Doran equates marriage with being cared for.

You heard from Rev. Joseph Simms on behalf of the plaintiff. He was the minister that married Paula and Eli. He stated that he would not marry the two if he doubted Eli's mental capacity. He said Eli seemed to be very aware that he was getting married. However, the reverend had only exchanged a few pleasantries with Eli. Eli said "he was living at Paula's and that she was taking good care of him and that he loved her." When asked why he wanted to marry Paula, he said "he loved her and the way she cared for him." Rev. Joseph Simms has no training regarding cognitive functioning. Although he states he's been counseled on how to be aware of conditions associated with aging, he did not conduct any assessment on Eli's cognitive abilities and only spoke with him on two short occasions. One being when they met and exchanged only pleasantries, and the second being when Paula and Eli were married. Rev. Joseph Simms does not have the expertise needed to determine whether Eli was able to consent to the marriage. Even if he was able to determine Eli's cognitive state, he had only spent a minimal amount of time with Eli. He had no other information regarding Eli's health history and only based his opinion on the brief interaction he had with Eli.

Contrary to *In re the Estate of Carlo Mason Green*, Eli's doctor, Dr. Bush doubts that he has moments of lucidity and that if he does, it's not the same as having the ability to exercise judgment. You heard from Dr. Anita Bush on behalf of Carol Roberts, guardian of Eli Doran. She has a Ph.D. in clinical psychology and practices as a forensic clinical psychologist. She works with patients who have cognitive or mental disorders. She knows Eli Doran because he was referred to her by his family doctor, who asked to assess him for cognitive functioning. She stated that Mr. Doran was not oriented on time and did not know what day it was or year it was. He also stated that he lived at home with his wife Janet, even though she passed away two years before. Later in the same interview, he stated he was married to Vera Wilson. In fact, he was never married to Vera. Dr. Bush also reviewed Eli's past medical history and discovered that about three years ago he underwent a test regarding his cognitive state and scored a 21. Someone with normal cognitive functioning should score at least a 23. Two years ago, Mr. Doran's score dropped to a 19. He did not know how to pay a bill, call 911 in case of emergency, or verbalize the understanding of a will. Although Dr. Bush only saw Eli Doran on two occasions, Dr. Bush has her Ph.D. in clinical psychology and had Eli's full medical history. Further, Eli's primary physician referred him to Dr. Bush because of her expertise. Along with Dr. Bush's expertise and review of Eli's past history, she gave two assessments of Eli's cognitive functioning. Also, Dr. Bush interacted with Carol Roberts, who knew of Eli's behavior prior to getting sick and during his illness. Carol is able to give an accurate description of how the illness has changed Eli's everyday behavior contrary to Paula and the reverend.

2. **Because Eli Doran Lacked Testamentary Capacity When He Executed Will, the Will Signed by Eli Doran on Oct. 7, 2019, Should Be Set Aside.**

   As claimants, we bear the burden of proving that Mr. Doran lacked testamentary capacity when he executed his will. We must prove our claim by a preponderance of the evidence. The law requires that the testator have testamentary capacity. That means that the testator must, at the time of executing the will, be capable of knowing the nature of the act he is about to perform, the nature and extent of his property, the natural objects of his bounty, and his relation to them. *In re the Estate of Dade*. A will executed by a testator that lacks capacity is void. The time for measuring capacity is at the time the instrument is executed.

   Under *In Re the Estate of Tarr*, a determination of legal incapacity along is not sufficient to find that the lack of testamentary capacity. Here, you found that Eli did not have testamentary capacity.

However, a determination of incompetence is a legal finding that a person lacks the mental ability to understand problems and make decisions. Dr. Bush saw Mr. Doran again on June 21, 2019. This was a few months before the signing of the will of Oct. 7, 2019. During the assessment, Eli told Dr. Bush that he lived with his wife Janet and that he would soon have to visit his parents. His parents also are deceased. Dr. Bush determined his memory was even worse at this assessment. Dr. Bush stated that Eli believed he was still married to his deceased wife, Janet, and that he would have to visit his deceased parents. Further, he did not know who his niece was. Carol Roberts had been taking care of him for years up to this point. Assessments of credibility are critical to determinations of testamentary capacity. As discussed earlier, Eli Doran's assessments prior to the will indicated that he did not have the cognitive capacity of a normal functioning individual.

You head from Mary Daws, a witness to the signing of the will. When Mary Daws asked Eli if he wanted his mother to have all of his items when he died, he stated, "yes, she takes good care of me." This goes towards Dr. Bush's indication that Eli equates marriage with being taken care of. This does not demonstrate that he knew where his property was going. Further, a testator must know the nature of his family relationships at the time of execution and Eli did not know his niece, Carol. He was unaware of what property he had because he did not manage his finances. According to Dr. Bush, he did not know what the meaning of a will was. Therefore, he did not satisfy the four elements of disposing a will.

Conclusion

We respectfully ask that you annul the Jan. 15, 2019 marriage between Eli Doran and Paula Daws because Eli Doran did not have the capacity to consent to marriage. We have proven by clear and convincing evidence that Eli lacked the capacity to consent to a marriage because of his severe dementia.

We respectfully ask that you set aside the will signed by Eli Doran on Oct. 7th 2019. We have proven that Eli did not have testamentary capacity when he signed the Oct. 7, 2019 will.

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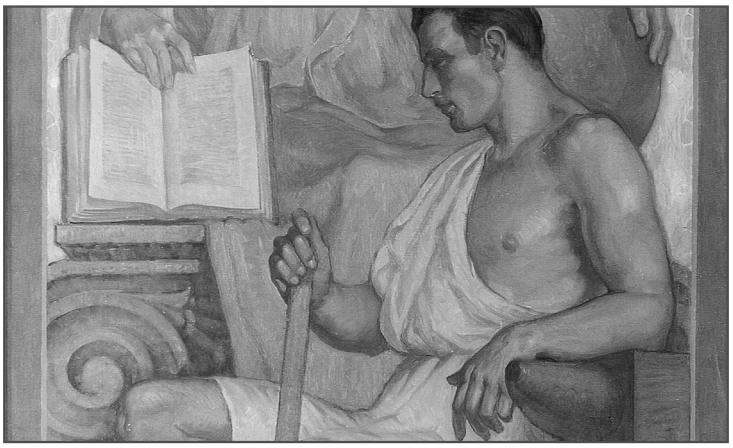

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Detail from the Thomas J. Moyer Ohio Judicial Center Law Library Reading Room Mural 7, which depicts the availability of knowledge in printed books.

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