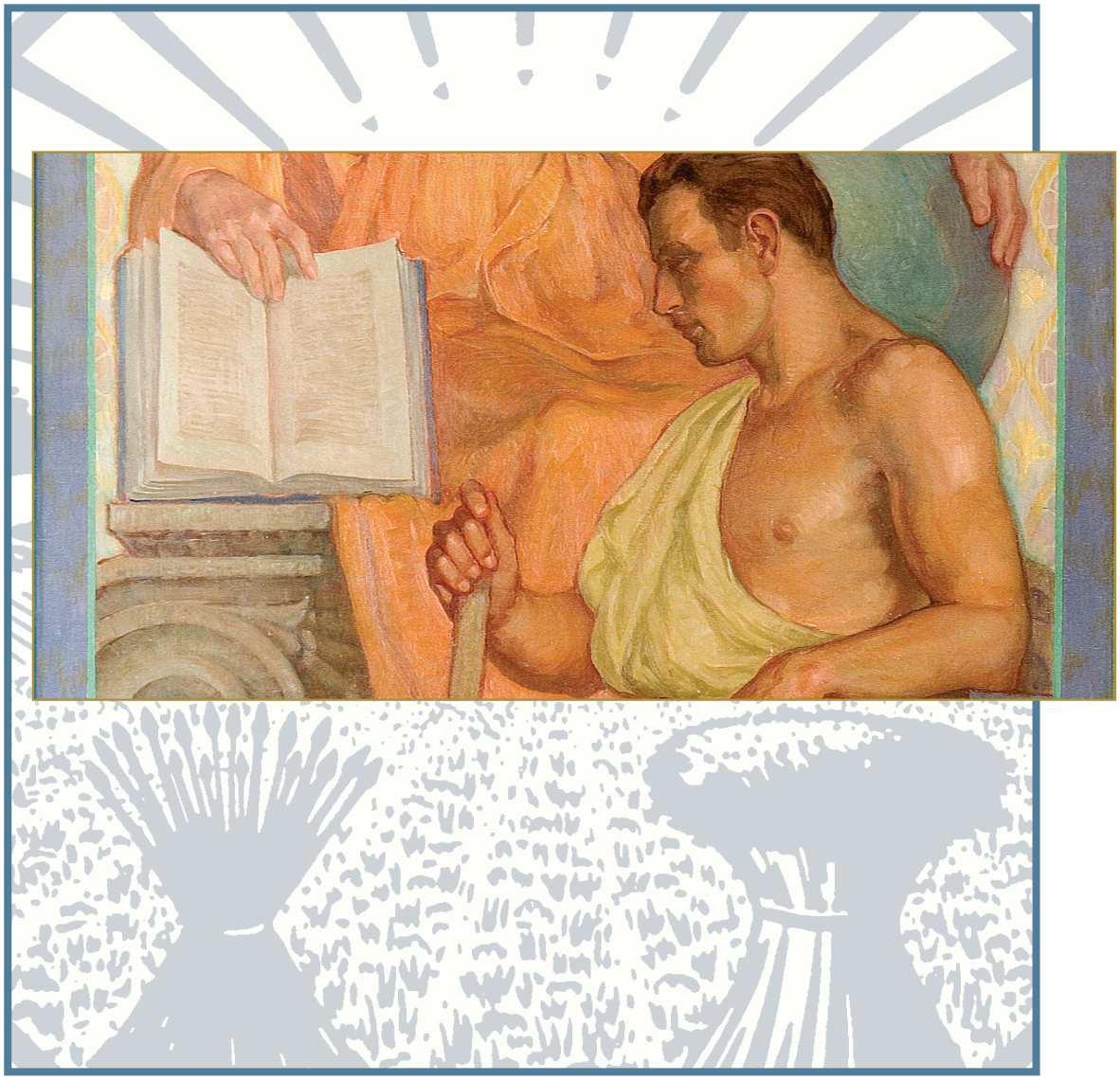
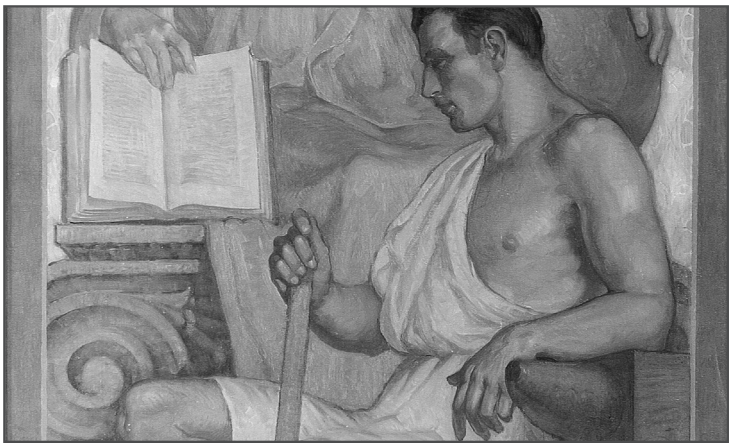
THE SUPREME COURT *of* OHIO

February 2018 Ohio Bar Examination

Essay Questions & Selected Answers

Multistate Performance Test Summaries & Selected Answers





On the cover:

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

The Supreme Court *of* Ohio

FEBRUARY 2018 OHIO BAR EXAMINATION

Essay Questions & Selected Answers

Multistate Performance Test Summaries & Selected Answers

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OHIO BAR EXAMINATION

FEBRUARY 2018 OHIO BAR EXAMINATION

Essay Questions and Selected Answers

MPT Summaries and Selected Answers

The February 2018 Ohio Bar Examination contained 12 essay questions, presented to the applicants in sets of two. Applicants were given one hour to answer both questions in a set. The length of each answer was restricted to the front and back of an answer sheet.

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

The following pages contain the essay questions given during the February 2018 exam, along with the NCBE's summaries of the two MPT items given on the exam. This booklet also contains some actual applicant answers to the essay and MPT questions.

The essay and MPT answers published in this booklet merely illustrate above-average performance by their authors and, therefore, are not necessarily complete or correct in every respect. They were written by applicants who passed the exam and consented to the publication of their answers. See Gov.Bar R. I(5)(C). The answers selected for publication were 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 answers.

Copies of the complete February 2018 MPTs and their corresponding point sheets are available from the NCBE. Check the NCBE's website at ncbex.org for information about ordering.

QUESTION 1

Q

Paul sued Dan in the Franklin County, Ohio, Common Pleas Court for damages resulting from a car accident. Paul did not include a jury demand on his complaint. Dan timely filed an answer to the complaint and in the caption of his answer, he wrote "jury demand endorsed hereon." In the answer, Dan also demanded a jury of 12 to hear the case. Paul moved to strike Dan's jury demand, arguing that only the plaintiff could demand a jury, but, if the trial court allowed the jury, Paul agreed that there should be 12 jurors. The trial court denied the motion to strike.

Before voir dire began, the trial court gave a brief introduction of the case to the jury pool. The judge described the claims and defenses of the parties. Dan objected to the judge's introduction. The court overruled Dan's objection. During voir dire, neither party challenged any prospective jurors for cause, and both parties passed on their first peremptory challenge. The trial court then announced that jury selection was complete and seated a jury of 12 people. Both Paul and Dan objected to the seating of the jury, and the court overruled their objections.

Paul then presented his opening statement, which consisted of a single sentence, "You should rule in favor of Paul." At the conclusion of the opening statement, Dan moved for a directed verdict. The court granted the motion.

Did the trial court rule correctly regarding:

1. Paul's motion to strike Dan's jury demand and request for the 12 jurors?

2. Dan's objection to the judge's introductory comments to the jury?

3. Paul and Dan's objections to the judge's ruling ending voir dire?

4. Dan's motion for a directed verdict?

Explain each of your answers fully.

A

1. The court incorrectly denied Paul's motion to strike. In Ohio, either party may demand a jury trial if the demand is made within 14 days of the close of last pleading in which a jury-triable issue arose. However, to demand a jury trial, the demand must be included in the complaint or answer, not simply in the caption. Here, Dan timely demanded the jury trial in his answer to Paul's complaint. However, Dan's demand was improperly made. Dan included the demand for a jury trial only in his caption and did not include a proper demand within the complaint. Thus, because the demand was improperly made, the motion to strike should have been granted.

   Further, in Ohio, the required number of jurors is 8. However, here, Dan ostensibly demanded a jury of 12. Thus, the demand for 12 jurors was improper.

2. The court properly overruled Dan's objection. The court is allowed to conduct voir dire by presenting the basic facts of the case, including the claims and defenses pled. The court may also question the jurors on its own. Here, the court properly gave the jurors the basic facts of the case. Further, there is no indication the court acted in an impartial manner. Because the court properly instructed the jury on the case, the objection was properly overruled.

3. The court properly overruled the objections to the seating of the jury as to the peremptory challenges, but not as to the size of the jury. In Ohio, each party may challenge a juror for cause, so long as the challenge is permissible and made in good faith. Further, each party may exercise its peremptory challenges. Peremptory challenges must be made by at least one party in the first round, or the challenges are waived. Here, neither Paul nor Dan chose to use their peremptory challenges in the first round, and thus waived the remaining challenges. However, the court improperly seated 12 jurors. As noted above, the jury size should have been 8. Thus, the court should have sustained an objection as to the size of the jury seated.

4. The court properly granted Dan's motion for a directed verdict. A party may move for a directed verdict after opening statements, at the close of the opposing party's evidence, or at the close of all evidence. When there is a motion for a directed verdict, the court will determine if the evidence is viewed in the light most favorable to the nonmoving party and if reasonable minds can come to but one conclusion. Here, Dan timely moved for a directed verdict at the close of Paul's opening statement. Because Paul has the burden of proving his prima facie case, the directed verdict motion can be made after opening statements. Further, Paul presented no facts, allegations, or basic statements to support his claim. Thus, the only evidence available at the time was Paul's statement that the jury should rule in favor of Paul. Even when such a statement is viewed in the light most favorable to Paul, reasonable minds can conclude only that Paul has failed to carry his burden. Thus, the motion was properly granted.

QUESTION 2

1. Daniel owns and operates several newspapers in the United States. In 1978, he purchased "The Rag," the local newspaper in Anytown, Ohio (Anytown). In January 1979, Daniel decided to move his business headquarters and family to Anytown. On Feb. 1, 1979, Daniel and his wife, Wendy, purchased their marital residence located in Anytown, Ohio (Home). At that time, they jointly took title to Home by a duly recorded estate in the entireties with survivorship rights deed.

   Over the years, Daniel routinely published unflattering stories in The Rag about Mike, the former Mayor of Anytown, calling Mike a crook and referring to him as "the politician who ripped off Anytown."

   In 2016, Daniel and Mike ran into each other at a local festival and got into an argument about the stories. As the argument escalated, Daniel suddenly hit Mike in the face, knocking him unconscious and causing him injury.

   Mike instituted an action based on the incident against Daniel in the proper Ohio court of common pleas and obtained a judgment against Daniel for $100,000. Mike then properly recorded the judgment in the county where Home was located. Mike has filed an action to foreclose on the judgment lien.

   How should the court rule on Mike's action to foreclose on the judgment lien? Discuss fully.

2. Owen owned two adjacent parcels, Lot A and Lot B, in Anytown, Ohio. In 2013, Owen entered into a purchase agreement (Agreement) with Paul for the sale of Lot B. Provision 3 of Agreement provided that Owen, or any future owner of Lot A, could place a trash dumpster on Lot B for the benefit of Lot A.

   Shortly thereafter, Owen transferred ownership of Lot B to Paul by general warranty deed. The deed contained language that it was subject to Provision 3 of Agreement and that Agreement was incorporated into and made a part of the deed by reference. The deed and Agreement were duly recorded in the appropriate county.

   In March 2017, Paul sold Lot B to City by limited warranty deed. The limited warranty deed provided that the conveyance was made subject to, among other things, easements, conditions, and restrictions of record. Once City acquired title, it removed Owen's dumpster and commenced construction of a park. Owen objected.

   City filed a complaint in the proper court to quiet title, challenging Provision 3 of Agreement as an unlawful restraint on alienation of City's fee simple title. Owen filed an answer and counterclaim for declaratory judgment, seeking a declaration that Provision 3 is enforceable and binding on City.

   How should the court rule on City's complaint and Owen's counterclaim? Discuss fully. Do not discuss the rule against perpetuities.

A

1 At issue is whether a lien can be enforced against a marital asset that was a deed as a tenancy by the entirety (TBE). Ohio currently does not allow for the conveyance of TBEs, but will allow a TBE to be grandfathered in and recognized if it was validly granted. A valid TBE in Ohio must have been granted between 1972 and 1985. To be valid, a TBE must have been conveyed to a married couple and included express language that the ownership was a tenancy by the entirety with rights of survivorship. In a TBE, each spouse owns an undivided one-half interest in the marital property. A lienholder of only one spouse may not attach their lien against the marital property, because of the other spouse's interest. Only lienholders of both spouses may attach a lien against marital property. Here, although Ohio does not currently allow for the conveyance of TBEs, the TBE of Daniel and Wendy will be grandfathered in and recognized, because it is valid. Daniel and Wendy's TBE is valid, because it was granted in 1979, when Ohio recognized TBEs. The marital residence, Home, was conveyed to Daniel and Wendy as a married couple and included express language that it was taken "in the entireties with survivorship rights." Thus, Daniel and Wendy each own one half undivided interest in Home, as marital property. Mike cannot attach his judgment against the Home, because he is only a lienholder of Daniel, as opposed to Daniel and Wendy. In conclusion, the court should deny Mike's action to foreclose on the judgment lien.

2a At issue is whether a restrictive covenant is a restraint on alienation. Courts in general oppose restraints on alienation, because they favor the transferability and usage of land. As such, a total restraint on the usage or transferability of land will be held invalid as a restraint on alienation. Conversely, only partial restraints on the usage or transfer of property will be considered valid. Covenants make land possessors either do something or refrain from doing something. Covenants are not total restraints on alienation. Here, there is not a total restraint on alienation, because the City is only subject to a covenant. There is a covenant in place because the City is being forced to do something. The City is being forced to do something because they must place a dumpster on their lot for the benefit of the adjacent lot. The covenant is not a total restraint on alienation because the City is still free to use the remaining portion of Lot B for whatever it so chooses, such as the construction of a park. Additionally, the covenant is not a total restraint on alienation because the covenant will not prevent the City from selling or leasing the property to another if they so choose. In conclusion, the court should dismiss the City's complaint.

2b At issue is whether successors in interest are bound by a promise of the originally contracting parties. For a covenant to run with the land, there must be privity, both horizontal and vertical, intent, notice and the covenant must touch and concern the land. Horizontal privity exists if the parties have a relationship outside of the original promise. Notice can be actual, inquiry, or record. Covenants touch and concern the land when one of the lands is benefited and the other is burdened. Here, there is horizontal privity, because Owen and the City have the relationship of grantor and grantee, outside of the original promise. There is intent to run, established by the language of the deed in the Owen to Paul transfer to bind future owners. There is notice, because the Owen-to-Paul transfer was recorded. The covenant touches and concerns the land, because Lot B is burdened by and Lot A is benefitted by the placement of the dumpster. In conclusion, the court should grant Owen's declaratory judgment.

QUESTION 3

Lawyer was engaged by Investor, Banker, Executive, and Accountant (collectively, Clients) to organize an Ohio corporation to be named "Best Candy, Inc." (Company). Clients directed Lawyer to prepare and file the Articles of Incorporation (Articles) so that Company could conduct any lawful business and would be authorized to issue 400 shares of Common Stock. There are no other provisions in the Articles. Lawyer took all appropriate steps to validly establish Company.

After the Articles were filed, Clients told Lawyer to amend the Articles so that Company will be able to authorize an additional 100 shares of stock and so that the Board of Directors (Board) would be authorized to determine the rights and privileges to be granted to the holders of those shares. As requested, Lawyer filed an Amendment to the Articles to authorize an additional 100 shares of stock and to grant Board the right to set the terms for those shares.

Thereafter, Company properly issued 100 shares of Common Stock to each of Clients and also elected all of Clients to be members of Board.

Board then elected Executive as President, Investor as Vice President/Secretary, and Accountant as Treasurer (collectively, Directors). The following corporate actions were taken at meetings that were properly noticed, called, and held:

1. At a Board meeting where Investor, Executive, and Accountant were present, they unanimously voted to issue 100 shares of Company stock to Manufacturer. The three Directors voted to designate the stock so issued as "Series A Preferred Shares" (Preferred Shares). Preferred Shares would have a right to an annual dividend of $10.00 per share before dividends were paid to Common Stock. Except for the dividend priority, Preferred Shares had all of the same rights as Common Stock.

2. At a Board Meeting, all Directors voted to amend Company's Articles, changing Company's name to "Best Chocolate Candy, Inc."

3. At a Shareholders meeting with all of the shareholders present, a resolution was made by Executive to amend the Articles to provide that Company would indemnify its directors to the extent permitted by law against any claims that may be asserted against them as a result of any act or omission taken by them on behalf of Company. The 300 shares owned by Executive, Investor, and Accountant, voted in favor of the resolution, and the 200 shares owned by Banker and Manufacturer voted in opposition to the resolution.

4. At a Shareholders meeting, Manufacturer presented a proposed Merger Agreement whereunder Candy USA, Inc. would acquire all of the stock of Company in exchange for the same number of shares of Candy USA, Inc. The 300 shares owned by Investor, Banker, and Manufacturer voted in favor of the merger, and the 200 shares owned by Executive and Accountant voted to oppose the merger. The Merger Agreement contained all of the required statutory terms, was properly signed by the officers of Company and Candy USA, Inc., and stated that it was effective on the date it was signed. Immediately after the Merger Agreement was signed, a copy was sent to all of the shareholders. Thirty days after the effective date of the merger, Executive and Accountant filed a lawsuit to set aside the merger.

A. Was the Amendment to the Articles by Lawyer regarding the issuance of additional shares valid?

B. Was the Amendment to the Articles by the Board authorizing the Preferred Shares valid?

C. Was the Amendment to the Articles by the Board changing Company's name valid?

D. Was the Amendment to the Articles by the shareholders providing for indemnification of directors valid?

E. Was the Merger Agreement between Company and Candy USA, Inc. valid?

F. Is the lawsuit by Executive and Accountant to set aside the merger likely to be successful?

Explain your answers fully.

A

A. The Amendment to the Articles of Incorporation by Lawyer to authorize additional shares of stock was valid. Under corporations law, a quorum at a shareholder meeting can authorize changes to the Articles of Incorporation. Here, the company had no shareholders as the Common Stock had not been issued. Because there were no shareholders to make the determination, and no Board of Directors had been established, the Amendment requested by the promoters of the corporation, the Clients, was proper. Therefore, the Amendment to add 100 shares of Common Stock by Lawyer was proper.

B. The Amendment to the Articles of Incorporation was proper. As stated previously, a quorum of shareholders is necessary for Amendments to the Articles of Incorporation. A quorum of shareholders generally consists of three-fourths of all shareholders in the corporation. Here, the shares had already been designated as shares that the Board of Directors were authorized to classify and grant. The number of Directors at the meeting, three out of four, was the required amount for a quorum, and the Directors who attended the meeting voted unanimously to designate the stock as preferred with the right to a dividend. Therefore, the Amendment to the Articles of Incorporation to distribute the preferred stock was valid.

C. The Amendment to change the company's name was valid. Under Ohio law, a corporation's name must include the designation incorporated, corporation, or similar; and must not be the same as any other legal entity in the state. Here, the name it was changed to did include the designation Inc. Also, Lawyer would have done an appropriate search at the secretary of state's office to determine that the name "Best Chocolate Candy, Inc." was not already taken. Therefore, the name change was valid.

D. The Amendment for the indemnification of the directors was not valid. Under corporate law, a company may choose to indemnify the acts of the corporate officers and acts done on behalf of the corporation. This Amendment could only be approved through a unanimous vote of the shareholders. Here, there was no need for a quorum to be present because all shareholders were there. The resolution made was not adopted by a unanimous vote of the shareholders, only 300 out of 500, and was not proper. Therefore, the Amendment for the indemnification of the directors was not valid.

E. The Merger Agreement between Company and Candy USA, Inc. was not valid. Under corporate law, a sale of the company and all of its assets can only be approved by a unanimous vote of the shareholders. Here, only 300 of the 500 shares voted for the merger. The merger constituted a sale of all of the stock of the company, which would include all of its current assets. Therefore, the merger agreement was not valid.

F. The lawsuit to set aside the merger will not be successful. Under corporate law, a lawsuit to set aside a merger would have to have been made prior to the effective date of the merger. Here, Executive and Accountant brought the lawsuit thirty days after the effective date of the merger. Therefore, this lawsuit to set aside the merger was untimely and would be unsuccessful.

QUESTION 4

Doug recently moved into the home adjacent to the backyard of a home owned by Paige in Anytown, Ohio. Because he was concerned about several break-ins in the area, Doug installed alarms, security cameras, and security lights inside and outside his home. Although he had no shooting experience or training, Doug also bought a shotgun to defend himself and his home.

Many of Doug's security lights were activated by motion sensors, but several were flood lights that remained illuminated from dusk until dawn. Some of the flood lights shine brightly throughout the night into the windows of Paige's two bedrooms on the second floor. Despite buying new shades for each window, Paige could not keep the lights from shining into her home. Paige discussed the problem with Doug, but he refused to adjust the flood lights. Paige could not sleep in either bedroom so she eventually decided to sleep in her first-floor living room at the front of her house.

In the kitchen at the back of her house, Paige opened her curtains one morning and noticed that several of Doug's security cameras seemed to be directed into her house. Fearing that she was being watched and recorded by Doug, Paige again approached Doug, who told her that he had noticed, based on his recordings, that they watch some of the same television programs. Paige now felt like a prisoner in her own home. She no longer sat out on her back deck or in her kitchen and felt compelled to keep the curtains on all of her back windows closed at all times.

More significantly, Doug frequently fired his shotgun whenever passing motorists or animals activated his motion sensor lights. On several occasions, empty shotgun shells landed in Paige's yard. No one has yet been injured, but Paige became terrified to go outside her house at night, fearing that she might activate the sensor lights and be shot.

Paige has also been kept awake by an overwhelming smell of skunks that have sprayed under her back deck. The smell lingered for hours some nights, making Paige ill. This was never a problem before Doug installed the lights and started firing his gun, and Paige noticed the smell immediately each time she heard gunfire and/or saw a light turn on.

Although Doug's security measures do not violate any criminal or zoning laws, he has refused Paige's repeated pleas to address her concerns, so Paige wants to file a tort action in an Ohio court against Doug.

What tort theories, if any, would provide Paige with a viable cause of action regarding:

A. The security lights?

B. The security cameras?

C. The gunshots?

Explain each fully.

Lights

Paige can file an action for private nuisance for the lights. Paige must show Doug's conduct resulted in a substantial and unreasonable interference with her right to use and enjoy her property. Substantial interference is annoying, offensive, or inconvenient to a person of ordinary sensibilities. It is not substantial if the plaintiff is hypersensitive or uses the property for a specialized use. Interference is unreasonable if the burden on the plaintiff outweighs the utility to the defendant. Here, Doug's conduct would annoy an ordinary person with the flood lights and motion sensor lights illuminating both of their bedrooms from dusk until dawn. The conduct is unreasonable as the utility of the lights in their current positions is slight as compared with Paige's inability to sleep in her bedrooms anymore. Paige will likely prevail in her nuisance claim, leading to an injunction at least as to the flood lights.

Security Cameras

Paige can file an action against Doug for intrusion into seclusion. Paige must show that Doug is intruding into her private seclusion and that the intrusion would cause mental suffering, shame, humiliation, or outrage to a person of ordinary sensibilities. Paige's kitchen in her home, at the back of her house, is a private area. Doug's cameras pointing into the kitchen, along with his comments that they watch the same TV shows, is likely to cause an ordinary person to suffer some shame or outrage. Paige does not need to show damages for her claim, and she is likely to succeed.

Paige can file an action for IIED, but she is unlikely to prevail. Paige would need to show Doug engaged in extreme and outrageous conduct that intentionally or recklessly causes severe emotional distress. Extreme and outrageous conduct is conduct that transcends all bounds of decency. Here, Doug's conduct would not likely be extreme and outrageous, but could become so due to its continuous nature. Further, there is little indication that Doug is intentionally or even recklessly causing Paige's severe emotional distress. Finally, Paige is likely suffering emotional distress resulting in some form of agoraphobia.

Paige can file a nuisance claim against Doug for the cameras. The question would be whether Doug's use of the camera substantially and unreasonably interferes with Paige's right to use and enjoy her property. The camera placement is likely offensive to an ordinary person. Further, the utility is likely outweighed by the burden on Paige given she can no longer sit on her back porch. The court may not favor such a claim for something like a camera rather than a more traditional intrusion (smoke or noise).

Shotgun Shooting

Paige can file an action for trespass to land for the shotgun shells. Trespass to land requires a tangible invasion of the plaintiff's real property. The act producing the invasion must be intentional. Here, there is no disputing that shotgun shells end up on Paige's property. Further, Doug intentionally shoots the shotgun, causing the shells to land on the property. Paige should succeed on her claim, but will likely recover only nominal damages.

Paige can file an IIED claim against Doug for shooting the shotgun. Shooting a gun whenever a light turns on is likely extreme and outrageous and has caused severe emotion distress. Paige is likely to recover for IIED.

Paige can file a nuisance action for the shooting. Shotguns are very loud, annoying, and scary to an ordinary person. There is no utility for random shooting. Paige is likely to recover and get an injunction.

Paige likely has no claim for the skunk smell as causation is likely not provable.

Paige is not likely to prevail on an assault claim for the shotgun. She would need to show Doug intentionally caused a reasonable apprehension of an immediate battery. There are no facts to support a reasonable apprehension of an *immediate* battery for Paige.

QUESTION 5

Tim became an assistant prosecuting attorney in Central County, Ohio, immediately following law school. He spent 10 years in the criminal division of that office, where he exclusively prosecuted criminal cases. He left to open his own law practice representing injured plaintiffs in personal injury actions.

Tim utilized social networking and word of mouth directed to friends and family, asking all to "pass the word around that I have opened a solo practice specializing in personal injury law."

Tim's sister, Clara, worked as an emergency room admitting clerk at the local hospital. Whenever she admitted a patient who appeared to be the victim of another's wrongdoing, Clara gave the patient Tim's business card and suggested that the patient talk to her brother about filing a lawsuit. Each time Tim was retained by a client referred by Clara, Tim took Clara out to dinner and gave her a $500 gift certificate.

One referral was Rex, who suffered a serious injury when struck by heavy equipment on a construction site at Fun Park, a local amusement park. Tim filed a personal injury lawsuit on Rex's behalf against Fun Park. Fun Park's attorneys promptly filed an answer to the complaint. Tim and the attorney for Fun Park agreed that Tim would take the deposition of Fun Park's Chief Financial Officer (CFO) within the next 90 days.

Tim's brother-in-law, Ben, had a season pass to Fun Park. Two weeks before Rex hired Tim, Ben invited Tim to join him at an exclusive event at Fun Park. The event took place shortly after Tim agreed to represent Rex. The Fun Park CFO led a tour and made a presentation. During the event, Tim declined to wear a name tag and avoided introducing himself. However, he asked the CFO several questions about Fun Park's finances and made some notes about his responses.

Which Rules of Professional Conduct, if any, has Tim violated?

Answer according to the Ohio Rules of Professional Conduct. It is not necessary to recite rules by number, but explain fully how particular conduct violates particular rules.

A

Lawyers are governed by the Ohio Rules of Professional Conduct ("Rules"). A lawyer is always under the obligation to conform to the Rules even when he is not at work.

1. At issue is whether in-person solicitation is permitted and, if not, whether intermediaries may be used to avoid the Rules. Lawyers may not solicit work in person unless the solicitation is to family members or other lawyers. Lawyers may not use intermediaries to violate the rules. Here, Tim would be allowed to tell his family in person that he has opened a solo practice and is seeking work. However, Tim's action of using his family to "pass the word around" is a violation of the Rules because he is using his family as an intermediary to violate the Rules concerning in-person solicitation. In conclusion, Tim violated the Rules when he told his family to spread the word about his new practice.
2. At issue is whether lawyers are allowed to say that they specialize. For lawyers in Ohio to say that they specialize in an area of law, they must be approved by the Commission on Certification of Attorneys as Specialists. Here, Tim is saying that he is specializing in personal injury law, so he must have undergone the process to be approved as a specialized attorney. There is nothing in the facts to indicate that Tim has undertaken such action. In conclusion, Tim violated the Rules when he said that he specializes in personal injury.
3. At issue is whether lawyers may use referrals. Lawyers are not allowed to receive a referral and must not provide anything in exchange for a referral. Here, Tim has received a referral, because his sister Clara is suggesting to patients that they talk to Tim to file a lawsuit. Tim is providing a benefit in exchange for the referral, because he is taking Clara out to dinner and giving her a $500 gift certificate each time Tim retained a client referred by Clara. In conclusion, Tim violated the Rules when he accepted the referral from Clara and gave her a $500 gift certificate.
4. At issue is what qualifies as competent representation. A lawyer must provide competent representation to his client. Competent representation includes knowing deadlines and time restraints of your jurisdiction. Here, Tim did not provide competent representation because he failed to follow jurisdictional deadlines. Tim failed to follow jurisdictional deadlines, because he agreed with opposing counsel to take the deposition of the defendant within 90 days. Ninety days is past the deadline. In conclusion, Tim's action to complete a deposition within 90 days violated the Rules.
5. At issue are the duties imposed upon a lawyer when engaging with adverse witnesses. A lawyer may not disguise themselves or hide their identity when interacting with an adverse witness. A lawyer may not interact with a witness when he knows they are represented by counsel without first getting approval from counsel. A lawyer has a duty to not engage in dishonest conduct. Here, Tim hid his identity when he interacted with the Fun Park CFO as an adverse witness because he declined to wear a name tag. The interaction with the CFO was not harmless either, because Tim asked several questions relevant to the case including inquiries of the defendant's finances. Tim also interacted with the CFO without getting approval from opposing counsel, even though he knew the CFO was represented. Tim knew the CFO was represented, because he talked to him about the CFO's deposition. Tim also engaged in dishonest conduct by not correcting the CFO or informing him of his adverse position and involvement in the case. In conclusion, Tim violated multiple rules when he interacted with the CFO of Fun Park, without disclosing his identity and by asking multiple questions relevant to the case.

QUESTION 6

Pamela, age 30, woke up feeling very ill and drove herself to the hospital emergency room. Nurse, stationed at the admitting desk, asked Pamela about her condition. Pamela told her that she thought she had "some terrible bug" and stated that she was congested, had a headache, and was experiencing slight chest pains. Nurse then asked Pamela a routine set of questions, including whether she had any family history of heart problems. Pamela told her that both her grandmother and an aunt had died early from heart attacks, but that she had never experienced any heart problems herself. Nurse then put a check on the admitting form indicating positive for a family history of heart disease.

Doctor, the emergency room physician, performed a 15-minute physical examination. He prescribed some medication to relieve the congestion and told Pamela that she was suffering from bronchitis. He told her to check with her family doctor in a week if the condition persisted. Doctor opted not to perform an electrocardiogram test (EKG).

Pamela then went to work where, eight hours later, she suffered a major heart attack due to a thrombosis that would have been discovered had an EKG been performed. She died on the way to the hospital.

When Doctor heard of Pamela's death, he reviewed her admittance form from that morning. He called Nurse and told her that he had taken his own history of Pamela and she had not mentioned any family history of heart problems. He told Nurse that she must have mixed up the information of another patient with Pamela's and asked her to create a new admittance form indicating negative for a family history of heart disease. Nurse did as he asked.

Pamela's family retained Attorney Mike, who filed a medical malpractice lawsuit against Doctor and the hospital. At Nurse's deposition, Nurse testified that she did recall Pamela mentioning her family's heart problems, but she could not remember if she indicated on the admittance form a positive or negative history. When Mike presented Nurse with the form that had been turned over in discovery, Nurse testified that she must not have indicated positive.

At trial, Mike called Nurse as the plaintiff's first witness. Mike asked Nurse whether she recalled Pamela mentioning any history of heart problems when she arrived in the emergency room. To Mike's surprise, Nurse replied that Pamela had not mentioned any family history of heart problems and further stated that at one point, she thought Pamela had mentioned a family history, but now believes she was confusing this information with another patient's history that morning.

As part of the plaintiff's case, Mike retained an expert who opined that the failure to order an EKG under the circumstances amounted to negligence. The hospital retained Dr. Edwards to present expert testimony countering this position. Dr. Edwards offered his opinion that, given the totality of the information that Doctor had that morning, the fact that he did not order an EKG did not fall below the appropriate standard of care and that if he were in the same position, he would not have ordered the test. Mike researched Dr. Edwards' background. On cross-examination, Mike asked Dr. Edwards the following questions:

A. Isn't it true that you charge your clients $700 per hour for pretrial services and $1,000 per hour for trial testimony?

B. Isn't it true that you have testified only one time in favor of a plaintiff during medical malpractice litigation and have testified over 500 times on behalf of the defense?

C. Isn't it true that you are an outspoken atheist and have authored a book on your beliefs?

D. There is a rumor among plaintiff attorneys that you once told an attorney that you would change your opinion for $10,000. Is this true?

The attorney for the hospital made appropriate objections to each of these questions, but the court overruled each objection.

Mike then sought to introduce into evidence video footage of a medical conference Dr. Edwards had attended seven years earlier. On the video, Dr. Edwards stated that in almost every case involving chest pain, he, out of an abundance of caution, would order an EKG, adding that it is an inexpensive and easy test to administer. The attorney for the hospital objected to the admission of the video footage, but the court overruled this objection as well.

1. **How should Attorney Mike have responded to Nurse's apparent change in her recollection of the facts?**
2. **Did the court rule correctly in overruling the objections to the questions Attorney Mike asked Dr. Edwards?**
3. **Did the court rule correctly in overruling the objection to the admission of the video footage of Dr. Edwards?**

Explain fully.

A

1. Mike should have impeached Nurse with her prior inconsistent statement. A party may impeach its own witness with a prior inconsistent statement, provided it can show surprise and damage to that party's case caused by the witness's inconsistent testimony. Here, Nurse had previously stated under oath that she remembered Pamela telling her she had a family history of heart problems and she also admitted to having forgotten to indicate the family history on the medical form appropriately. Because she had made this statement under oath, Mike will be able to show surprise, and it is likely to have caused damage to his case, as it is paramount to his complaint of medical malpractice. Therefore, Mike should have impeached Nurse with her own prior inconsistent statement.

2A. The objection was properly overruled by the court. A party must disclose its testifying expert's fee schedule prior to trial, and he may be properly questioned about it while at trial. Information concerning a witness's bias may always be used to impeach the witness. Information concerning the payment by a party to an expert witness would go toward helping the jury decide the credibility and bias of a testifying attorney. Mike's question about his hourly rates provided information to the jury that would inform them as to any bias that the witness might have. Therefore, the question was proper and the objection was overruled correctly.

2B. The question was properly overruled. A testifying expert witness's profession is giving opinion in court. Questions concerning history may supply a view of his bias toward certain parties. Therefore, a question concerning his overall record of testifying for a plaintiff 500 times out of 501 may show a bias and is proper to impeach the witness. Therefore, the objection was properly overruled.

2C. This question was improperly overruled. At one time, a person's lack of religious beliefs was enough to have them declared incompetent to testify at trial. However, it is now prohibited to ask a witness about his religious beliefs, or lack thereof, for purposes of impeachment. The question concerning Dr. Edwards' atheism might have been public knowledge, but it went toward his own personal beliefs. Therefore, it was improper and the objection should have been sustained by the court.

2D. The question was improperly overruled. A witness may be asked about specific bad acts, especially ones that show a lack of trustworthiness, so long as the impeaching attorney has a good faith foundation for the question itself. One must give the witness an opportunity to deny or explain the bad act before the impeaching attorney may present extrinsic evidence to prove the matter. Here, Mike asked about a specific

incident where the expert witness offered to perjure himself in exchange for a bribe. However, Mike is basing his question off of a rumor alone and, therefore, is not likely to be found to have a good-faith basis for the question. Therefore, the court should have sustained the objection.

3. The court improperly overruled the objection. In Ohio courts, a prior inconsistent statement may be introduced against an opposing witness at any time. However, prior to introducing extrinsic evidence, the opposing attorney must first give the witness an opportunity to deny or explain the inconsistent statement. Here, this was a valid statement that could be presented against Dr. Edwards, because his testimony in court was in direct conflict with the statement on the video concerning the use of EKGs. Given the opportunity though, the doctor might have provided a valid explanation concerning changing his standards. Therefore, the objection should have been sustained.

QUESTION 7

Six months prior to his death, Robert Brown executed a will leaving his entire estate to his second wife, Susan. After his death, Mr. Brown's two adult daughters from his first marriage filed a complaint to contest the validity of the purported will by claiming that Mr. Brown was under the severe pressure and undue influence of Susan. At the same time, Susan filed a motion in the estate proceedings, demanding the return of certain personal property in the daughters' possession.

Within a month of the filing of the will contest, Susan's attorney called the daughters' attorney on the telephone with an offer to settle. He said that the terms of the offer were that Susan would pay $50,000.00 to each daughter in exchange for their dismissal of the will contest. After communicating the offer to the daughters and receiving their consent, the daughters' attorney called Susan's attorney and accepted the offer on behalf of his clients.

Upon hearing of the daughters' acceptance, Susan insisted that the agreement be put in writing and that the settlement also address the personal property that Susan wanted returned. Susan's attorney prepared a written settlement agreement, including provisions addressing the personal property. Upon receiving the settlement agreement, the daughters' attorney informed Susan's attorney that a writing was unnecessary, that the disposition of the personal property was not part of the agreement, and that a valid verbal agreement existed.

The daughters filed an action to enforce the purported settlement agreement. At trial, the following issues are before the court:

1. **Was a valid offer communicated to the daughters by Susan?**
2. **Was a valid, enforceable oral contract created between Susan and the daughters?**
3. **Was the written settlement agreement containing additional provisions a counter-offer? What is the impact of a counter-offer, if any, on the original offer?**
4. **Assume that it was demonstrated at trial that Susan's attorney's communication was "Would the daughters consider taking $50,000.00 in exchange for their dismissal of the will contest?" What impact, if any, would that language have on the validity of the original offer?**
5. **Assume that it was demonstrated at trial that Susan's attorney's communication was "Susan would pay $50,000.00 to each daughter in exchange for their dismissal of the will contest and the agreement shall be in writing executed by all parties." What impact, if any, would that language have on the validity of the contract?**

Explain all of your answers fully.

Assume that the statute of frauds does not apply.

A

An agreement requires manifestation of assent (offer and acceptance), consideration, and lack of defenses to the agreement.

1. An offer, written or oral, is valid if it is communicated by the offeror to the offeree with the intent to be bound. The offer must place the power of acceptance into the hands of the offeree. Here, Susan's attorney, an authorized agent of Susan, offered to the daughters' attorney an offer to settle the will contest for $50,000. The offer was communicated to the offerees (their authorized agent) and contained Susan's present intent to be bound if accepted. Therefore, this was a valid offer.
2. For an enforceable contract to be created, the offer requires acceptance and consideration for the agreement. Acceptance occurs when the offerees communicate their asset to be bound to the agreement to the offeror. To be enforceable, consideration must exist. Consideration must be bargained for and exists if there is a legal detriment to the promise or a benefit to the promisor. Giving up a legal right is consideration. Here, the daughters (through their authorized attorney) manifested assent to be bound to the offer by Susan. The bargained for consideration is the daughters' agreement to not further pursue their legal right to contest the will in exchange for Susan's agreement to pay them $50,000. Therefore, this oral agreement is an enforceable agreement.
3. The written settlement agreement contained additional/different terms that was originally agreed upon in the oral agreement. Under common law, the mirror image rule applies. As such, when additional or different terms exist in an acceptance it is deemed a counter-offer, and, thus, rejection of the initial offer. Here, however, the oral agreement was already accepted, and an agreement existed. Susan, therefore, was attempting to modify the agreement, which requires consideration and assent by the other parties. Because such modification did not contain additional consideration above what each party was already obligated to do, and, more importantly, the daughters did not agree, Susan's attempt to modify has no bearing on the agreement. Therefore, the additional terms have no impact on the agreement.
4. The communication altered the entire status of the agreement. When a communication is merely an inquiry, and, thus, contains no present intent to be bound, then the communication is not an offer. As such, it does not place the power to accept in the other party. Here, if this was the case, the original communication would not be an offer, and the daughters could not have accepted the offer. Instead, if they communicated to Susan the offer of $50,000 to abandon the will contest, this would have been deemed the offer. Also Susan's added terms regarding personal property would have not complied with the mirror image rule regarding acceptance and, thus, would have been a counter offer and rejection of the original offer. Therefore, there would be no enforceable agreement between the parties if the communication was an inquiry.
5. If the offer contained a condition, then the daughters' acceptance of the offer, would require the condition be satisfied. Conditions must be strictly satisfied for the other party's duty to come due. Here, until the agreement was materialized in writing, Susan would not be required to perform.

QUESTION 8

Felix and Marcy are Ohio residents and were married in 1990. Felix had two children from a previous marriage, Brad and Gus. Marcy had one child from a previous marriage, Cindy.

In 1992, Felix and Marcy decided to execute Wills in accordance with Ohio law. Felix's Will provided as follows:

1. I give $25,000 to each of my sons, Brad and Gus.
2. I give my entire gun collection, which is presently comprised of six antique shotguns, to my son, Brad.
3. I give my 1964 Corvette to my son, Gus.
4. I give the rest and residue of my estate to my spouse, Marcy. If Marcy does not survive me, I give the rest and residue of my property to my issue, per stirpes.

Marcy's Will provided as follows:

1. I give my diamond necklace, which I received from my mother, to my daughter, Cindy.
2. I give $1,000 each to Brad and Gus.
3. I give 75 percent of the rest and residue of my estate to my spouse, Felix, and the balance to my issue, per stirpes.

Subsequent to executing the Wills, the following events occurred:

- Felix sold four of the six shotguns that he owned and used the proceeds to buy an antique rifle (Rifle) and a used truck (Truck).
- Felix gave $5,000 to Gus in 2008, to help Gus make a down payment on a house. Felix told Gus and Brad that the $5,000 would be part of Gus's inheritance.
- Gus passed away in 2014. Gus never married, but is survived by one adult child, Vince.
- Marcy and Cindy had a serious argument in 2015 about Cindy's drinking habits, and, as a result, Marcy gave her diamond necklace to Cindy's daughter, Diana.
- Marcy wrote a note at the end of her Will that stated, "My daughter Cindy shall not be considered my issue and my granddaughter Diana shall receive any share Cindy would have received." Marcy signed her name below the statement.

In 2017, Felix and Marcy were travelling out of state on a vacation and were involved in a serious accident. Felix died at the scene of the accident. Marcy survived Felix; however, after being hospitalized for seven days, she eventually succumbed to her injuries.

At the time of his death, Felix owned the following assets:

a. $400,000 in a bank account at Bank 1.
b. Two of his shotguns from his original collection.
c. The 1964 Corvette.
d. The Rifle.
e. The Truck.

At the time of Marcy's death, she owned the following assets:

a. $100,000 in a bank account at Bank 2.

Felix and Marcy are survived by Brad, Cindy, Diana, and Vince, who all claim to be beneficiaries of one or both of the estates.

Assume that Marcy never made any election to take against Felix's Will and also assume that no allowance for support was paid to Marcy prior to her death from Felix's estate. In regard to the above assets:

1. **Who is entitled to receive Felix's assets?**
2. **Who is entitled to receive Marcy's assets?**
3. **Is Cindy entitled to claim the diamond necklace left to her under Marcy's 1992 Will?**

Explain fully.

A

1. **$400,000 in bank account at Bank 1**: $25,000 will go to Brad, $25,000 will go to Vince, and the remaining $350,000 will go to Marcy's estate. Felix made a specific bequest to Brad and Gus. Although he gave Felix an "advancement" of $5,000 in 2008 to help him make a down payment, it was invalid because an advancement must be acknowledged in writing. Here, there was no writing to support the advancement. Remaining funds constitute rest, residue and remainder. Under Felix's will, he left all the rest, residue and remainder to his spouse Marcy. Marcy did in fact survive Felix. If a person does not survive the deceased by 120 hours (5 days), then they are said to have predeceased them. Here, Marcy survived Felix by seven days before she passed away. For this reason, the remaining $350,000 will pass to her and then through her estate.

   Two shotguns from collection: The two shotguns will go to Brad. Felix made a specific bequest to his son Brad, giving him his entire gun collection, which included the shotguns. At the time he created the will he had 6 guns, but four of those guns have been adeemed as they are no longer part of Felix's estate. Brad is still entitled to the two shotguns, but not the proceeds from the sale of the other shot guns since they were adeemed prior to Felix's death.

   1964 Corvette: The 1964 Corvette will go to Gus's son, Vince. Felix made a specific bequest to his son Gus leaving him the 1964 Corvette. However, Gus had predeceased Felix, meaning that the gift has lapsed. However, under Ohio's anti-lapse statute, the gift can be saved and an issue of the predeceased party can inherit the specific gift, so long as that person would have normally inherited from Felix in the line of intestacy in the first place. Since Vince is Felix's grandson, he will receive the 1964 Corvette under the anti-lapse statute.

   Rifle: The rifle will go to Brad. Although Felix did not own the rifle at the time that he created his will, he specifically bequested his entire gun collection to his son, Brad. The rifle is presumably a part of his gun collection and, for this reason, the rifle will go to Brad.

   Truck: The truck will go to Marcy's estate. Here, the truck falls into the rest, residue and remainder section of the will. Felix originally left the rest, residue and remainder to his spouse. Like the bank account, since Marcy survived him, the truck will pass to her and then through her estate.

2. **$100,000 in bank account at Bank 2**: The first $2,000 will go to Brad and Vince. Although stepchildren are generally the last to inherit by intestacy, Marcy made a specific bequest to give each $1,000 from her estate. Since Gus predeceased her, his $1,000 will go to Vince and Brad will receive $1,000 for his gift. The remainder will go to Cindy. Although she left the rest residue and remainder to Felix, he predeceased her, so her issue will inherit. Marcy attempted to disinherit Cindy from the will, but her attempt is invalid. Any revision or modification, known as a codicil, to a will must be made properly by signing at the end of the document, and in front of two witnesses. Here, Marcy just wrote in her disinheritance and signed her name below. No witnesses were present, so the codicil is invalid. For this reason, Cindy can still inherit under the will and will receive the remaining $98,000.

A

3. Cindy is not entitled to claim the diamond necklace left to her under Marcy's 1992 will. Although Marcy did make a special bequest to Cindy in her 1992 will, Marcy gave her diamond necklace away to her granddaughter Diana before her death. The gift has been adeemed since she no longer has ownership or possession of the diamond necklace. Therefore, since Marcy no longer has possession, Cindy is not entitled to claim the necklace.

QUESTION 9

The following transactions involved loans by State Bank (Bank) located in Ohio to Ohio residents:

1. On March 1, 2016, George borrowed $1,000 in cash from his Aunt Mary for his auto repair business general operations, and he signed a promissory note and security agreement giving Mary a security interest in a machine (Machine) that he used in his business, as collateral for the loan. Mary immediately put the note and security agreement in her safe deposit box at Bank, but took no further action. George then took the $1,000 and deposited it in his account the next day. On Dec. 30, 2016, George borrowed $10,000 from Bank in order to pay down his business credit card debt. He signed a promissory note to Bank and a security agreement giving Bank a security interest in all of George's business equipment, "including Machine." On Jan. 1, 2017, Bank filed a UCC 1 financing statement with the Ohio Secretary of State accurately covering the collateral described in the security agreement. George has now defaulted on both notes, and Bank and Mary are both seeking to repossess Machine from George.
2. On Sept. 1, 2015, Bank agreed to loan Susan $50,000 to start a new business. Susan signed a loan agreement and gave Bank a security interest in a valuable painting (Painting) owned by Susan. Bank filed a UCC-1 financing statement with the Ohio Secretary of State on Sept. 2, 2015, properly describing Painting as collateral for the loan. Susan decided she needed more money for her business and approached her Father, who agreed to loan her $10,000. Susan signed a promissory note to Father, along with a security agreement describing Painting as collateral. Father filed a UCC-1 financing statement properly describing Painting with the Ohio Secretary of State on Sept. 11, 2015, and gave her the $10,000 in cash on the same day. Bank did not actually disburse any of the funds of the $50,000 loan to Susan until Oct. 1, 2015. Susan has now defaulted on both loans, and Father and Bank are each seeking to repossess Painting.
3. Acme Hardware Co. (Acme) is a local hardware store in Anywhere, Ohio. Acme borrowed $150,000 from Bank on Jan. 1, 2016, and the owner of Acme signed a security agreement on behalf of Acme the same day, giving Bank a security interest in "all of Acme's existing, and hereinafter acquired, inventory, plus the proceeds thereof." Bank filed a UCC-1 financing statement with the Ohio Secretary of State on Jan. 10, 2016, properly describing the collateral, and Bank immediately disbursed the funds to Acme.

   In March 2016, Acme wanted to purchase 10 new riding lawnmowers from Mower Co. and signed a promissory note in payment for the mowers and a security agreement giving Mower Co. a security interest in the 10 new mowers. On March 14, 2016, Mower Co. filed a UCC-1 financing statement covering the mowers with the Ohio Secretary of State, properly describing the collateral, and the next day Mower Co. delivered the new mowers to Acme. On March 17, 2016, Mower Co. then sent a written notification by certified mail to Bank, notifying Bank of its security interest in the new mowers. Acme subsequently sold five of the mowers to Customer in exchange for a promissory note from Customer to Acme. In November 2016, Acme defaulted on its obligations, and Bank and Mower Co. both claimed the right to the five remaining mowers and also to the promissory note from Customer.

Who is likely to prevail in the following disputed claims?

1. **Bank vs. Mary for Machine.**
2. **Bank vs. Father for Painting.**
3. **Bank vs. Mower Co. for the remaining inventory of mowers and for the promissory note.**

Explain fully.

A

These disputes arise under UCC Article 3, which governs secured transactions. In order for a security interest to attach, there must be a written security agreement, the secured party must give value, and the debtor must have rights to the collateral. A secured party may generally perfect a security interest by filing a financing statement, possession, control, or by automatic perfection for PMSI in consumer goods. The security interest cannot be perfected until it has attached. When there are conflicting security interests, the priority controls. A PMSI super priority will generally have priority over all other interests. When there are two perfected security interests, the first to file or perfect wins. When one is unperfected, the perfected party wins. When neither is perfected, the first to attach wins.

Bank v. Mary: Bank has priority over Mary for the Machine. Both Mary and Bank have properly attached security interests in equipment – the machine. Mary did not perfect her interest in the machine in any of the ways described above, as simply storing the note and agreement in her safe deposit box would not amount to possession or control of the collateral. Bank perfected its security interest on Jan.1 by filing a financing statement. Because Bank perfected and Mary did not, Bank has priority over Mary for the machine.

Bank v. Father: Bank has priority over Father for the painting. Both Bank and Father have properly attached security interests in the painting. Father perfected his security interest by filing a financing statement on Sept. 11. Bank's security interest was perfected by filing a financing statement, but the interest did not perfect until Oct. 1. Because both parties perfected, the first party to file or perfect has priority. The date of attachment is immaterial here as Bank filed its financing statement on Sept. 2, nine days before Father filed his financing statement. It does not matter that Father perfected first. Therefore, Bank has priority over Father.

Bank v. Mower Co.: Bank has priority over Mower Co. (MC) in both the inventory and the promissory note. Both Bank and MC have properly attached security interests in Acme's inventory. Bank properly acquired a security interest in the after acquired inventory, which is permissible under the UCC if identified in the security agreement. The after-acquired-property clause was properly attached. Both secured parties have an interest in the identifiable proceeds of the inventory, whether specified in the security agreement or not.

Bank properly perfected its interest by filing the financing statement on Jan.1 and giving value on Jan. 10. MC attained a PMSI in Acme's inventory on March 15 when it delivered the mowers to Acme. MC properly perfected the PMSI by filing a financing statement on March 14, with perfection happening when it gave value on March 15. MC attempted to obtain a PMSI super priority in the inventory, but failed to do so. To achieve the super priority, the PMSI must have been perfected at the time the debtor received possession, and written notice of the PMSI must have been given to the other secured parties prior to the debtor receiving possession. Here, the interest did perfect at the time Acme received possession. However, MC did not send written notice to Bank until two days after Acme received possession. Therefore, MC does not have a PMSI super priority, and Bank will prevail because it was first to file and first to perfect.

Bank will also take the identifiable proceeds, which is the promissory note. The proceeds came from the perfected collateral and, thus, were automatically perfected for 20 days. The priority remains the same as above, with Bank being the first to file.

QUESTION 10

George is 34 years old and has resided in Anytown, Ohio his entire life. At age 13, George was diagnosed with a significant mental illness and, consequently, has undergone psychiatric treatment and is required to take prescribed medications as ordered by his physician. He lives alone and maintains full-time employment at a local department store. George has never been in any criminal trouble.

One night, George was invited by his lifelong friend, Stan, to go to a local tavern to watch baseball. Stan was aware of George's psychiatric illness and that he was not supposed to drink alcohol because it could cause George to have delusions when combined with his medications. Stan was accompanied by his friend, Mack, who drove all of them to a tavern that evening. Mack had never met George prior to that evening and had no knowledge of George's psychiatric condition.

Upon arrival at the tavern, George, Stan, and Mack sat at the bar. George ordered a vodka and tonic, and the others ordered alcoholic drinks as well. A woman sat next to George and the two spoke briefly. After he finished his first drink, George ordered plain club soda, but, unbeknownst to him, Stan and Mack had the bartender slip vodka into George's next three drinks.

During George's conversation with the woman, he became delusional about her, believing her to be his fiancée. When the woman's husband came and sat next to her, George became incensed and a verbal argument ensued. The husband told George that he was the woman's husband, but George did not believe it and became violent. He picked up a pool cue and beat the man severely, causing him to suffer a fractured jaw and other multiple serious injuries.

Police were summoned and arrived at the scene quickly. George, Stan, and Mack were taken into custody. George consented to a breathalyzer test that revealed a blood-alcohol content well in excess of the legal limit.

George has been charged with felonious assault and Stan and Mack have been charged with complicity to commit felonious assault. George has pled Not Guilty and Not Guilty by Reason of Insanity and has raised the additional defense of intoxication. Stan and Mack have entered pleas of Not Guilty.

1. **Should George prevail on his plea of Not Guilty by Reason of Insanity?**
2. **Should George prevail on his defense of intoxication?**
3. **Should Stan be convicted of complicity to felonious assault?**
4. **Should Mack be convicted of complicity to felonious assault?**

Explain your answers fully.

A

1. In Ohio, a criminal defendant may plead guilty, not guilty, or no contest. A not guilty plea may be entered by reason of insanity of the defendant. In Ohio, a criminal defendant is presumed to be competent to stand trial unless he pleads otherwise. The standard for insanity in Ohio is the second prong of the M'Naughten test, which states the defendant, due to mental illness or disease, cannot comprehend the wrongfulness of his acts. Here, George has a history of mental illness, treatment, and medication. Despite facts that George may not have been aware of the wrongfulness of his acts, this is due to his intoxication by alcohol and medication. Thus, George's mental illness alone did not cause him to be incompetent. George will not prevail.
2. In Ohio, a criminal defendant may not plead voluntary intoxication, only involuntary. Felonious assault is the causing of actual physical harm to another, acting with the specific intent to cause such physical harm or apprehension thereof, using a deadly weapon. Thus, George has been charged with a specific intent crime. Involuntary intoxication is also a defense to felonious assault, if the defendant did not knowingly ingest intoxicants and, as a result, was unable to comprehend the nature of his acts. George may assert involuntary intoxication, despite his choice to drink one drink. Stan and Mack snuck alcohol into the other three drinks, which caused George to hallucinate and act as he did. Facts indicate George was unaware of his actions at the time they occurred due to this intoxication. Had George not drank three additional drinks, he would not have hallucinated. Also, George could not form the specific intent to harm the man with a pool stick. Thus, George will succeed on his defense of involuntary intoxication.
3. In Ohio, complicity replaces the solicitation offense. Complicity occurs when one, acting with requisite intent for conviction of the underlying charged offense, aids, abets, or solicits another to commit a crime, or otherwise knows another is to commit a crime. Unlike conspiracy, complicity requires the crime actually be completed and a substantial step. An individual convicted of complicity may be charged with the underlying offense, even if the principal actor is not convicted. Here, the underlying offense of felonious assault did occur (see 2). George did act with a deadly weapon, anything brandished as such with intent to use to cause serious physical harm, in using the pool stick. George did assault the man with the pool stick and cause him serious harm. George did formulate the specific intent to harm the man at the time, but was involuntarily intoxicated due to the actions of Stan and Mack. Stan had actual knowledge of George's medications and inability to drink on them and still acted to intoxicate George. Thus, the offense was completed.

   A complicit actor may be held liable for foreseeable harm of the principal. Here, George must have acted with the specific intent to assist or aid or solicit George to assault the man. Here, Stan intoxicated George knowing he might hallucinate. An individual would reasonably foresee that if one hallucinates on medication, they may act in a dangerous manner, potentially harming others. The court may hold Stan's causing the intoxication of George with reckless disregard as to the consequences making him liable for the foreseeable harm caused. Whether Stan is convicted of complicity will depend on whether the court holds that he should have been substantially certain harm may come to others as a result of intoxicating George.
4. See Part 3 for discussion of complicity requirements, (intent required and George's completion of the offense). Here, Mack had no knowledge of George's hallucinations upon drinking. He may not be convicted, as he did not act with specific intent to cause harm to others or a substantial certainty it would result.

QUESTION 11

1. Andy, a U.S. citizen who was born in Turkey, was an 18-year-old high school senior at Ridgemont Public High School in the State of Franklin. During an assembly in the school auditorium, Andy threw a live turkey off of the balcony, to protest U.S. inaction toward human rights violations in Andy's native country, and yelled, "U.S. is blind to atrocities in Turkey!"

   Unfortunately, the stunt caused the assembly to end. An informal hearing before the School Board was held to discuss disciplinary action against Andy. At the hearing, Andy was found to have violated the Ridgemont School District Code of Conduct, which states in part:

   Disciplinary penalties will be assessed for the following prohibited in-school actions:

   - Gross misbehavior;
   - Obscene, vulgar, and profane actions;
   - Horseplay;
   - Disruptive behavior that impedes the education process;
   - Disrespect by word or action toward any faculty, staff member, student or administrator.

   While the actions described above represent a cross section of activities, no compilation can be all inclusive and students are expected to refrain from behavior that would be characteristic of these actions.

   Andy was suspended for two weeks, banned from any extracurricular activities, and prohibited from participating in graduation ceremonies with his classmates. Andy filed a lawsuit against the school district alleging that the code of conduct violated his First Amendment rights because it is vague and overbroad.

2. As a way to protest Andy's punishment, several students devised a plan in which they would all begin wearing an eye patch to class to raise awareness of Andy's harsh penalty. The Ridgemont School Board found out about the plan and quickly adopted a policy that stated that any student wearing an eye patch (unless medically necessary) would be asked to remove it, with refusal to do so resulting in suspension. The policy was disseminated to all Ridgemont Public High School students. Two days after the policy was adopted, several students carried out their protest and wore the eye patch. All students wearing the eye patch were asked to remove them. Two students, Bob and Carol, refused to remove the eye patch and were suspended. Through their parents, the students sued the school district for violating the students' First Amendment rights.

3. At a school assembly in the school auditorium, convened to discuss the recent suspensions, one student, Don, unfurled a banner that read, "Smoke a doobie and let Andy graduate." The banner was greeted with loud cheers from the student body. Principal asked Don to take down the banner, as it violated school policy.

   After Don refused to take down the banner, Principal had the banner removed and later suspended Don. Through his parents, Don sued the school district for violating Don's First Amendment rights.

4. Another student, Eddie, began displaying an identical banner across the street from school property. He did so after obtaining all of the appropriate permits and only displayed the banner before and after school hours as students were entering and leaving school property. Principal asked Eddie to take down the banner, as it violated school policy. After Eddie refused to take down the banner, Principal had the banner removed and later suspended Eddie. Through his parents, Eddie sued the school district for violating Eddie's First Amendment rights.

How should a court rule on the constitutional challenges asserted by each of the following plaintiffs and why?

A. Andy?

B. Bob and Carol?

C. Don?

D. Eddie?

Explain your answers fully.

A

1. A court should hold that the school's code of conduct is overbroad because it punishes both protected and unprotected speech.

   The First Amendment freedom-of-speech protections apply only to that speech that is protected. Any speech that is threatening, obscene, or induces violence, is either unprotected, or receives lesser, limited protection. A person may challenge a restriction on speech by being overbroad or by being vague. If a restriction is overbroad, it will be overturned if the restriction forbids both protected and unprotected speech. If a restriction is vague, it will be overturned if a reasonable person is confused as to what speech the restriction applies to.

   Here, the restriction is overbroad because it punishes speech and behavior that are constitutionally protected by the First Amendment. The restriction states that "disruptive behavior that impedes the education process" is not allowed. However, a student protest or assembly, albeit disruptive to the education process, is protected speech. As a result, Andy should be successful in his claim, and the school must change the restrictions to cover only speech that is unprotected.

2. A court should rule in favor of Bob and Carol because their symbolic actions are protected speech.

   Symbolism, under the First Amendment, is a form of protected speech; therefore, a restraint punishing a symbolic act is unlawful. Further, a prior restraint, a restraint before the actual speech occurs, must be necessary to avoid an imminent harm or threat caused by the speech. As long as the symbol is not inciting violence or representing a form of unprotected speech, it is protected under the First Amendment.

   Here, Bob and Carol should be successful in their challenge because their symbolic speech is protected. The act of wearing an eyepatch represents a peaceful, nonviolent symbol that is, therefore, protected. Further, the prior restraint by the school was unlawful because it was unnecessary to achieve its intended result. Therefore, the challenge should be successful because it represents a symbolic form of protected speech under the First Amendment.

3. Don will be unsuccessful in his challenge because his form of speech was unprotected.

   A sign or banner is a form of speech under the First Amendment and is permitted as long as the substance or message is protected. Speech that describes illegal activity and is likely to encourage illegal activity as a result is not a form of protected speech. However, if the speech is unlikely to encourage others to participate in the unlawful behavior, then the speech will likely be protected.

   Here, Don's banner will be unsuccessful because it will likely encourage others to participate in illegal activity. It is likely that students in support of Andy will follow the message and it is likely that they will do so on school grounds as a group. As a result, the message motivating this certain illegal behavior is unprotected. Therefore, Don will be unsuccessful.

4. Eddie will likely be successful in his challenge because the speech is in a public forum.

   Speech in a public forum will be permitted unless prohibiting the speech is necessary to achieve a compelling government interest. The burden is on the party prohibiting the speech, and there must not be any less restrictive means to forbidding the speech.

   Here, the school is unlikely to stop the speech because it occurs in a public forum. The school has the burden and must survive strict scrutiny for the speech to be prohibited. The school will unlikely be affected by Eddie's speech and does not have a compelling interest. The activity is occurring outside the school grounds and during non-school hours. Therefore, Eddie will likely be successful because the speech is protected and the school will not survive strict scrutiny.

QUESTION 12

Paula was driving her automobile northbound on State Street in Anytown, Ohio when she slowed as she approached the intersection at Main Street, which was controlled by a traffic light.

Paula's driving irrationally angered Dennis, who followed and harassed her for several blocks. As Paula approached Main Street, the light turned from red to green. Before she could proceed through the intersection and while Paula was accelerating from about 5 mph, Dennis, while travelling at 35 mph in a fit of road rage, intentionally struck Paula's vehicle in the rear. The impact propelled Paula's vehicle into the intersection where she was struck by a commercial truck that ran a red light while travelling in excess of 50 mph eastbound on Main Street.

The commercial truck was driven by Worker and was owned by his employer, Employer (Employer).

Worker was within the scope of employment for Employer at the time he struck Paula's automobile.

Paula suffered multiple serious injuries and was rendered quadriplegic as a result of the collisions.

A suit was filed and the case went to trial. The jury returned a verdict in favor of Paula in the amounts of $2,000,000.00 for economic damages and $2,000,000.00 for non-economic damages. The jury also found that Dennis, Worker, and Employer were all responsible for Paula's injuries. Dennis was found liable of an intentional tort and to have been 40 percent responsible for Paula's injuries, and Worker and Employer were found 60 percent responsible for Paula's injuries.

1. **For what amount of the damages is Dennis responsible?**
2. **For what amount of the damages is Worker responsible?**
3. **For what amount of the damages is Employer responsible?**

Fully explain what legal theories apply and why.

A

Dennis will be responsible for all damages, but may seek contribution.

Under Ohio tort law, non-economic damages are limited to $250,000 or 3x the economic damages provided by the court with a further statutory cap. Additionally, a joint tortfeasor will be jointly and severally liable for all damages, unless such tortfeasor was responsible for less than 50 percent of the harm or committed an intentional tort. Such defendant may then institute a contribution action against the other joint tortfeasors to recover the amount for which he is not at fault. If a defendant's negligent acts are responsible for less than 50 percent of the harm, then such defendant will only be liable for that percentage. Here, the economic damages are $2,000,000 and the non-economic damages are the same amount, and, therefore, will not need to be limited. Dennis will be jointly and severally responsible for the full $4,000,000 if Paula brings suit against him individually, because he committed an intentional tort in causing the damage and the above-50-percent limitation will not apply. Dennis could then file a contribution action against Employer/Worker to receive the 60 percent for which they are responsible. If all parties are included at trial, Dennis will be responsible for his 40 percent and Worker/Employer will be responsible for their 60 percent.

Employer/Worker will be responsible for all damages, but may seek contribution.

Under Ohio law, the theory of respondent superior imposes vicarious liability on an employer for the tortious actions of an employee committed while the employee engaged in conduct within the scope of his employment. While minor frolics from the employee's scope will not release an employer from liability, a major detour may do so. Further, intentional torts are usually not considered within the scope of employment, unless the employee was acting in the interests of the employer when committing the tort. Additionally, even though the employer may be held liable for the employee's actions, the employer will then have a contribution claim against the employee for the relevant negligent/intentional acts and resulting losses. Here, Worker was acting within his scope of employment and was 60 percent responsible for the harm to Paula. As such, Employer will be liable for the harm caused by Worker's actions. Per the rules above, Worker/Employer will be jointly and severally responsible for the full $4,000,000 if Paula brings suit against them separately because Worker was over 50 percent responsible for the harm. Worker/Employer could then file a contribution action against Paul to recover 40 percent based on his responsibility. Paula may bring suit against either Employer or Worker or both, but will likely be more successful against Employer, as it is likely Employer has bigger pockets and can pay the high level of damages in this case. If all parties are included, Employer and Worker will be jointly and severally responsible for 60 percent of the damages. Once Employer makes the payment to Paula, it can then properly file a contribution against Worker for his negligent acts.

MPT 1

State of Franklin v. Clegane

This performance test requires examinees to draft an argument in support of the reading of victim-impact statements and requests for restitution, as authorized under the Franklin Crime Victims' Rights Act (FCVRA), at the sentencing hearing for defendant Greg Clegane. The law firm's client is Sarah Karth, who wishes to make such statements on behalf of her sister, Valerie Karth, and on her own behalf. In the underlying criminal action, Clegane illegally sold dangerous fireworks to a minor who later ignited those fireworks at a party. The fireworks caused serious injuries to Valerie, as well as property damage. Clegane was convicted of a felony but has not yet been sentenced. Clegane has moved to exclude the sisters' victim-impact statements at the sentencing hearing and to deny their requests for restitution. Examinees' task is to draft the argument section of the brief opposing Clegane's motion and persuading the court that under the case law interpreting the FCVRA, Sarah and Valerie are both crime victims entitled to restitution and to make statements at the sentencing hearing. The File contains the instructional memorandum, the firm's guidelines for writing persuasive trial briefs, a newspaper article about the fireworks incident, excerpts from the client interview, and the defendant's motion. The Library contains excerpts from the FCVRA and three Franklin Court of Appeal cases.

A

Selmer & Pierce LLP

Attorneys at Law

412 Valmont Place

Franklin City, Franklin 33703

MEMORANDUM

TO: Anna Pierce

FROM: Examinee

DATE: February 27, 2018

RE: State of Franklin v. Clegane

INTRODUCTION:

You have asked me to draft the argument section of a brief in opposition to the motion filed by Greg Clegane which argued that Sarah should not be permitted to give a victim-impact statement on behalf of herself or her sister at Clegane's sentencing hearing, and arguing that Sarah and Valerie should not be permitted to recover restitution. Below is the argument section which argues that Sarah and Valerie are victims within the meaning of the Franklin Crime Victims' Rights Act (FCVRA), and that they are both entitled to restitution from Clegane.

LEGAL ARGUMENT:

I. Valerie is a victim within the meaning of the FCVRA because Clegane's conduct satisfies the two-prong test provided by the Franklin Court of Appeal:

The FCVRA provides that a crime victim is "a person directly and proximately harmed as a result of the commission of a Franklin criminal offense." *Franklin Crime Victims' Rights Act Section 55(b).*

A. Clegane's conduct was the cause in fact of Valerie's economic and mental injuries:

In applying the definition of "crime victim" under the FCVRA, the Franklin Court of Appeal in *State v. Jones* provided that the purported "crime victim" must show "(1) that the defendant's conduct was a cause in fact of the victim's injuries and (2) that the purported victim was proximately harmed by that conduct." *State v. Jones.* Cause in fact means that there is a direct causal connection between the conduct and the harm. *State v. Berg.*

Here, there is a clear causal connection between Clegane's conduct and Valerie's injury. Had Clegane not sold the fireworks to the underage minor, the minor would not have set them off, resulting in Valerie's physical and economic injuries. Valerie suffered physical injury in the form of being struck by the fireworks, which sent her into a coma for several months. Valerie is currently in stable condition, but still incapacitated from the incident. Additionally, Valerie suffered out-of-pocket expenses in the form of medical bills, missed salary, and the cost of rebuilding her destroyed garage, which was also destroyed by the firework incident.

B. Clegane's conduct was the proximate cause of Valerie's economic and mental injuries:

Proximate causation means that the harm was within the zone of risks resulting from the defendant's conduct, meaning that it was reasonably foreseeable that the defendant's conduct might cause the harm. *Id.* In *State v. Berg*, the Franklin Court of Appeal indicated that this test should be interpreted "broadly." *State v. Berg.* In *Berg*, where the purported victims were the family of a drunk driving victim, the family satisfied the two-prong test in showing that their daughter was the victim of the defendant's conduct of providing alcohol to the underage driver of the vehicle who caused the accident that killed their daughter. *Id.* There, the Court found that the cause-in-fact prong was satisfied because had the defendant not provided alcohol to the driver of the car, she would not have gotten into the accident that killed the victim. *Id.* Additionally, the proximate cause prong was satisfied because it was reasonably foreseeable to the defendant that his purchasing alcohol and giving it to his girlfriend might result in her causing an accident due to driving under the influence. *Id.*

This case mirrors that of *State v. Berg* in terms of establishing proximate causation. As the seller of fireworks, Clegane was aware of the law requiring that he sell fireworks only to people above the age of majority, as indicated by his statement during trial that he assumed that the minor was "at least in his twenties." *Transcript of Interview with Sarah Karth.* If he did not know he could only sell to adults, he would not have cared about the boy's age. This knowledge indicates that it would be reasonably foreseeable to Clegane that the reason for being permitted to sell fireworks only to adults is because fireworks are dangerous, and in the hands of an inexperienced and naive minor who might misuse them, they could cause physical injury to another person or to another person's property. In this case, that is what happened. Similarly to *Berg*, the actor violated the law by providing a dangerous substance or object to a minor, with the knowledge that misuse of that substance or object could cause injury to another, and injury actually occurred. As stated above, Valerie suffered significant physical and economic injury.

In *State v. Jones*, the Franklin Court of Appeal actually found that the proximate causation prong was not satisfied where the purported victim was the girlfriend of a man who frequently bought cocaine from the defendant because the court found that the boyfriend's abusive conduct only while he was under the influence was too attenuated to satisfy the proximate causation prong. *State v. Jones*. However, in that case, the Court explicitly noted that the cause-in-fact element was satisfied, and that the only reason why the boyfriend's conduct was too attenuated was because "the contention raises complex questions relating to the causes of domestic violence." *Id.* Here, no such problem exists. While domestic violence is a very complex issue with multiple, ongoing issues of causation which would be too difficult to narrow to the use of a single drug, fireworks are significantly simpler. Fireworks themselves pose a substantial risk of physical harm to people and property, and physical damage is a foreseeable and substantial risk of their misuse.

II. Sarah is a crime victim within the meaning of the FCVRA because Sarah is permitted to assert the rights of her incapacitated sister under the FCVRA as well as her own rights:

A. Sarah may assert the rights of Valerie because Valerie is incapacitated and a family member:

In addition to the injured victim, family members of crime victims who are incapacitated, incompetent, deceased, or under the age of 18 are permitted to assume the crime victim's rights under the FCVRA. *FCVRA Section 55(b)(2).* Among the rights that crime victims possess, they are entitled to be reasonably heard at any public proceeding in a district court involving sentencing, pleas, release, or parole. Id. Here, Sarah is permitted to step into the shoes of Valerie and assert her rights as a victim under the FCVRA. Valerie was a crime victim, as explained above, who to this day remains incapacitated due to her condition from the incident. She is still in the hospital and unable to come to court. As provided under the statute, as Valerie's sister, Sarah is permitted to assert her rights as a crime victim in court.

B. Sarah may assert her own rights because she was factually and proximately harmed by Clegane's conduct:

Sarah suffered her own financial detriment to help Valerie, to which she is entitled restitution. In *Humphrey*, the victim's young sons were considered crime victims resulting from the loss of their father's financial support because the court found that they were actually and proximately harmed by the defendant's conduct. *Id.* Also, "harm" includes physical, financial, and psychological damages. *Id.* Here, Sarah incurred $1,500 in out-of-pocket medical bills as a result of Clegane's conduct. She has also been seeing a therapist twice a week due to the emotional harm she suffered as a result of her sister's injuries, and has been paying the cost herself. This damage was the actual cause of the defendant's conduct because had he not sold the fireworks to the minor, Valerie would not have been injured and this damage would not have arisen. Further, similarly to Humphrey, it is reasonably foreseeable to a defendant that his reckless and dangerous conduct could cause injury that could seriously incapacitate or even kill a person who has close family members, who then must take care of the medical expenses and bear their own psychological torment as a result.

III. Valerie and Sarah are entitled to restitution because Clegane caused physical and psychological damages to them:

The FCVRA Section 56 provides that when a court is sentencing a defendant, the defendant shall be ordered to make restitution to any victim of the offense equal to the return of damaged property, or the cost of destroyed property, and in the value of necessary medical and related professional services relating to physical, psychiatric, and psychological care. *FCVRA Section 56.*

A. Valerie is entitled to restitution because she satisfies the three-prong test:

When determining the amount of restitution, the court must consider (1) the public policy that favors requiring criminals to compensate for damage and injuries, (2) the financial burden placed on the victim and those who provide services to the victim as a result of the defendant's conduct, and (3) the financial resources of the defendant and the nature of the burden of the payment of restitution on him. *Id.* A defendant is presumed to have the ability to pay restitution unless he establishes otherwise by a preponderance of the evidence. *Id.*

Here, public policy strongly encourages Clegane to have to pay restitution for his conduct. The purpose of the criminal statute, that makes it illegal to sell fireworks to a minor, is to prevent this exact type of scenario. Clegane was casual in his decision to not even check the age of the minor before selling him fireworks, even after the minor told him that he was planning to use them to give all of his friends "a big surprise." This type of carelessness and callused disregard for the safety and well-being of others should not go unpunished. In addition, Valerie's financial burden has been enormous. It is inequitable to force Valerie, who was an innocent bystander, to bear the brunt of not just the physical injuries of the incident, but also the financial costs related to the incident. Valerie is facing upward of $62,000 in medical expenses, $120,000 in lost salary, and $17,000 in replacement costs for her garage. There is no reason why she should bear these costs instead of the man responsible for them. Finally, Clegane has provided no actual evidence that he cannot pay the restitution beyond a blanket statement that he "does not have the resources to pay the amounts requested." This is not sufficient to satisfy his burden of proof. As a result, Clegane should be responsible for paying these costs.

B. Sarah is entitled to restitution on Valerie's behalf as a family member of an incapacitated crime victim:

Here, because Sarah is the family member of Valerie, who is incapacitated, she is permitted to represent Valerie's interests in court. See *FCVRA Section 56.* In *State of Franklin v. Humphrey*, the Franklin Court of Appeal found that where a bicyclist was killed by a careless defendant, it was "undisputed" that his wife was the appropriate representative under the act. *State of Franklin v. Humphrey.* Here, a similar scenario has arisen because Valerie is currently incapacitated based on her condition in the hospital and inability to represent herself in court.

C. Sarah is entitled to restitution on her own behalf because she satisfies the three-prong test:

Sarah satisfies the three prong test establishing that she is entitled to damages for many of the same reasons as her sister. Public policy demands that the person who is responsible for the harm should pay for it. In this case, that is Clegane, whose reckless conduct caused the accident that created these out out-of-pocket expenses and emotional damages. The burden has been enormous on Sarah, requiring her to see a therapist multiple times a week in order to help get past the incident, which has her sister still completely incapacitated to this day. This emotional damage and other damages are adding up significantly and costing Sarah a significant amount of money. Finally, as stated previously, Clegane has not satisfied his burden of proof as to his inability to pay restitution because all he has provided is a blanket statement indicating that he cannot pay. As a result, Clegane should be responsible for paying these costs.

CONCLUSION:

Because Valerie was physically injured and had property damage resulting in monetary loss, she is entitled to be heard at the sentencing hearing as a crime victim. Since she is currently incapacitated, her sister, Sarah, is entitled to assert Valerie's rights on her behalf. Additionally, since Sarah suffered her own financial and psychological damages as a result of Clegane's conduct, she is entitled to be heard at the sentencing hearing as a crime victim and is permitted to assert her own rights to restitution, as well as Valerie's. If there is anything else I can do to help, please feel free to reach out to me.

MPT 2

In re Hastings

In this performance test, examinees' law firm represents Danielle Hastings, who serves on the board of directors for Municipal Utility District No. 12 (MUD 12), a local government entity that provides public water, sewer, drainage, and other services to her neighborhood. Hastings seeks legal advice as to whether she can hold an election-related position in her voting precinct while remaining on the MUD 12 board. The two positions Hastings is considering are county election judge and precinct chair; she doesn't want to pursue either position if doing so would jeopardize her ability to serve on the MUD 12 board. Examinees' task is to prepare an objective memorandum analyzing whether Hastings can apply for and hold the county election judge position or the precinct chair position, while simultaneously serving as a member of the board of directors for MUD 12. The File contains the instructional memorandum, a transcript of the client interview, and descriptions of the two new positions that Hastings is considering. The Library contains Franklin Constitution article XII, section 25; excerpts from the Franklin Election Code; and three Franklin Attorney General opinions.

A

Belford & Swan S.C.

Attorneys at Law

6701 San Jacinto Avenue, Suite 290

Marin City, Franklin 33075

Memorandum

TO: Emily Swan

FROM: Examinee

DATE: February 27, 2018

RE: Danielle Hastings Inquiry

Introduction/Issue:

You have asked me to draft a memorandum evaluating whether Ms. Hastings is barred from holding positions as both a member of the board of the Municipal Utility District No. 12 (MUD 12) and either a county election judge position or a precinct chair position. Below is a memorandum outlining my findings on this issue.

Brief Answer:

It is permissible for Ms. Hastings to hold the position of MUD 12 board member and also simultaneously hold the position of County Election Judge or Precinct Chair.

Law and Analysis:

I. Constitutional Restrictions:

The State of Franklin Constitution Article XII section 25 provides that "No person shall hold or

exercise, at the same time, more than one civil office of emolument, except for justices of the peace, county commissioners, and officers and enlisted men and women of the United States Armed Forces, the National Guard, and the Franklin Guard, or unless otherwise specifically provided herein." *Franklin Constitution Article XII Section 25*. The Attorney General of Franklin has issued several advisory opinions analyzing Section 25 of the Franklin Constitution as it applies to different positions.

The Attorney General has provided that the distinguishing factor which determines whether there is a civil position held by an officer or an employee is "whether any sovereign function of the government is conferred upon the individual to be exercised by the individual for the benefit of the general public largely independent of the control of others." *Attorney General of Franklin Opinion No. 2003-9*. This is known as the Morris Test. *Id*. In that opinion, the Attorney General looked at whether the positions independently exercised various governmental powers for the benefit of the public, which can include the power to appoint agents or employees, enter into contracts, purchase and sell property, borrow money, impose and collect taxes, sue and be sued, and perform other acts necessary for emergency services. Additionally, a position that is subject to emolument has been interpreted to mean that the position is entitled to any type of "pecuniary profit, gain or advantage" beyond simple reimbursement of expenses. *Attorney General Opinion No. 2003-9*.

Serving as a board member of a MUD has been conclusively found by the Attorney General to be a position that is considered a civil office subject to emolument under the Franklin Constitution. *Attorney General Opinion No. 2008-12*. The Attorney General found that MUD directors are civil officers because they are local government entities that are authorized under the Franklin Constitution and subject to the Franklin Water Code. *Id*. Also, their board of directors is responsible for managing all affairs of the district in which they are located. *Id*. As for their duties, they are permitted to levy and collect a tax, charge fees for provision of services, issue bonds or other financial obligations, and exercise various other powers that are expressly set out in the Franklin Water Code. *Id*. They are also positions that are subject to emolument because they are entitled to receive a $150 per diem payment as compensation for attending MUD board meetings or engaging in other

MUD-related activities. *Id.* It is immaterial whether the board member accepts or rejects this payment. Because of this finding, Ms. Hastings will be unable to serve as a member of the MUD board of directors and occupy any other position that is considered a civil office subject to emolument.

A. Whether County Election Judge is a Civil Office Subject to Emolument:

It is likely that a County Election Judge (CEJ) is not considered to be a civil office subject to emolument. A CEJ exercises substantial governmental functions for the benefit of the general public, because a CEJ administers election procedures set forth in the Franklin Election Code. *County Election Judge Summary.* This is a governmental function because it relates to enforcement of a government code, and it would be difficult to make an argument otherwise. These are government functions that include handling and securing election equipment, locating election clerks, organizing the setup of the election equipment and the operation of the election, handing out ballots, and setting up and closing down the polling site. *Id.* However, CEJs, although positions of civil office, are not subject to emolument because CEJs are entitled only to reimbursement for the cost of training, supplies, or other expenses. *Id.* So long as these are the actual payments that the CEJs are to receive, they will not be considered civil offices subject to emolument, and the Franklin Constitution will not bar a person from occupying that office while also being a MUD board member.

B. Whether Precinct Chair is a Civil Office Subject to Emolument:

Precinct chairs are likely not civil offices subject to emolument either. Precinct chairs are essentially a political agent for their respective political parties who bridge the gap between the public and their elected officials. *Precinct Chair Summary.* They are also responsible for organizing and campaigning and working with others to mobilize and organize voters and get them to the polls. *Id.* The argument could be made that these are governmental functions that are for the benefit of the people because the precinct chairs organize voters and facilitate their voting, which is a service the government provides to the general public, and they are voting members of their Executive Committees, which are governing bodies of political parties. *Id.* Also, it could be argued that they operate on behalf of the general public because they are the bridges between the people and their elected officials. Although both of these points are valid, it seems more likely that a precinct chair will not be considered to be in charge of a general government activity because the government traditionally does not advocate on behalf of a political party. Instead, the government provides the sites for members of political parties to vote, which the CEJs will ensure are being run appropriately. Here, however, the precinct chairs are more likely to be seen as private representatives of political parties, which although they are open to the public, they are not a function of the government. Additionally, precinct chairs are not entitled to compensation for their services, so it is not possible for them to be seen as a member of a civil office subject to emolument. *Id.*

II. Common Law Restrictions:

In addition to the Constitutional restriction on occupying two civil offices subject to emolument simultaneously, there is also a common law restriction based on the doctrine of incompatibility. *Attorney General Opinion No. 2008-12.* The doctrine of incompatibility bars any person from holding two civil offices if the offices' duties conflict. *Id.* The three aspects for determining whether there is a conflict are whether there is self-appointment, self-employment, and conflicting loyalties. *Id.* As provided in the above section, it is likely that a MUD board member and a CEJ will be found to be civil officers. However, it is unlikely that a precinct chair will be considered a civil officer.

A. Self-Appointment and Self-Employment:

Self-appointment and self-employment occur where the duties of one position include appointing or employing the second position. *Id.* Here, there is nothing to indicate that a CEJ appoints or employs any members of the MUD boards of directors, or vice versa. In fact, MUD elections are completely separate from elections monitored by CEJs. *Interview with Danielle Hastings.* Similarly, there is nothing to indicate that a precinct chair appoints or employs any members of the MUD boards of directors, or vice versa.

B. Conflicting Loyalties:

In order for the conflicting loyalties prong to apply, both positions must constitute a "civil office." *Attorney General Opinion No. 2008-12*. The test is whether the members of one of the positions has powers and duties that are incompatible with the powers and duties of members of the other position. *Id.* This must be done in a way that prevents a person from exercising independent and disinterested judgment in either or both positions, usually due to overlapping jurisdictions. *Attorney General Opinion No. 2010-7*. In Opinion No. 2008-12, the Attorney General found that the positions of a MUD board member and a member of the Planning and Zoning Commission (PZC) were incompatible due to conflicting loyalties, because a PZC might be able to control and impose its policies on the MUD for proposed developments that are located within the MUD on whose board the PZC member serves. *Attorney General Opinion No. 2008-12*.

i. Conflicting Loyalties between MUD board position and CEJ:

Here, as explained above, both the MUD and the CEJ positions will be considered to be civil offices. However, it is unlikely that there will be any conflicting loyalties between board members of a MUD and a CEJ. A MUD oversees water, drainage, sewer, and other services to suburban communities. Id. A MUD is not responsible, however, for overseeing elections or providing for their operations, which is what a CEJ is in charge of doing. Although there are elections to determine who are members of MUD boards, as provided above, the CEJ is not responsible and does not have jurisdiction for overseeing those particular elections. For that reason, the two positions, although both civil offices, likely do not have any conflicting loyalties.

ii. Conflicting Loyalties between MUD board position and precinct chair:

As explained above, it is likely that a precinct chair position will not be considered a "civil office" position. If it were to be seen as one, however, there could possibly be an issue of conflicting loyalties. MUD board members are elected in their own elections held in November. *Transcript of Danielle Hastings*. These November elections are partisan in nature and determine which candidates make it on the board of directors. *Id.* This could create a conflict of loyalties with the precinct chair position, because the precinct chair acts as a liaison between the political party affiliates of the general public and the elected officials that represent that party. *Precinct Chair Summary*. They are also responsible for organizing and campaigning, and mobilizing voters who will go to the polls. *Id.* This would create a similar conflict as that in Attorney General Opinion No. 2008-12 between MUD board members and PZC members. Here, the issue would be that the precinct chairs could potentially influence the outcomes of the MUD board elections to get people on the board who would act on issues in accordance with the precinct chair's wishes and beliefs. Despite this risk, however, as stated above, the conflicting-loyalties issue likely does not apply because it is unlikely that a precinct chair will be seen as a civil office.

Conclusion:

The position as a MUD board member will be seen as a civil office of emolument and, under the

Franklin Constitution, will not be permitted to be held with any other position that is also considered a civil office of emolument. The CEJ position will likely be considered a civil office position due to its public nature, but will likely not be seen as a position that involves emolument because CEJs are permitted only to accept reimbursements. The precinct chair position will likely not be seen as either a position of civil office, because of its non-government nature, nor as a position involving emolument, because precinct chairs are not entitled to payment of any kind. Further, neither position will be barred for Ms. Hastings under the common-law restriction based on the doctrine of incompatibility. The CEJ position has no loyalties that overlap with the MUD board member position because the elections are separate, and the precinct chair position, although likely conflicting with the MUD board member loyalties, is not a position of civil office. As a result, Ms. Hastings will likely not be barred from accepting either position in conjunction with her current position as a MUD board member.

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