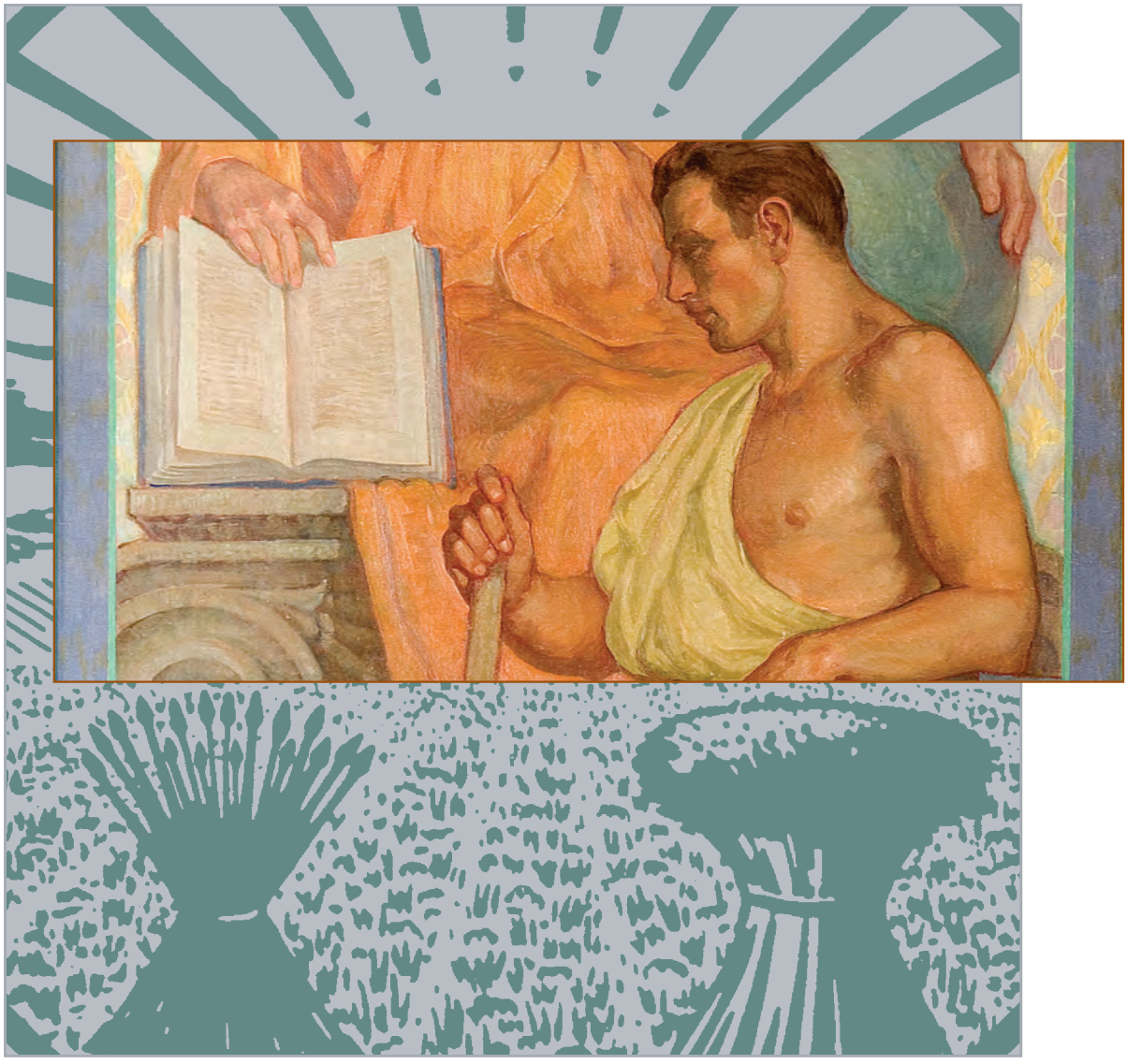
THE SUPREME COURT *of* OHIO

February 2013 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 2013 OHIO BAR EXAMINATION

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OHIO BAR EXAMINATION

February 2013 Ohio Bar Examination
Essay Questions and Selected Answers

MPT Summaries and Selected Answers

The February 2013 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 2013 exam, along with the NCBE's summaries of the two MPT items given on the exam. This booklet also contains some actual applicant answers to the essay and MPT questions.

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

Copies of the complete February 2013 MPTs and their corresponding point sheets are available from the NCBE. Please check the NCBE's website at www.ncbex.org for information about ordering.

QUESTION 1

Developer owned a 37-acre parcel of land he intended to develop as Haven Links, an exclusive residential and golfing community in Anytown, Ohio. The parcel was situated off the main road, adjoining property owned by Neighbor, and the most convenient access to Developer's parcel was across Neighbor's property. It was crucial to the marketability of the lots in the development that there be access over Neighbor's property.

Developer met with Neighbor to negotiate access to Haven Links over Neighbor's property. Neighbor declined Developer's request for an easement, but did agree to a long-term written lease of a defined strip, 50 feet wide, for access. Under the lease, Developer was permitted to enter the land and commence construction of the road upon payment to Neighbor of the first annual rent of $25,000.

As further inducement to Neighbor, Developer, who knew that Neighbor was an avid golfer, promised in an oral side-agreement to arrange for Neighbor to have free membership in the golf facilities for as long as Neighbor owned the adjoining property.

Developer paid Neighbor the first $25,000 rental payment, contracted for construction of the road, and simultaneously began to sell lots in Haven Links.

The covenants, conditions, and restrictions (CC&Rs) that Developer had written were duly recorded in the county land records. The CC&Rs provided that the use of the golf facilities would be limited to the property owners in Haven Links and their guests.

When this restriction came to Neighbor's attention, Neighbor tried several times over a period of two weeks to get in touch with Developer by phone and e-mail, asking Developer to give him a written guarantee that the CC&Rs would not affect the golfing rights Developer had agreed to secure for Neighbor. Frustrated that Developer did not respond to any of his communications, Neighbor refused to allow the road construction crew to commence work.

A few days later, Neighbor received a letter from an attorney representing Developer stating that Developer would consider it a breach of the lease agreement unless Neighbor immediately allowed the road crew to commence construction. The letter also stated that the issue of Neighbor's golfing rights was "a totally separate matter that is out of Developer's hands," inasmuch as it was governed by the CC&Rs. However, the letter stated, "Developer will make a good faith effort, as promised, to persuade the Haven Links property owners association to make an exception for Neighbor, but he cannot guarantee anything."

Neighbor responded that it was Developer who breached their contract, tendered a refund of the $25,000 rental payment, and said, "The lease is cancelled." Developer refused to accept the refund and filed suit for breach of contract.

What arguments can Developer make in support of his claim for breach of contract; what defenses can Neighbor assert; and who is likely to prevail? Explain your answers fully.

Developer is likely to prevail in this breach of contract action despite Neighbor's defense.

Developer can argue that the agreement between himself and Neighbor was limited to what was written in the lease itself. Generally, a lease for land over one year must be in writing to satisfy the statute of frauds. When a contract is in writing, signed by both parties, and contains what appears, on its face, to be all the terms that fully manifest the two parties' intent, the document is considered fully integrated and no extrinsic or parol evidence will be allowed to contradict or add to these terms. Here, the Developer can argue that the contract between himself and Neighbor is a fully integrated expression of both parties' intent and, therefore, should be construed by the court to contain only one condition to the lease – the payment of the annual $25,000 rent. Developer can argue that because that is the entire expression and the $25,000 has been paid. Neighbor has breached the contract by refunding the $25,000 and refusing access to the land.

Developer can also argue that because the writing was the full expression of intent, the golf-course access promise was intended merely as a good-will showing on the part of the Developer. It was not intended to be a part of the written contract as it was not included and there is no consideration to support it as a separate contract because at the time it was spoken, both parties had already signed the written lease contract and therefore Neighbor was already under a pre-existing legal duty to allow Developer access to the leased land. Pre-existing legal duties cannot be used as present consideration for new contracts. As the golf-course access promise was not a bargained – for exchange between the two parties and there was no reliance to detriment by Neighbor, this promise will not be enforceable as either part of the written lease or as a separate contract.

Neighbor can try to assert lack of condition occurring as a defense to the breach of contract argument. He can argue that the writing was not a fully integrated document, that it was only partially integrated as evidenced by Developer's oral contemporaneous promise to allow golf-course access. If this could be shown, Neighbor would argue that a condition to the lease was allowing him golf-course access and the covenants restricting access only to development property owners was a breach of that condition. This will fail because of the parol evidence rule which prohibits evidence of prior oral or written statements that add to or alter the terms of the written agreement, as well as contemporaneous agreements that would add to or change the material terms of the written agreement. The addition of an extra condition to performance would go beyond mere explanation of ambiguous terms and, therefore, should be prohibited by the court. Because Neighbor's defense will fail, Developer should prevail in his breach-of-contract action.

QUESTION 2

The Franklin State Legislature has enacted the following laws:

Law 1: A law authorizing a two-minute silent period at the start of each school day, which is to be used for meditation or voluntary prayer.

The law states: "At the commencement of the first class of each day in all grades, in all public schools, the teacher in charge of the room in which each class is held may announce that a period of silence, not to exceed two minutes in duration, shall be observed for meditation or voluntary prayer and during any such period no other activities shall be engaged in." The Legislature enacted the law in response to a U.S. Supreme Court decision striking down a Franklin state law authorizing the reading of a state composed prayer at the start of each school day.

Law 2: A law creating a tuition voucher program.

The law provides that any student in kindergarten through 8th grade who is currently enrolled in a failing public school system under state control could receive a tuition voucher to partially offset the cost of attending another participating public or private school. While less than 10% of eligible students have taken advantage of the tuition voucher program, of those students, more than 95% use the vouchers to enroll in Catholic schools.

Law 3: A law creating a scholarship fund to assist academically gifted students with college education expenses.

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

In addition, and not dependent on the foregoing laws, two public schools in the State of Franklin that receive state and federal financial assistance engage in the following practices:

ABC High School permits student religious groups, as well as non-religious groups, to hold meetings before and after school hours. One very popular religious studies group meets every Tuesday after school. Principal Skinner attends all of these meetings as a faculty member for his adult presence. He is not officially a participant, but has been known to chime in from time to time with his own point of view on the religious topics being discussed.

DEF Elementary School, having heard about the popularity of the religious studies meeting at ABC, decided to allow student religious groups to meet on the same before/after school basis as the non-religious extra-curricular groups. Children as young as 5 years old regularly attend the religious studies group meetings. The meeting is staffed by a school faculty member who does not participate in the discussions.

All three state laws and both of the religious studies meeting programs have been challenged as violative of the First Amendment of the United States Constitution by parties who have standing to challenge the laws and activities.

How will the Court likely rule on each of the challenges? Explain your answers fully.

Law 1:
The moment of silence will be held as unconstitutional. The Lemon test states that in order for a statute to be Constitutional under the first amendment, the primary purpose of the statute has to be secular, it can neither inhibit nor advance religion, and it cannot foster excessive entanglement of the state and religion. This law was enacted in direct response to Franklin's law about prayer being struck down. It also states that children can either "meditate or voluntary prayer." When the language is coupled with the fact that the law was just struck down, the court will likely see this as being a statute for a non-secular purpose. It would also seem to promote religion as students can pray. The court would hold this statute unconstitutional and strike it down.

Law 2:
Law number two, the voucher program, will be upheld. It is also subject to the Lemon test: Primary purpose of the statute has to be secular, can neither promote nor inhibit religion, and no excessive entanglement. The purpose of this program is to allow students to go to a better school system. The statute is neutral on its face as to what schools they can or cannot attend. The fact that the students tend to go to Catholic schools does not automatically make them unconstitutional. The first element will be met, because the secular purpose is that the children get a better education. The second element is also met because the statute does not say that they can or cannot go to religious schools. To do either would fail the second prong of the Lemon test. The third part is also satisfied in that it is not creating any excess entanglement between the government and religion. The court has also held in similar circumstances that allowing for buses, books, or waiver programs have not violated the establishment clause in the past. This law will be upheld because it does not violate the Lemon test.

Law 3:
Law number three, the scholarship fund, will be upheld. Here, it is also subject to the Lemon test which requires that the primary purpose must be secular, neither advance nor inhibit religion, and no excessive government entanglement. The statute is for a secular purpose in that it allows a student to go to any college and take any class as long as it is not for a degree in theology. It may seem to fail the second prong of not inhibiting religion, but the Supreme Court has told us in comparable cases that allowing a student to take religious classes at a private institution as long as it is not for a degree in theology is acceptable in that it is as neutral as possible towards religion. This also does not foster in excessive entanglement with the government in that they are just providing the scholarship neutrally.

Religious Study Meetings:
Both of the meetings will be subject to the Lemon test as well. The first school will fail the Lemon test because the principal participates in the discussions. Since he is the principal working in a public school, he is an extension of the State. His "chiming in" from time to time would seem to advance religion and fail the second prong of the Lemon test. It would also seem to foster entanglement between religion and state. The second public school meeting will likely be constitutional even though there is a teacher present. Here, the teacher remains silent and is just an adult presence. It is a voluntary meeting, and they have non-religious meetings as well. The first public school will fail because of the principal's involvement, but the second will prevail because it is voluntary, neutral, and the teacher is silent.

QUESTION 3

Alan, Bev, Chad, and Dana are equal partners in A-Thru-D Partnership, an Ohio partnership engaged in the sale of Wackywanna, a natural herb rumored to have intoxicating properties similar to that of marijuana. The partnership agreement (Agreement) specifies that the term of the partnership is for a period of six months.

A week after the partnership was established, the following events occurred.

On Monday, Alan gave notice to the partnership and each partner that he was immediately withdrawing from the partnership for personal reasons. Bev, Chad, and Dana vowed to continue with the partnership business.

On Tuesday, A-Thru-D Partnership lost a huge contract to sell Party Time International (PTI) an enormous quantity of Wackywanna. The sale, which was to have been completed that day, did not occur because PTI had dealt with A-Thru-D only because of a personal relationship with Alan.

On Wednesday, Bev dropped dead when she heard the news of the loss of the PTI contract. Chad and Dana vowed to continue with the partnership business.

On Thursday, the federal government banned all future sales of Wackywanna and made it unlawful to engage in the business of selling the herb.

On Friday, Chad dropped dead when he heard the news of the federal ban.

On Saturday, Dana took it upon herself to wind up the partnership's business by disposing lawfully of the remaining inventory of Wackywanna, paying all outstanding partnership debts, and selling the remaining partnership assets. Dana then distributed the proceeds equally to Alan, herself (Dana), and the estates of Bev and Chad.

Under Ohio general partnership law:

1. Was Alan's withdrawal from the partnership allowable and, if so, was it rightful or wrongful?
2. What is the effect, if any, of each of the following events on the continuation of the partnership:
    (a) Alan's withdrawal from the partnership?
    (b) Bev's death?
    (c) The federal ban on Wackywanna?
    (d) Chad's death?
3. Did the loss of the PTI contract resulting from Alan's withdrawal expose Alan to any liability to the partnership?
4. Was Dana lawfully required to wind up the partnership, and did she properly distribute the net proceeds from the sale of the assets?

Explain your answers fully.

A

Under Ohio law, a partnership is an agreement between 2 or more parties to operate a business and share the profits. While a partnership does not require a written agreement, if it has one, then it controls the parties' relationship and overrules any contrary state law provision.

1. Alan's discharge was permitted, but was nonetheless wrongful. The ability to withdraw from a partnership and the wrongfulness of that withdrawal from the partnership are two separate questions. A partner is always permitted to withdraw from a partnership, regardless of whether the withdrawal is rightful or wrongful. Whether the withdrawal from the partnership is wrongful or not depends on the reason for the withdrawal and whether the partnership was for a term or at will. In this case, the partnership was at will. This means that any withdrawal before the end of the term is wrongful, unless it is permitted in the agreement, or resulted from a death, bankruptcy, etc. In this case, Alan withdrew before the end of the term of the partnership. There is no indication that this withdrawal was permitted by the agreement, so it was wrongful.

2. (a) Alan's withdrawal from the partnership was wrongful. This means that Alan is responsible for damages to the partnership. However, it does not necessarily dissolve the partnership. Instead, if the remaining partners agree, they can pay Alan his share of the partnership (minus damages for his wrongful withdrawal) and continue operating as a partnership.

(b) Bev's death is not a wrongful withdrawal. It is, however, a dissociation. Dissociation caused by death does not automatically cause dissolution of the partnership. Rather, her interest is dissociated and her estate is entitled to her portion of the partnership assets.

(c) The federal ban on Wackywanna resulted in a dissolution of the partnership. Regardless of whether a partnership is for term or at will, if the purpose of the partnership becomes illegal, the partnership is dissolved. In this case, the main purpose of the partnership (selling Wackywanna) became illegal, so the partnership dissolved.

(d) At the time of Chad's death, the partnership already dissolved because its purpose had become illegal. If the illegal purpose had not dissolved the partnership, then Chad's death would have. A partnership requires an agreement between two or more people to operate a business for profit. In this case, upon Chad's death, there would only be one partner left, and the partnership would thereby dissolve.

3. Alan's dissociation from the partnership was wrongful. When a partner wrongfully dissociates from a partnership, he is entitled to any damages resulting from his wrongful dissociation. In this case, the loss of the PTI contract was a harm to the partnership that was directly caused by his wrongful dissociation. Furthermore, the damages were foreseeable since Alan had brought the PTI contract to the partnership in the first place. Accordingly, Alan will be responsible for the damages caused by the loss of the contract.

4. Once a dissolution event occurs, the partnership does not automatically dissolve, but rather requires winding-up of the partnership's affairs. Any partner who has wrongfully dissociated cannot participate in the winding-up process. During the winding-up process, the participating partners must exercise a duty of care, but no longer a duty of loyalty. When winding up a partnership, all assets must be sold, debts of the partnership paid, the partner's equity returned, and then profits paid to the partners. In this case, Dana correctly wound-up the partnership by first paying the debts of the partnership. However, she should not have distributed the assets equally. Because Alan's dissociation was wrongful, his amount should be offset for the damages he caused to the partnership.

QUESTION 4

John, a resident of Cleveland, Ohio, was injured while using a power tool he purchased from Morgan's Home Supply Co. (Morgan's). The tool was manufactured by Atlas Tool Company (Atlas).

John filed a complaint for personal injury in Ohio state court alleging that his injury was caused by a defect in the power tool. He named as defendants, the following entities:

- Morgan's;
- Atlas;
- Holding Corp. (Holding), a New York corporation that holds all the stock of Atlas and has its sole office in New York;
- Sam's Supply House (Sam's), an Ohio corporation from which Atlas purchased components of the tool;
- X Corp., an Illinois corporation that holds all the stock of Sam's and has its sole office in Chicago;
- James Corp. (James), an Ohio corporation from which Atlas purchased components of the tool.

All defendants were served, but before any of them filed an answer or other pleading, John filed and served an amended complaint alleging an additional claim based on failure to warn. The amended complaint named the same defendants, except Morgan's. John inadvertently failed to name or assert a claim against Morgan's in the amended complaint.

Morgan's filed an answer to the original complaint. Later, Morgan's received a copy of the amended complaint, to which it did not file an answer.

Atlas filed an answer to the amended complaint denying all claims asserted against it and asserting affirmative defenses of contributory negligence and assumption of the risk. Atlas also filed a cross-claim against Sam's alleging breach of a contract for Sam's failure to timely deliver goods three years earlier.

Sam's filed an answer to the amended complaint denying all claims against it and asserting as an affirmative defense the bar of the statute of limitations. Sam's also answered Atlas's cross-claim denying the allegations and asserting the affirmative defense that it was an impermissible cross-claim.

X Corp. filed an answer to the amended complaint denying all allegations and asserted the affirmative defenses of lack of personal jurisdiction and that it is an improper party.

Holding and James filed answers to the amended complaint denying all allegations. Neither of them asserted any affirmative defenses.

During pretrial discovery, the following facts were established as undisputed: John was 65% contributorily negligent; John was fully aware of the risk involved in using the power tool; John's action was filed one day after the statute of limitations expired and after Atlas had paid John $5,000 for a full release of all his claims against Atlas.

Upon completion of discovery, the following parties filed the following motions relating to the amended complaint:

1. Morgan's moved for a ruling that it was not a party in the action.
2. Sam's moved to dismiss Atlas's cross-claim on the ground that it is not a proper cross-claim.
3. Atlas, Sam's, and James each filed motions for summary judgment on the following grounds: (i) John's assumption of the risk; (ii) John's contributory negligence; (iii) and John had released his claims.
4. Holding and X Corp. each filed motions to dismiss on the following grounds: (i) failure to state a cause of action upon which relief can be granted; (ii) each is an improper party; and (iii) lack of personal jurisdiction.

John filed briefs in opposition to each motion.

Applying the Ohio Rules of Civil Procedure, which of the motions would John be likely to prevail on and which ones would he likely lose? Explain your answers fully.

1. John will lose with respect to Morgan's motion. A pleading may be amended once without leave of court, and if it is a complaint, it may be amended in the lesser of 28 days or when a party files an answer to it. When John filed the amended complaint, it was his first amendment, within 28 days, before any parties had yet answered. As such, John properly amended his complaint. The amended complaint "relates back" to the date of the original complaint, essentially taking the place of the original complaint. Here, when filing an amended complaint that excluded Morgan, John necessarily removed Morgan from this action. Morgan is not a party in the action.

2. A cross-claim is an action by one defendant against another defendant, or by one plaintiff against another. A cross-claim must arise out of the same transaction, occurrence, or common nucleus of facts as the original action. Atlas's claim against Sam was improper, as it arose not out of the products liability action regarding the power tool, but out of a separate contract dispute between the party three years prior. John will win this motion.

3 & 4. Affirmative defenses, such as assumption of the risk and contributory negligence, and lack of personal jurisdiction rule 12(b)(2) must be raised in the answer or are waived. The parties each are filing a summary judgment motion, where there should be no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, with respect to the (1) assumption of the risk defense, (2) contributory negligence defense, and (3) release of claims. Atlas raised assumption of the risk and contributory negligence in his answer. Sam raised none of the above issues in his answer, and James raised none of the issues. As such, collectively the only issues which any defendant can raise for summary judgment which are preserved are assumption of the risk and contributory negligence for Atlas. Only Atlas will be granted summary judgment for contributory negligence, and assumption of the risk as John's 65% negligence and admitted assumption of the risk present no issues as to material facts. Atlas' motion regarding lease of claims still has genuine issues of material fact, so Atlas' motion for summary judgment will lose on that matter.

Holding did not properly raise personal jurisdiction in his answer, and it will be struck down. X Corp raised it so John will lose on that motion if there truly is no personal jurisdiction as to X Corp.

QUESTION 5

Driver and his adult Son were travelling northbound on Golf Road in Anytown, Ohio, on their way to play golf at about 7:30 a.m. one Saturday. There was no traffic or other activity on Golf Road at the time.

The posted speed limit sign that Driver passed earlier was 35 mph; however, the speed limit sign in view ahead was 55 mph. Both Driver and Son were wearing seat belts, and Driver was driving appropriately in the right lane of travel.

Seemingly out of nowhere, travelling south, Trooper Tuff (Tuff) drove past Driver's vehicle and shortly thereafter turned around and activated his overhead cruiser lights, speeding up to the rear of Driver's vehicle to effectuate a traffic stop. Tuff indicated that the stop was for "going 52 in a 35." Driver, without admitting his speed, asked how Tuff could clock the speed of Driver's vehicle under the circumstances, and Tuff replied "experience."

Driver produced a valid title, registration, and proof of insurance. Tuff required Driver and Son to exit the vehicle while Tuff walked around it to observe the exterior and interior. Tuff continued to question Driver about where he purchased the vehicle; where he was going; why Son was with him; if and where either worked; if either had ever been in any kind of trouble before; and if either had consumed any drugs or alcohol recently. Driver and Son cooperated and answered Tuff's questions politely for a period of about 25 minutes.

Tuff then asked to search the glove box and trunk of Driver's vehicle "just to make sure you're telling the truth." Driver refused consent to search the vehicle and told Tuff to give him the traffic ticket because he was leaving for golf. Tuff ordered Driver not to leave, but Driver and Son got into their vehicle and left.

Tuff pursued them, stopped them again, and arrested Driver for failure to obey an order or signal of a police officer. Driver's vehicle was then impounded and searched. The vehicle search yielded a loaded firearm in the glove box, for which Driver had a concealed carry permit. Nonetheless, Driver was also charged with improperly handling a firearm in a motor vehicle.

A search of the trunk yielded a small computer, owned by Son, that bore the label "boys." The crime lab processed the computer to discover juvenile pornography stored on the hard drive. Son was charged for pandering obscenity due to the result of the search of the computer. A traffic citation was never issued for the alleged speeding violation.

Prior to trial, Driver filed a motion to dismiss the charge of failure to obey an order or signal of a police officer. Driver also filed a motion to suppress the evidence of the firearm, and Son filed a motion to suppress the computer evidence discovered in the search of the vehicle.

1. Should Driver's motion to dismiss the charge of failure to obey an order or signal of a police officer be sustained?
2. Should Driver's motion to suppress the gun be sustained?
3. Should Son's motion to suppress the computer content be sustained?

Explain your answers fully.

1. Driver's motion to dismiss should be granted.

A police officer has the ability to stop a vehicle based upon reasonable suspicion [which is questionable in the case at bar]. Once the stop is effectuated, a police officer can develop probable cause that can lead to a search of a vehicle [which is an exception to the warrant requirement of the 4th amendment]. However, a police officer cannot indefinitely detain an individual without having some form of reasonable suspicion or probable cause.

In the case at bar, the police officer stated that he stopped Driver for driving "52 in a 35." It is questionable whether the new speed limit was 55 or 35, but assuming that it was 35, the police officer's experience of determining that a car was speeding would give that police officer reasonable suspicion to pull over a vehicle. However, after pulling over that vehicle, the police officer didn't develop any further information of criminal wrongdoing. The fact that Driver denied the police officer's request to search "just to make sure [they were] telling the truth" did not provide the police officer with any justifiable reason to continue to detain them. After 25 minutes of questioning and producing whatever he wanted, police officer had no further justification for detaining Driver and therefore, Driver cannot be found guilty of failing to obey an order or signal of a police officer. Therefore, Driver's motion should be granted.

2. Driver's motion to suppress the gun should be sustained.

The 4th Amendment grants one the ability to be free from unreasonable search and seizure. Consequently, for the police to search or seize, they are required to either have a warrant or there must be an exception to the warrant requirement.

In the case at bar, there was no warrant, but there is an exception to the warrant requirement. The one exception to the search requirement is a search that is done when impounding a car. In that case, no warrant is required and there is no requirement for probable cause. This search must be a routine or regularly done at the impound lot and not done simply for one vehicle. The facts don't seem to suggest, but it is common for cars to be searched when they are impounded. But even with that exception, it is clear that the stop was illegal and anything that came from that stop is fruit of the poisonous tree and should be excluded. Therefore, Driver's motion should be granted.

3. Son's motion to suppress the computer contents should be granted.

A passenger in a car cannot challenge the search of a car, as they have no reasonable expectation of privacy in the car. They can, however, challenge the stop of a vehicle. As demonstrated earlier, the second stop was wrong and, therefore, it violated Son's rights. Everything that follows from this illegal stop is considered fruit of the poisonous tree and should be excluded.

But, assuming arguendo, that the stop was lawful, Son may be able to challenge the search of the contents of his computer. In a routine impound storage search, police are simply allowed to take inventory of what is in the car for reasons of liability [to say that something was stolen from the car by the police]. It does not give the police officers the ability to search within a computer to see if there is anything on said computer. Clearly, Son would have a reasonable expectation of privacy in the files on his computer. Therefore, to do a search of the computer, the police must be able to show probable cause and obtain a warrant. The simple fact that the computer bore the label "boys" is not enough for probable cause and no warrant was sought. Therefore, the contents of the computer should be suppressed because the search of the computer violated Son's reasonable expectation of privacy.

QUESTION 6

Lawyer, a partner in a three-partner law firm, represents Apex, a plaintiff in a civil lawsuit referred to as the "Complex Matter" that has been pending for more than a year. Pursuant to a written fee agreement between Lawyer and Apex, an attorney's fee was paid in advance and deposited in Lawyer's law firm trust account from which the firm has been deducting Lawyer's earned fees and case expenses each month when statements are delivered to Apex. There remains a substantial balance.

Complex Matter has included massive production of both electronic and paper documents to and from all parties. Many of the documents are subject to a confidentiality order, prohibiting their use or dissemination outside the Complex Matter. In addition, many of the Apex documents have been withheld by Lawyer because they are subject to attorney-client privilege. Lawyer has listed those documents on a privilege log, which she maintains in her office.

By leave of court, New Party, a current client of one of Lawyer's partners, has recently been joined as a defendant in Complex Matter. The interests of Apex and New Party in Complex Matter are directly adverse.

What ethical issues confront Lawyer and her firm under the Ohio Rules of Professional Conduct, and what steps must they take to resolve them? Explain your answers fully.

Duty of Loyalty. Although many conflicts can be waived with appropriate safeguards, it is not possible to waive the conflict created by representing two parties that are directly adverse to each other in litigation. A lawyer and, by imputation, his or her firm, owe a duty of loyalty to their clients, and it is impossible to be loyal to two opposing parties at the same time.

Because of this conflict, the law firm must withdraw from representation, preferably of both parties. Because there may be a substantial hardship resulting from the time and money spent by Apex, Lawyer and Apex may seek to get New Party to agree to allow the law firm to withdraw from representation of them as a client, but permit the firm to continue to represent Apex. As a former client, a duty of loyalty is still owed, but this could potentially be waived by former clients with consent that is (1) informed, (2) written, and (3) preferably agreed to after seeking legal advice. Waiver of the conflict is only proper if doing so is reasonable. This may mean that further steps need to be taken to insure that the partner who represented New Party does not see Apex's files, does not discuss the matter, and does not share in the fees. Because the firm is small, this may not be practical. On the other hand, no facts indicate the parties knew of potential conflict, so it is possible that the lawyers run fairly independent practices within the firm. If so, waiver of the conflict could be considered reasonable.

If it is necessary to withdraw from representing both Apex and New Party, further duties apply. The law firm must return all money, as well as all files to the clients.

Lawyers owe a duty of confidentiality to former clients. Therefore, even if the lawyers withdraw from the case, they may not discuss anything they learned during the discovery process that is covered by the court's confidentiality order or anything learned during the course of representation. The lawyers within the law firm cannot discuss with one another what they learned from representing New Party and Apex.

QUESTION 7

Commuter, who walks each day from her home to her office in Anytown, Ohio, recently experienced the following events. As Commuter was approaching the Anytown business district, she encountered Panhandler, who was asking passersby if they had any loose change. Commuter responded that she had no money and quickly walked past him. Panhandler followed her down the sidewalk for several blocks, continuing to ask for money. As Commuter pulled out her cell phone to call for help, Panhandler grabbed her phone and started to run away. Commuter chased after him and was able to get close enough to club him with her umbrella. The blow from the umbrella caused Panhandler to fall to the ground and drop the cell phone. Commuter retrieved her phone and quickly continued down the sidewalk.

A few blocks later, as Commuter was crossing through a street intersection, she saw Bicyclist heading down the street toward her. Irritated that Commuter was blocking his path through the intersection, Bicyclist continued peddling toward Commuter, trying to intimidate her to get out of his way. As she saw Bicyclist heading directly toward her, however, Commuter was petrified with fear and froze in her tracks. Attempting to avoid an inevitable collision, Commuter aimed her water bottle at Bicyclist and squirted a stream of water at his face. Bicyclist avoided being pelted with the water by swerving to one side, but by doing so he crashed into a curb and was thrown from his bicycle and injured.

As Commuter walked away, Neighbor drove by and offered Commuter a ride, stating, "I'm going to an 8:15 a.m. medical appointment a few blocks short of your office. I'm happy to give you a lift that far. In fact, would you mind driving my car for me to the medical building because I have a terrible headache this morning?" Commuter gladly accepted Neighbor's offer, hopped in, and started driving. As they approached the medical building, however, Commuter realized that she was almost late for work, but that Neighbor still had 30 minutes to get to his appointment. Without discussing her plan with Neighbor, she decided to drive all the way to her office. As they passed the medical building, Neighbor yelled, "Wait, that was the medical building!" Commuter did not stop or even slow down, but just kept driving until they reached her office building. "Thanks for the lift," she said to Neighbor, as she got out of the car and walked into her building.

What intentional torts may Panhandler, Bicyclist, and Neighbor each assert against Commuter; what defenses, if any, might Commuter raise as to each tort; and is Commuter likely to prevail on any of the defenses? Explain your answers fully.

Panhandler v. Commuter

Panhandler can assert the intentional tort of battery. Battery is when one intentionally causes a harmful and/or offensive contact with another. Harmful and/or offensive is judged by what a reasonable person would consider to be harmful. The contact can come from anything, not necessarily the human body.

In the case at bar, Commuter used an umbrella to "club" Panhandler. By any reasonable measure, this is harmful and/or offensive contact that was intended by Commuter. Therefore, Panhandler has a prima facia case for battery.

Commuter, however, could assert the defense of defense of property. One is allowed to defend one's property with non-deadly force, as long as they give a warning [the warning is not necessary if it would be futile]. Furthermore, one is allowed to chase after someone and use reasonable force [which is judged using the reasonable person standard] to re-obtain property that was wrongfully taken from them.

In the case at bar, Panhandler stole Commuter's phone and ran away. Commuter followed Panhandler and used enough force to simply prevent Panhandler from stealing the property. [A warning in this case would have been pointless, as he was running away]. Therefore, Commuter will be able to successfully assert a defense against Panhandler's case, and will win.

Bicyclist v. Commuter

Bicyclist can assert the intentional tort of assault. Assault is when one intentionally causes another to fear an immediate harmful or offensive contact [aka, a battery]. One must be aware of the actions from the Defendant [which is the opposite for battery]. Furthermore, there is a level of immediacy that is required. Finally, as with battery, the standard for judging harmful or offensive is what a reasonable person would consider to be harmful or offensive. In the case at bar, Commuter aimed a water bottle at Bicyclist and squirted a stream of water at his face. Bicyclist was aware of this immediate harmful and offensive contact. Furthermore, a reasonable person would consider a spray of water to the face to be considered harmful and offensive. Finally, Commuter intended to spray the water to make contact with Bicyclist. Therefore, Bicyclist will have a prima facie case for assault.

Commuter, however, will be able to assert the defense of self-defense. One is allowed to defend oneself with reasonable force; i.e., enough force so as to prevent an intentional tort or criminal activity. One cannot use any more force than is reasonably necessary. Furthermore, while there is a duty to retreat [except from cars or homes], this duty only applies to the use of deadly force. In the case at bar, Commuter used reasonable force to prevent Bicyclist from hitting her with his bike. While she clearly had the ability to get out of the way, she had no duty to get out of the way and this will not affect her ability to use the defense of self-defense. Consequently, Commuter will be able to defend against Bicyclist's assault tort.

Neighbor v. Commuter

Neighbor will be able to assert the intentional tort of trespass to chattel [TC]. TC is when one intentionally interferes with one's possessory rights to chattel by either intermeddling or dispossessing. In the case at bar, Neighbor allowed Commuter to drive his car to his doctor. Once Commuter drove past the doctor's office, she was dispossessing and intermeddling with Neighbor's car. Therefore, Neighbor will have a prima facie case for TC.

Commuter, however, will have no defense to assert against Neighbor. The closest she could use would be private necessity. A private necessity exists if one is in need of using another's property to protect oneself from harm. However, one cannot use this defense if they were the ones who created the risk. As Commuter was late because of her actions, she will not be able to use this defense.

QUESTION 8

John Law (Law) owns a law practice and has entered into a Loan Agreement with Big Bank (Bank) to provide working capital. As security for the repayment of the loan, Law has executed a Promissory Note and Security Agreement. The Security Agreement grants Bank a security interest in "Law's property of any kind, nature and description then owned or thereafter acquired." Bank properly filed a Financing Statement describing its collateral as all of Law's property, as described above. While the loan to Bank was outstanding, Law entered into the following transactions:

1. Purchased a television for his home from Ace TV and agreed to pay for it one year after purchase. He signed a security agreement describing the television. No Financing Statement was filed.
2. Borrowed $10,000 from Pawn Shop, and to secure the repayment, signed a security agreement describing a gold watch, his wife's engagement ring, and his diamond ring. He delivered his gold watch to Pawn Shop and agreed to deliver his diamond ring and his wife's engagement ring the following day. Neither the engagement ring nor his diamond ring was delivered. No Financing Statement was filed.
3. Purchased a computer for his law practice from Specialty Computer (Specialty). The computer was delivered to his office and payment was required to be made within 10 days. Law did not make payment within 10 days, and on the tenth day, Specialty properly filed a Financing Statement and described the computer.
4. Purchased furniture for his office from Furniture Mart (Mart), and the same was delivered. He signed a security agreement granting Mart a purchase money security interest in the furniture. No Financing Statement was filed.
5. Purchased an automobile from Dealer and agreed to pay for it in one year. He signed a security agreement describing the automobile. Dealer properly noted its security interest in the auto on the title and retained possession of the title. No Financing Statement was filed.
6. Borrowed money from Brother and signed a security agreement granting Brother a security interest in a trust in which Law is the beneficiary and in an estate, the proceeds of which will be distributed to him when the administration is completed. No Financing Statement was filed.

Bank asserts that it has a first and best security interest in all of Law's assets. The other creditors claim they have a first and best security interest in the particular property described in their respective security agreements.

1. Does Bank have a best and first security interest in any of Law's assets that is superior to that of any of the other creditors?
2. Does each of the remaining creditors have a perfected security interest in the assets described in their respective security agreements?

Explain your answers fully.

A security interest arises when a person provides collateral to support a debt obligation. A security interest can be created in writing or potentially by taking possession. For the interest to be created, the debtor must receive value, have rights in the collateral, and unambiguously state the nature of the collateral. The collateral described may not be super-generic – that is, it cannot be for all of a person's property forever acquired. Once the security interest attaches, the issue arises over who has a right to make claims on it. The process of putting the world on notice of the interest is called perfection. Perfection can be accomplished automatically, by filing a financing statement, or by taking possession of certain items. Typically, the first in time to perfect the claim is the first in right. An exception exists for Purchase Money Security Interests (PMSI). A PMSI arises when the money is used to buy the item in which the interest lies. A PMSI in consumer goods perfects automatically. PMSI in other items may perfect automatically but only for a period of 20 days. PMSI in inventory perfects if the secured party alerts other debtors. Filing can also perfect a security interest – an authorized financing statement that describes the parties and has a sufficient description of the collateral is needed. Further, items that have special titling rules, such as cars, may have other requirements, such as the listing of the lien on the title.

Here, Bank's agreement to acquire title in property of any kind, nature and description then owned or thereafter acquired was super-generic, which is not allowed. Therefore, its interest never attached, and it will be considered an unsecured creditor.

Ace TV has a perfected security interest because it sold a consumer good with a security interest in that good. Therefore, Ace has a PMSI that automatically perfected as described above.

Pawn Shop has a perfected security interest in the gold watch, but not in the other items. In order to perfect the interest in the other items, Pawn Shop would have needed to take possession or to file a financing statement. Pawn Shop did neither and thus failed to perfect its interest.

Specialty had a perfected interest in the computer. The computer, because it was to be used in his business, was equipment (a subset of goods). Further, because he used the credit to buy the computer, a PMSI exists. This PMSI is automatically perfected for 20 days. Within those 20 days, Specialty filed a financing statement. Thus it has appropriately perfected its interest.

Following the same logic as stated above, Mart would have had a perfected interest had it filed within 20 days. Failure to do so, however, will terminate the perfection.

As noted above, an interest in an article that has a separate titling statute must follow the rules of that statute. Here, Dealer appropriately noted the lien on the title and kept the title. Therefore, its interest is perfected.

Brother attempted to take a security interest in intangibles. Such a security interest is not perfected merely by the signing of an agreement. Therefore, Brother will not have a perfected security agreement.

QUESTION 9

Mark's car struck Art's truck from behind at the intersection of Fifth and Vine, in Anytown, Ohio. Bystander saw the collision. The investigating Officer took a statement from Bystander who volunteered that he was unemployed. In the accident report, Officer noted a small dent on the fender of Art's truck.

Doctor, Art's physician and long-time golfing buddy, treated Art for a muscle sprain of the neck. Doctor referred Art to Litigator for purposes of filing a personal injury lawsuit. Litigator sent a letter to Doctor thanking him for the referral and agreeing to pay 100% of Art's medical expenses from the proceeds of the personal injury case.

At Officer's pre-trial deposition, attended by Mark's attorney, Officer testified that he not only saw a dented fender, but a lot of damage to the back bumper of Art's truck.

At trial, on direct examination by Litigator, Doctor testified that medical treatment of Art's very painful neck injury totaled $10,000. Before concluding direct examination of Doctor, Litigator approached the judge and advised that he intended to ask Doctor about his opinion of Art's character for truthfulness. To support his opinion, Doctor would also testify that Art always told the truth about his golf score. Mark's attorney objected to any testimony by Doctor relating to Art's character for truthfulness.

On cross-examination of Doctor, Mark's attorney stated to the judge that he was going to ask Doctor to identify the letter from Litigator, offer the letter in evidence, and then ask the following question: "Isn't it true that Litigator guaranteed payment of your medical fees from any money awarded in this lawsuit?" Litigator objected to the question and admission of the letter.

Litigator called Bystander as a witness. Bystander testified that Mark's car struck Art's truck from behind. Bystander also testified that he was on a lunch break from work at the time of the accident and proudly stated that he had no prior brushes with the law. On cross-examination, Mark's attorney asked the following questions:

- Isn't it true you told Officer that you were not working on the date and time of the accident?
- Isn't it true that you were convicted five years ago on your 30th birthday for a misdemeanor DUI?

Litigator objected to both questions.

Mark's attorney called Officer to testify about the damage to Art's truck at the scene of the accident. Officer testified that he saw a small dent in the fender and a lot of damage to the back bumper. Mark's attorney then marked the accident report as an exhibit and asked Officer, "Isn't it true that, in your accident report, you stated that you saw only a small dent in the fender?" Litigator objected.

Assume the Ohio Rules of Evidence apply.

1. How should the trial court rule on the objection by Mark's attorney to preclude testimony by Doctor on (a) Art's character for truthfulness and (b) Art's truthfulness about his golf score?
2. How should the trial court rule on Litigator's objections to the intention of Mark's attorney on cross-examination to ask Doctor (a) to identify the letter sent to him by Litigator and then offer it in evidence and (b) how his fees were to be paid?
3. How should the trial court rule on Litigator's objections to cross-examination of Bystander by Mark's attorney on: (a) his inconsistent statement about his employment and (b) his prior conviction?
4. How should the trial court rule on Litigator's objection to the direct examination by Mark's attorney of Officer about the damage to Art's vehicle?

Explain your answers fully. Do not address issues of admissibility based on hearsay, relevance, or competency.

Doctor's Testimony

The trial court should sustain the defense's objection and preclude both items of testimony regarding Art's truthfulness. In a civil case, evidence of a party's character cannot be introduced unless it is at issue or the party opens the door. Some examples include custody disputes or defamation actions. This is a personal injury case. Art's truthfulness is simply not at issue. Further, Doctor's introduction of a specific instance of character is not allowed to prove character.

The Litigator's Letter

The trial court should deny Litigator's objections and rule that this evidence is admissible to impeach and substantively to show bias. A party may introduce evidence that is relevant to showing a witness' bias that may affect his testimony or view of the events. The letter can be admitted as substantive evidence pursuant to the best evidence rule. Litigator seeks to prove the content of the letter and has presented an original or copy for that purpose. Doctor can provide authentication for the letter by identifying and using his personal knowledge. The evidence of how his fees were paid is directly relevant to Doctor's bias. Litigator is allowed to show that Doctor is potentially an interested party. The weight given to this evidence will be at the jury's discretion, but the trial court should admit it.

Prior Inconsistent Statement and Bystander's Crime

The trial court should deny Litigator's objection regarding Bystander's prior inconsistent statement. A party can impeach a witness with a prior inconsistent statement. However, because the statement was not made under oath, any evidence of it cannot be admitted substantively. The Defense may only ask if the statement was made.

The trial court should sustain Litigator's objection regarding Bystander's prior crime of a misdemeanor DUI. Crimes may be admitted for purposes of impeachment when they are a crime of dishonesty or fraud or if they are a felony crime committed within 10 years (a prejudice test must be performed as to felony crimes). Here, Bystander's crime does not fit the parameters for admissibility to impeach. It is a not a crime of dishonesty and, although it occurred only 5 years ago, a DUI is not a felony. This evidence is far more prejudicial than probative.

Direct of Officer

The trial court should sustain Litigator's objection. Although it is not clear as to what Litigator is objecting to and he should clarify to preserve the issue, he has several grounds. First, the Defense has asked a leading question on direct, which is not permitted by the rules of evidence in these circumstances. There is no evidence of any exception to this rule, such as Officer being a hostile witness.

Second, the Defense has marked the police report as an exhibit. Generally, police reports are not admissible substantively. The Defense can refresh Officer's recollection with the document should Officer indicate to a proper question (that is, not the leading question already asked), that he does not recall.

In the alternative, the Defense could try to impeach Officer with the document. However, under the Ohio rules, this can only be done in limited circumstances because Officer is the Defense's own witness. The Defense would have to show surprise, which would be difficult to prove here since Officer made the same statement in the pre-trial deposition. The Defense could try to admit the deposition as substantive evidence for purposes of impeachment since it was performed under oath and Litigator had the opportunity to examine Officer at that time.

QUESTION 10

In 1957, Husband and Wife purchased Lots # 1 and # 2 in Happy Valley Residential Subdivision in Right County, Ohio. They took title to the two lots as tenants in common. The deeds to both lots, properly recorded in Right County, contained the following restriction: "This transfer is subject to the restriction that any home constructed on this lot must be built by Builder. This restriction runs with the land."

In 1974, Husband and Wife completed construction of their home (Home), built by Builder on Lot # 1, and at the same time, by a deed properly recorded in Right County, transferred title to themselves as tenants by the entireties with a right of survivorship.

Also in 1974, Husband and Wife purchased Apartment, a four-unit apartment building (Apartment), and took title to Apartment as joint tenants with a right of survivorship. The deed was properly recorded in Right County.

Later that same year, Husband and Wife sold Lot # 2 to Purchaser. The deed from Husband and Wife to Purchaser contained the same "built-by-Builder" restriction as in the original 1957 deed.

In 2005, Husband obtained a personal, unsecured loan for $350,000 from Bank, a local bank, and executed a promissory note in return. In 2008, Husband defaulted on the loan. Bank sued him and recovered a judgment, which Bank recorded in Right County, creating a judgment lien on Home and Apartment. The judgment exceeded the combined value of both Home and Apartment.

Bank has instituted an action against Husband in the proper Ohio court of common pleas to foreclose its judgment lien against Husband's interests in Home and Apartment. Wife, with leave of court, intervened in the action to challenge Bank's right to foreclose on the properties.

In the meantime, Purchaser hired Contractor to build a home for him on Lot # 2. When Builder found out, he approached Purchaser and told him that the deed restriction was a covenant running with the land, which required Purchaser to use Builder to construct the home. Purchaser refused, asserting that the restriction was unenforceable as an unlawful restraint on alienation.

1. What legal arguments could Wife successfully make to prevent Bank from foreclosing its lien on Home and Apartment?
2. Is Purchaser bound by the deed restriction? (Do not discuss the rule against perpetuities or privity of contract.)

Explain your answers fully.

1. Wife will assert that Bank may not foreclose on Home because it is owned by Husband and Wife as Tenants by the Entirety. In a tenancy by the entirety, five unities are present: time, title, interest, possession, and marriage. Each tenant takes the same interest in the land at the same time and has the right to possess the whole – and the tenants are married. A tenancy by the entirety is destroyed only by a written joint agreement executed by both tenants; death; divorce; or by a judgment creditor of both tenants. Here, Husband has a personal loan that only Husband executed. Because Wife is not a party to the loan and did not jointly secure the loan with Home, Bank is precluded from using Home to satisfy Husband's debt. Under Ohio law, foreclosure does not affect a severance of a tenancy by the entirety. As such, Wife will be successful in this argument and Bank cannot foreclose on Home.

Wife will argue that Bank cannot foreclose on Apartment because Wife did not sign the loan agreement. Wife's argument will fail. In a joint tenancy with right of survivorship, 4 unities are present: time, title, interest, and possession. The tenants must take title at the same time and each has an undivided interest in the property and has the right to possess the whole. When a joint tenant dies, that share automatically passes to the other joint tenants. A joint tenancy, however, is more fragile than a tenancy by the entirety. A joint tenant may sever a joint tenancy by conveying the property, wherein the buyer would be a tenant in common with the other joint tenants. A tenant may also petition the court to partition the property so that a tenant may own his or her portion outright. In Ohio, executing a loan or mortgage and using the property as security does not affect a severance because Ohio is a lien theory state. In essence, title remains in the tenant and the joint tenancy is not destroyed. The creditor, however, may foreclose on the joint tenant's portion and thereby become a tenant in common with the other joint tenants. Here, Bank will show that Apartment is owned by Husband and Wife as joint tenants. As such, Bank may foreclose on Husband's interest in the apartment. This foreclosure would affect a severance of the property and Bank and Wife would each own a one-half undivided interest in Apartment as tenants in common. Therefore, Wife's arguments will fail and Bank will succeed.

2. Restrictive covenants in deeds run with the land at law if certain requirements are met. To enforce a restrictive covenant against a subsequent purchaser at law, one must prove that the parties intended the covenant to run, the purchaser had notice (actual, constructive or inquiry), vertical privity, and that the restriction touches and concerns the land. To enforce the burden of a restrictive covenant in equity, one must prove the parties intended the covenant to run, that it touches and concerns the land, and the purchaser had notice. An action to enforce the covenant at law seeks money damages; an action to enforce the covenant in equity seeks an injunction. In any case, a covenant touches and concerns the land when the covenant makes that land and others' land more beneficial or more useful than it would be without the covenant. Here, Builder will be unsuccessful in proving that the restrictive covenant runs to Purchaser. While Purchaser had notice of the covenant because it was in his deed and perhaps Happy Valley was interested in benefiting Builder, using Builder does not make Purchaser's land any more beneficial or useful, and does not make his neighbors' land in Happy Valley any more beneficial or useful. Therefore, since the restrictive covenant does not touch and concern the land, Purchaser is not bound by the deed restriction and can use Contractor to build his home on Lot 2.

QUESTION 11

Crim lives in Anytown, in the State of Franklin, U.S.A. and has a criminal record of several misdemeanor offenses. Last year, he was seated in his car parked in an area known for drug dealing. He was approached by the police and told he was being arrested for violating an Anytown loitering ordinance that states:

> Anytown Loitering Ordinance: "Individuals remaining in any one public place in Anytown with no apparent lawful purpose are subject to arrest and punishment for a misdemeanor."

As Crim exited his car, a package of illegal drugs fell out onto the street. Crim was also charged with drug trafficking. He was convicted of both offenses and sent to prison.

At the beginning of his trial, the Anytown City Prosecutor notified Crim that if he was convicted on the drug-trafficking charge, his car would be subject to forfeiture pursuant to the following ordinance:

> Anytown Criminal Enterprise Forfeiture Ordinance: "Property used in a criminal enterprise is subject to forfeiture immediately upon conviction of the owner for the offense in which the property was used."

Immediately after Crim's conviction Anytown took possession of the car and sold it with the proceeds going to the police department to offset law enforcement costs.

A month after Crim's conviction, his wife received a notice from the Franklin Department of Family Services that the public assistance benefits that the Crim household was receiving were being terminated. The State of Franklin's laws specified that when an adult member of a household that was receiving state public assistance benefits was convicted of a drug-related crime, the benefits to that household would be terminated. The statute states:

> Franklin Termination of Benefits Statute: "When an adult member of a household receiving benefits under Franklin's public assistance program is convicted of a drug-related offense, benefits to the household shall be immediately terminated upon notice to the household. Other members of the household may appeal the termination and the Department of Family Services shall hold a hearing on the appeal within 90 days."

Crim filed a lawsuit challenging the constitutionality of the Anytown loitering ordinance and the Anytown criminal enterprise forfeiture ordinance. His wife filed a lawsuit challenging the constitutionality of the Franklin termination of benefits statute. All three laws are being challenged on the basis that they violate the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution.

Will each challenge be successful under the Due Process Clause or not? Explain your answers fully.

You may assume that state action is present in all three situations, and that the lawsuits are proper in all procedural respects.

The due process clause applicable to the states is embodied in the Fourteenth Amendment of the US Constitution. The 5th Amendment is applicable only in regards to the federal government. Both procedural and substantive due process is required. Procedural due process requires that notice and a hearing be afforded to all persons before the government may interfere with life, liberty, or property interests of the people. State action is required.

A law may be challenged under the due-process clause as a substantive matter where a regulation is vague or overbroad. A regulation or restriction is vague where it leaves the person convicted under such statute or regulation without notice of how to cause the criminal offense. Such statutes are void for vagueness where invalid on their face. Overbreadth occurs where the law is so broad as to encompass classes of persons that it does not reasonably need to encompass to uphold a legitimate state interest. In the husband's action, the Loitering Ordinance is properly challenged on the basis of substantive due process.

The Loitering Ordinance is arguably void on its face. The statutes makes unlawful any person "remaining" in any public place with no "apparent lawful purpose." These terms are vague. It is left to the police to determine how long is too long to remain in one place and to determine whether or not you have an apparent lawful purpose. Leaving discretion to the officers is in and of itself a violation of the due process clause. Liberty is construed to mean your right to freedom, to move around. Here, a person's liberty to be free to stand in one place for a period of time is unreasonably restricted. As a result, the ordinance is vague on its face and void.

The Forfeiture Ordinance is not void on its face nor does it appear to be void in its application. Any concerns of overbreadth are remedied by the need to be convicted of the offense prior to being subjected to the ordinance. The state has a legitimate state interest in curbing criminal enterprise actions and paying for the police to uphold the law. A rational basis is all that is required as no fundamental rights or suspect classes, such as gender or alienage, are at issue. Although the husband may argue the term "criminal enterprise is vague," by requiring a criminal conviction of drug trafficking, the statute is not void for vagueness. Further, the statute is not overbroad as discussed above.

The Forfeiture Ordinance may be challenged on procedural due process grounds; however, this argument also fails. Although notice and a hearing are required before one's property is taken, and a vehicle is one's property, the requirements have been satisfied. The ordinance sufficiently puts people on notice that if they are convicted of a criminal enterprise offense, and the vehicle was used, that property is immediately forfeited. Therefore, notice has been achieved. Constructive notice is sufficient. Further, the defendant had a hearing in that he had a criminal trial regarding his use of the vehicle to traffic drugs. He was properly convicted and there is no problem with immediate forfeiture.

The wife may also challenge the Termination of Benefits Statute under a procedural due-process argument. As stated, prior to terminating property rights, such as public assistance that is necessary to sustain life in the wife's circumstances, notice and a hearing are required. Here, the wife received notice that her right was being terminated. However, although the statute provides the wife with the opportunity to be heard, she does not get to exercise this right until her benefits have been cut off and an appeal may take as long as 90 days. The hearing must be before the rights are cut off. As a result, due process has been violated and the wife has a valid claim.

QUESTION 12

Juanita, a widow, lived at 100 Hunt Street, in Franklin, Ohio. Juanita had one child, Ben, who had moved to California in the late 1990s. In 2010, Juanita began having health problems and asked Ben if he would return to Ohio to care for her. Ben refused and, since that time, Juanita and Ben have not spoken.

Juanita told her niece, Nancy, that if she would provide care for Juanita in Juanita's house, she would name Nancy as a beneficiary in her Will. When Nancy agreed, Juanita had her attorney prepare a will (2010 Will), which Juanita executed. The 2010 will was valid in all respects and provided as follows:

1. I give $25,000 to my niece, Nancy, to show my gratitude for Nancy agreeing to provide care for me.
2. I give all the rest and residue of my estate to my deceased husband's brother, Joe.

Unbeknownst to Nancy, Juanita also had her attorney prepare a Transfer on Death Affidavit/Deed in accordance with Ohio law (TOD Deed), which provided as follows:

> I, Juanita, own the real estate located at 100 Hunt Street and shall remain the sole owner during my life. Upon my death, the 100 Hunt Street property shall pass to my niece, Nancy, as my designated beneficiary.

Juanita executed and recorded the TOD Deed in accordance with Ohio law.

After providing care for Juanita for approximately six months, Nancy determined that the work was more than she had anticipated. Nancy advised Juanita that she had changed her mind and that she was no longer going to provide care. Juanita expressed her disappointment with Nancy's decision, but Nancy's decision did not change.

Juanita subsequently told her neighbor, Vickie, that if Vickie would provide care for Juanita, she would "provide generously" for Vickie in her will. Vickie agreed and began caring for Juanita. Accordingly, Juanita typed up an instrument (2011 Instrument) that provided as follows:

> I revoke Item 1 in my 2010 Will as it relates to the $25,000 that was to be provided to my niece, Nancy. I also revoke the remainder interest that I granted by my TOD Deed to Nancy for my residence on Hunt Street. Instead, upon my death, I give to my neighbor, Vickie, the $25,000 that I had previously left in my 2010 Will to my niece, Nancy. All other provisions of my 2010 Will shall remain unchanged.

Juanita signed the 2011 Instrument in the presence of Vickie and gave Vickie a copy of the 2010 Will and 2011 Instrument. No one other than Vickie was in Juanita's presence when Juanita signed the 2011 Instrument. Juanita then attached the original 2011 Instrument to her 2010 Will.

In late 2012, Juanita passed away. Juanita's brother-in-law, Joe, had predeceased her in late 2011. Joe was survived by one child, Colt. In addition to Colt, Juanita is survived by Ben, Nancy, and Vickie. Juanita never executed any other instruments or deeds regarding her property. At the time of her death, Juanita's estate consisted of the house on Hunt Street and $200,000 in cash after payment of all debts and administration expenses.

What rights, if any, do Colt, Ben, Nancy, and Vickie each have to Juanita's assets? Explain your answers fully.

Colt:
Colt does not have any rights in Juanita's assets. Juanita gave the rest and residue of her estate to Joe in her 2010 will. Her 2010 will was validly executed. However, Joe predeceased Juanita. When a devisee of a will predeceases the testator, that individual's gift in the will terminates, unless the anti-lapse statute applies. The anti-lapse statute provides that if the person named in the will was a grandparent, descendant of a grandparent, or a stepchild of the testator, then if that individual predeceases the testator, their gift will not terminate. Instead, their gift will go to their estate. Joe was Juanita's deceased husband's brother. Thus, the anti-lapse statue is not applicable, Joe's gift terminated because he predeceased, and Colt will not have any rights in Juanita's assets.

Ben:
Ben has a right to the residue of the will. Juanita originally gave the residue of her estate to Joe in the 2010 will, but Joe predeceased Juanita and his gift terminated. Thus, Juanita died partially intestate and the laws of intestate succession will apply. Ben is Juanita's only child and her husband is deceased. Therefore, Ben will take the rest and residue of Juanita's estate pursuant to the laws of intestate succession.

Nancy:
Nancy will have a right to the House and the $25,000. Juanita gave Nancy $25,000 in her 2010 will, which was validly executed. Juanita attempted to revoke the gift given to Nancy in the 2010 will by executing a 2011 instrument. A will may be revoked by a subsequent document, which is known as a codicil, if the document is properly executed and complies with all deed formalities. In order to be properly executed, the document must be in writing, signed by the testator, at the end of the document, in the conscious presence of two witnesses, who also sign the document. Moreover, one of the witnesses to the signing of the document may be an interested witness – this does not affect the validity of the will. In this case, Juanita executed the 2011 Instrument and signed it in the conscious presence of Vickie and no one else. Thus, the instrument was not properly executed because it was not witnessed by two witnesses and it will not revoke the prior properly executed 2010 instrument. A contestant could argue that the improper execution of the 2011 instrument was harmless error, but in order to be successful pursuant to a claim of harmless error, the testator must have signed the instrument and it must have been witnessed by two witnesses. In this case, only Vickie witnessed Juanita sign the instrument, so the harmless error doctrine will not apply. Thus, Nancy will still take the $25,000 as gifted in the 2010 instrument. Moreover, Nancy will take the house. Juanita executed and recorded a Transfer on Death Deed in accordance with Ohio law. The deed provided that Nancy would receive the House on Juanita's death. The deed constitutes non probate assets. Normally, non probate property will not be affected by probate property, such as property distributed in a will, unless the testator has indicated an intent to the contrary. Juanita attempted to revoke the deed in the 2011 instrument, but that instrument was not properly executed. Thus, Nancy has a right to the house.

Vickie:
Vickie will not have any rights to Juanita's assets as a result of the 2011 instrument because it was not properly executed. However, there is an enforceable contract between Juanita and Vickie. Vickie agreed to provide care for Juanita in return for Juanita providing generously for Vickie in her will. Thus, Vickie may bring a cause of action for breach of contract, which would be satisfied out of the residue of the estate, which is held by Ben. Once the amount due to Nancy is subtracted, Ben will have a right to $175,000. Therefore, Vickie may bring a breach of contract claim and if successful, may have a right to the $175,000 held by Ben.

MPT 1

In re Wendy Martel

In this performance test, examinees are employed by the law firm that represents Wendy Martel, a Franklin attorney. Martel seeks the law firm's advice regarding her representation of David Panelli, M.D. Martel recently settled Panelli's case and has received the settlement funds. When Martel informed Panelli that she had the funds and needed to determine how much Panelli's former attorney, Rebecca Blair, was entitled to for her work on the case, Panelli was adamant that Blair should receive nothing and should not even be told of the settlement. (Panelli had fired Blair as a result of a personality conflict.) Martel wants to be sure that she acts ethically with regard to Blair and the information about the settlement that Blair is entitled to have. Examinees' task is to draft an opinion letter, following the firm's guidelines, identifying the ethical issues raised by Panelli's position and advising Martel as to how she should proceed. The File contains the instructional memo from the supervising attorney, a format memo for opinion letters, the client interview, copies of the Martel/Panelli emails, and a copy of Blair's lien. The Library contains excerpts from the Franklin Rules of Professional Conduct, a Franklin State Bar ethics opinion, and a case from the Franklin Supreme Court.

A

State of Franklin
District Court of Palomas County

Dear Ms. Martel,

I am writing in response to your request for an opinion letter on behalf of Walden, Martin & Watterson LLP, per your request at your interview with Kimberly Salter on February 25, 2013.

The question you are seeking an answer to is how you should proceed with the $600,000 settlement funds received from your representation of David Panelli, in light of the fact that he was represented by Rebecca Blair prior to your representation.

Please be advised that you should proceed as follows. First, you should put the disputed amount of fees, in this case the 1/3rd contingency fee amounting to approximately $200,000, in your client trust account. Next, you should distribute to Panelli his award that is not in dispute – approximately $400,000. Third, you should consult with Panelli about your limited role with respect to the Rules of Professional Conduct in meeting his request to withhold the money from Blair and keep it a secret. Next, you must inform Blair of her interest in the disputed funds. If you cannot successfully convince Panelli that Blair may be entitled to some portion of the funds, you must seek court intervention pursuant to the below.

As an attorney, you are subject to the Franklin Rules of Professional Conduct at all times. Generally speaking, pursuant to Rule 1.2(a), you should abide by your client's decisions concerning objectives of the representation, and shall consult with the client as to the means by which they are pursued pursuant to Rule 1.4. Thus, generally speaking, you must abide by Panelli's decisions with respect to representation and consult with him prior to making any important decisions – such as regarding settlement. However, pursuant to rule 1.4(a)(5), you must consult with Panelli about any relevant limitation on your part when you know that Panelli expects assistance not permitted by the Rules of Professional Conduct – as is the case here. Since, pursuant to Rule 1.6(a), you are not permitted generally to reveal information relating to the representation of Panelli unless he gives informed consent, you must keep Panelli informed.

However, it must be noted that pursuant to Rule 1.6(b)(4), you are permitted to reveal information relating to the representation of a client to the extent that you believe is necessary to secure legal advice about your compliance with the Rules – as you have done here. In this case, you are permitted to reveal this information to seek legal advice under the Rules. However, I would recommend informing Panelli that you have sought our advice about this settlement disbursement issue.

The first action you must take prior to attempting to resolve the dispute between Panelli and Blair in any way, is to account for the settlement funds. Pursuant to Rules of Professional Conduct 1.15(a), you are required to hold the property of your client or third person in possession with your representation in an account that is separate from your own property. The separate account must be maintained in the state where your office is located, or elsewhere with the consent of Panelli or the third person. As you have done, pursuant to 1.15(d), you were right to notify Panelli that you have received the settlement funds of $600,000 (see e-mail to Panelli). Upon receipt of the funds, pursuant to 1.15(d), you must promptly deliver to Panelli his share of the settlement distribution. For example, in Greenbaum v. State Bar, the Franklin Supreme Court held that an attorney must promptly disburse to the client any funds that the attorney holds in trust for the client that the client is entitled to receive.

Greenbaum went on to hold that an attorney must nevertheless continue to hold in trust, even contrary to the client's instructions, any portions of such funds on which the attorney has a claim in conflict with the client. Greenbaum, however, did not address the situation in which a third party has such a conflicting claim (see Ethics Opinion). It is risky for you to unilaterally determine Panelli's "entitlement" in this case as between Blair and him. (Ethics

Opinion). As such, I would advise you to disburse the amount of funds to which Panelli is entitled. Courts have held that in a contingent fee arrangement, when attorney fees are in dispute, the client should receive the amount to which he is entitled. (See Clement). For example, "[i]f a successor attorney subsequently obtained a recovery during her representation, she would be entitled to receive whatever her contingent fee agreement specified – for example, if she had a one-third contingent fee agreement and obtained a $300,000 recovery, she would be entitled to receive $100,000." (Clement). The discharged attorney would receive her fair share of the disputed $100,000.

Here, both Blair and you were each entitled to the same contingent fee agreement – that is, a 1/3rd recovery of the total amount of received. Here, the settlement was for $600,000. Therefore, pursuant to Greenbaum, the Ethics Opinion, and rule 1.15(d), Panelli is entitled to immediately receive his share, which is 2/3rds or $400,000. You must immediately disburse this amount to Panelli. However, since the remaining 1/3rd contingency fee of $200,000 is still in dispute, under the Rules and this state's Supreme Court history, you must keep the remaining $200,000 in the client trust account. Pursuant to Rule 1.15(e), when in the course of representation a lawyer is in possession of property in which two or more persons claim interests (including third parties as here), the property shall be kept separate by the lawyer until the dispute is resolved. The comments to Rule 1.15 further explain your duty to keep the remaining $200,000 separate: "An attorney may have a duty to protect such a third-party claim against wrongful interference by the client. In such cases, the attorney must refuse to surrender the funds to the client until the claim has been resolved, and must so advise the client." (Ethics Opinion).

An attorney has a duty to keep the funds separate when the attorney has knowledge of the existence of a third-party's interest in the funds in question. (Ethics Opinion). It must be noted that although the Ethics Opinion does not purport to bind any court or tribunal, it is intended to guide attorneys who practice in this state, and based on authority delegated to it by the Franklin Supreme Court. When an attorney has knowledge of the existence of a third-party's interest in the funds in question, the attorney has been held to have entered into a fiduciary relationship with the third-party by operation of law, and has subjected himself to deal with the third-party with the utmost good faith and fairness, and to disclose to the third-party material facts relating to the third-party's interest in the funds. (See Johnson v. State Bar). Here, you had knowledge of Blair's prior representation of Panelli (See Client Interview, Notice of Lien, Email from Panelli).

It is imperative that you keep the remaining $200,000 in a separate account and not disburse it to Panelli, because such a disbursement would violate your fiduciary duties to Blair, and would make you liable for compensatory or punitive damages. (Ethics Opinion). Further, your disbursement to Panelli may even subject him to a breach of contract claim. Rule 1.5(a)(5) requires a lawyer to "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these rules." Thus, it is important that you explain to Panelli your duty to keep the $200,000 separate and not disburse it to either yourself, or Blair, and explain why this would violate the rules (as Panelli has expressed his unequivocal desire for you to not give Blair any money, or even tell Blair about the settlement). Despite whether you believe that Panelli is rightfully withholding the money from Blair, as stated above, you should not make a unilateral decision to determine Panelli's or Blair's entitlement to the portion of the $200,000. Thus, pursuant to Greenbaum and Ethics Opinion, as well as the local rules, you must immediately disperse $400,000 to Panelli, and keep the remaining $200,000 in a client trust account. You also must explain to Panelli the reasons for doing so pursuant to the Rules.

After you have informed Panelli about your ability to consult with our firm regarding the settlement disbursement issue and your duty to disburse the funds to Panelli and the client trust account accordingly, you must next inform Blair of her possible entitlement to a portion of the funds. As stated above, pursuant to the Ethics Opinion and Johnson v. State Bar, since you are in a fiduciary relationship with Blair (because you are aware of her interest in the funds in question), you must act with good faith and fairness and disclose to Blair the material facts relating to her interest in the funds. Typically, under a contingent fee agreement, an attorney does not have any right to fees unless and until the contingency specified has occurred. Without a right to fees, the attorney does not have a cause of action against the client for breach arising from failure to pay. (Clements v. Summerfield) Here, Blair never accumulated

any settlement or monetary award for Panelli during her representation, and thus, generally would not have any right to fees.

However, "the contingency specified may occur after the attorney's representation has terminated and another attorney has taken his or her place. In that case, the discharged attorney's right to, and cause of action for, fees is limited to quantum meruit, that is, the reasonable value of the services rendered during his or her representation, paid as a share of the total fees payable to the successor attorney – not as something in addition to those fees." (Clements). This is important to remember, because public policy disfavors hindering a client's ability to discharge an attorney, which is absolute – by requiring a client to pay double fees for a successive representation. Here, even though Blair did not get any monetary award for Panelli, since you have gotten a settlement of $600,000, Blair's cause of action is ripe. Thus, Blair, in her previous representation of Panelli, will be entitled to reasonable fees and "what is fair" out of the remaining $200,000. (Clements). "Of course, what fees are fair depends on the facts of the individual case as seen through the lens of equity, and may range from nothing out of the total fees payable to the successor attorney, or total fees in their entirety." (Clements).

Here, the remaining $200,000 must be divided, in some portion, between you and Blair. The facts of this case govern what fees will be reasonably accorded to each. Here, the termination of representation amounted to merely a "personality disorder." (Interview with Martel). In your opinion, you believe Blair did a good job litigating the case, including filing a statutory lien early on to obtain a security interest in any recovery she obtained for Panelli during her representation. Blair represented Panelli for at least three years prior to you taking over. You went on to complete discovery and filed a motion for summary judgment that the court denied. Further, you managed to negotiate a settlement shortly thereafter. (Interview). It appears that Blair will be entitled to quantum meruit for her services, despite Panelli's assertion that he fired Blair "eighteen months ago."

However, as stated previously, I caution you to make a "unilateral decision" concerning the proper disbursement between you and Blair for the remaining $200,000. (Ethics Opinion). "An attorney should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute." (Comment to Rule 1.15; Ethics Opinion). Once you seek guidance from the court, you must inform both Panelli and Blair (Ethics Opinion). Where there is no clear distribution, it is the trial court that should strike the appropriate balance. (Clements).

Accordingly, the court will decide what share of the $200,000 Blair is entitled to receive, and you would be entitled to receive for the reasonable value of services. (Clements).

Pursuant to the above, I advise that you immediately give Panelli the share of the $600,000 that he is entitled – approximately $400,000, and separate the remaining $200,000 in a separate account until the dispute is resolved. Next, you should inform Blair of her possible right to fees, and inform Panelli that you must do all of the above. Finally, you must seek court intervention to determine the reasonable amount of fees that should be awarded to Blair and yourself.

Please let me know if you have any questions and do not hesitate to contact me regarding this issue. Thank you.

Sincerely,

Applicant

Walden, Martin & Watterson LLP

MPT 2

In re Guardianship of Will Fox

Examinees' law firm represents Betty Fox, a member of the Blackhawk Tribe, who has petitioned for guardianship of her minor grandson, Will. Will's mother died when he was born, and his father, Betty's son, has been in a coma for several months as a result of a car accident. Betty is petitioning for guardianship in the Blackhawk Tribal Court in response to a petition for guardianship in Franklin state court filed by Will's maternal grandparents, the Lodens, who are not members of the tribe. In addition, the law firm has filed on Betty's behalf a motion to transfer the Lodens' state court action to the tribal court. Examinees are asked to prepare a brief in support of the motion to transfer, following the firm's format for persuasive briefs, and anticipating those arguments likely to be raised by the Lodens against the transfer. The File includes the instructional memo from the supervising attorney, a format memo for persuasive briefs, the competing petitions for guardianship filed in state and tribal court, the motion to transfer, a letter from the tribal court, an email from Betty's son, and an excerpt from the Journal of Native American Law. The Library contains excerpts from the Indian Child Welfare Act of 1978, guidelines from the Bureau of Indian Affairs for Indian child custody proceedings, and a case from the Franklin Supreme Court bearing on the subject.

BRIEF IN SUPPORT OF MOTION TO TRANSFER CASE TO BLACKHAWK TRIBAL COURT

STATEMENT OF THE CASE

The movant, Betty Fox ("Fox") has moved this Court to transfer this action to the Tribal Court of the Blackhawk Tribe, pursuant to the Indian Child Welfare Act of 1978 ("ICWA") and 25 U.S.C. §§ 1901 et seq. Concurrently with this Motion to Transfer, Fox petitioned this Court for guardianship over Will Fox ("Will"), a minor child who is 10 years of age, and the paternal grandson of Fox. On February 1, 2013, Don and Frances Loden ("the Lodens") also filed a petition for guardianship and temporary custody over Will. To date, no orders have been entered in any court affecting the custody or guardianship of Will or the parental rights of Joseph Fox – Will's incapacitated father. The Lodens object to the transfer to the Tribal Court and ask this Court to deny the motion.

ARGUMENT

I. Will Fox is an "Indian Child" as Defined by the ICWA Because He is Under Eighteen Years of Age, and is a Member of the Tribe.

Under the ICWA, an "Indian child" is defined as an unmarried person who is under the age of eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian Tribe. Here, it is undisputed that Will is a male minor child who is 10 years old. (Fox Petition for Guardianship). Both Will and his father Joseph are members of Blackhawk Tribe, as demonstrated by the letter from the Tribal Court and the Blackhawk Tribe. (See also Fox Petition for Guardianship). As Will is both a member of Blackhawk, or, alternatively, is eligible for membership in Blackhawk and the biological child of Joseph Fox, who is also a member of Blackhawk, under the ICWA, Will is an "Indian child."

II. The Blackhawk Tribe is an "Indian Tribe" as Defined by the ICWA and the Blackhawk Tribe is an "Indian Child's Tribe" Under the ICWA Because Will Fox is a Member of the Tribe.

Under the ICWA, Congress established Federal Standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs. An "Indian" under the ICWA, means any person who is a member of an Indian tribe. The Blackhawk Tribe is a recognized tribe under the ICWA and the Blackhawk Tribal Court is a recognized instrumentality of the Tribe. The Tribal Court has a family court unit, with the power and authority over any family matter. (See Letter of ICWA Director).

III. Because this is a Child Custody Matter, this Should be Transferred to the Blackhawk Tribal Court under ICWA Be.

This is a child custody proceeding under § 1903 of the ICWA. Under that section, a child custody proceeding includes "foster care placement," which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated. Like the Joan Albers in In re Custody of R.M., Fox does not seek the termination of Joseph's parental rights, she merely seeks to have custody and become guardian over Will. (Fox Petition for Guardianship). This Court has held in In re Custody of R.M., that just because a party does not seek to terminate parental rights, the actions may still fall under "foster care placement" that is governed by § 1911(b) of ICWA.

"The critical issue in determining whether ICWA applies is not how a party captions the petition, but rather what the petition seeks." (In re Custody of RM) ICWA defines foster care placement as encompassing four requirements:

(1) the Indian child is removed from the child's parent or Indian custodian, (2) the child is temporarily placed in a "foster home or institution or the home of a guardian or conservator," (3) the parent or Indian custodian cannot have the child returned upon demand, and (4) parental rights have not been terminated. (In re Custody of RM; 25 U.S.C. §1903 (1)). Although ICWA does not define these terms, Franklin state law defines the guardian of a minor as one with "the power and responsibilities of a parent with sole legal and physical custody to the exclusion over all others." Fr. Rev. Stat. § 72.04 (In re Custody of RM). Under this section, a guardian is empowered to facilitate the minor's education and social and other activities and to authorize medical care. Under Franklin law, a "conservator for a minor" has the power to provide for the needs of the child and has the duty to pay the reasonable charges for the support, maintenance, and education of the child." (In re Custody of RM).

Here, by seeking to have sole legal custody of Will, both the Lodens and Fox seek the ability to decide his care, including the ability to permanently move Will to either Fox's home on the Reservation of Blackhawk, or the Lodens' home in Melville, Franklin. Also, once no longer incapacitated, Joseph would not be able to remove Will on demand (he would have to go through the Court to get the guardianship removed). Like Alber in In re Custody of RM, the terms "conservator" and "guardian" describe the very powers the Lodens and Fox seek. Thus, despite the Lodens possible assertion that this is not a custody matter because they do not seek to terminate Joseph's parental rights, the Franklin Supreme Court has held otherwise. (In re Custody of RM). Thus, the petitions for guardianship fall within the definition of "foster care placement" to which ICWA applies.

IV. Since Betty Fox is an "Indian Custodian" Under the ICWA, She has the Right to Petition for Transfer.

Under the ICWA, an "Indian custodian" means any person who has legal custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody, and control has been transferred by the parent of such child. "Because of the extended family concept in the Indian community, parents often transfer physical custody of the Indian child to such extended family members on an informal basis, often for extended periods of time and at great distances from the parents. While such a custodian may not have rights under State law, they do have rights under Indian custom, which this bill seeks to protect, including the right to protect parental interests of the parents." (In re Custody of RM; H.R. Rep. No. 95-1386).

Here, Fox is an Indian Custodian under ICWA because Joseph, as a member of the tribe, informally gave Fox custody pursuant to his letter to Fox that Will would be with Fox for the holidays, and powwows. Further, it is well known that "Native American tribes have a long-standing custom or practice of caring for their children within the extended family. Even where Native American parents have not appointed a custodian, tribes expect that an extended family member will become the custodian of the child. In most tribes, it is expected that the maternal grandparents will be the custodians if the natural parents are . . . unable to parent the children." Journal of Native Am. Law. In fact, Blackhawk expects that Native American grandparents will become the custodian. Here, Fox can argue that she was given custodial power informally by Joseph, as well as the traditions within the Blackhawk tribe. It must be noted that "although guardianship is established by native custom and practice, it is not unusual for those who have become guardians through native custom or practice to seek tribal court appointment as guardians" to avoid disputes with various entities, such as schools and medical providers. (Id.). Here, Fox is the custodian pursuant to long standing custom, and the Lodens are not custodians because Will's mother was a non-tribe member. Thus, Fox is favored to be the custodian. As custodian, Fox was eligible to petition to transfer.

V. Pursuant to § 1911 (b) of the ICWA, the State Court Child Custody Proceedings in this Case Should be Transferred to the Tribal Court, as the Blackhawk Tribal Court has Jurisdiction, Joseph Fox does not Object, and There is not Good Cause to Avoid Transfer.

Under §1911(b), upon receipt of a petition to transfer by a parent, an Indian custodian, or the Indian child's tribe,

the state court child custody proceedings are to be transferred to the tribal court, except in cases of "good cause," objection by a parent, or declination of jurisdiction by the tribal court. (In re Custody of RM). The Bureau of Indian Affairs has issued Guidelines to help state courts in determining good cause not to transfer. Although the Guidelines have not been promulgated as administrative regulations, they clarify the congressional intent behind the ICWA legislation, and this Court follows them. (In re Custody of RM). The Guidelines recognize that undue hardship is one of the circumstances that would warrant a finding of good cause not to transfer. Here, as Fox is an Indian custodian as discussed above, and Joseph does not object as the parent of Will, and the Tribal Court has jurisdiction, as discussed above, an analysis of good cause is necessary to determine whether transfer is appropriate.

First, under the Guidelines, good cause not to transfer the proceeding exists if the Indian Child's tribe does not have a tribal court defined by ICWA to which the case can be transferred. Here, the Blackhawk does have a tribal court in congruence with the ICWA (see letter from ICWA director). As such, good cause does not exist pursuant to Guideline (a) against transfer.

Second, under Guideline (b), good cause not to transfer this proceeding may exist if any of the following circumstances exist: (i) the proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing; (ii) the Indian child is over 12 years of age and objects to the transfer; (iii) the evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or witnesses; and (iv) the parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

A. Since this proceeding was not at an advanced stage when the petition to transfer was received, transfer is appropriate.

Under guideline (b)(i), transfer is not appropriate when the proceeding was at an advanced stage of litigation when the motion to transfer was filed. Here, this is not the case. The Lodens filed their petition for Guardianship on February 1, 2013. Just ten days later, Fox filed her petition for Guardianship and the Motion to transfer. Neither guardianship request has been granted, nor has any other action been taken by this court with respect to the same. As such, transfer is appropriate.

B. As Will Fox is 10 years old and does not object to the transfer, transfer is appropriate.

Under guideline (b)(ii), good cause not to transfer this proceeding exists if the child is over 12 years old and objects to the transfer. Here, Will is 10 years old and does not object to the transfer. As such, transfer is appropriate.

C. The evidence necessary to decide this case is adequately presented in the tribal court without undue hardship to the parties and witnesses.

Under guideline (b)(iii), good cause not to transfer exists if the evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or witnesses. Here, the Lodens will likely argue that undue hardship will result because they reside in Melville, Franklin – approximately 250 miles from the Reservation (a three to four hour drive). However, this court has held that travel time that is two hours is not too far, especially when it has been traveled before. (In re Custody of RM). Here, there is only roughly a three hour drive, and since Will has been to the reservation at least 3 times for the powwows, undue hardship would not result from the Loden's residence in Melville.

D. Since Joseph Fox is not available and Will has had a lot of contact with Betty Fox, transfer is appropriate.

Here, Will is over five years old (10) and his father is incapacitated (thus not available). Also, Will has had a lot of contact with Fox, as he has attended yearly powwows on the reservation and has stayed with her over the holidays (see Joseph's letter). As such, good cause not to transfer does not exist.

Conclusion

It must be noted that the burden of establishing good cause is on the Lodens in this case, and the Lodens have not met that burden (as they are the party opposing transfer). As such, transfer is appropriate pursuant to the reasons discussed above.

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