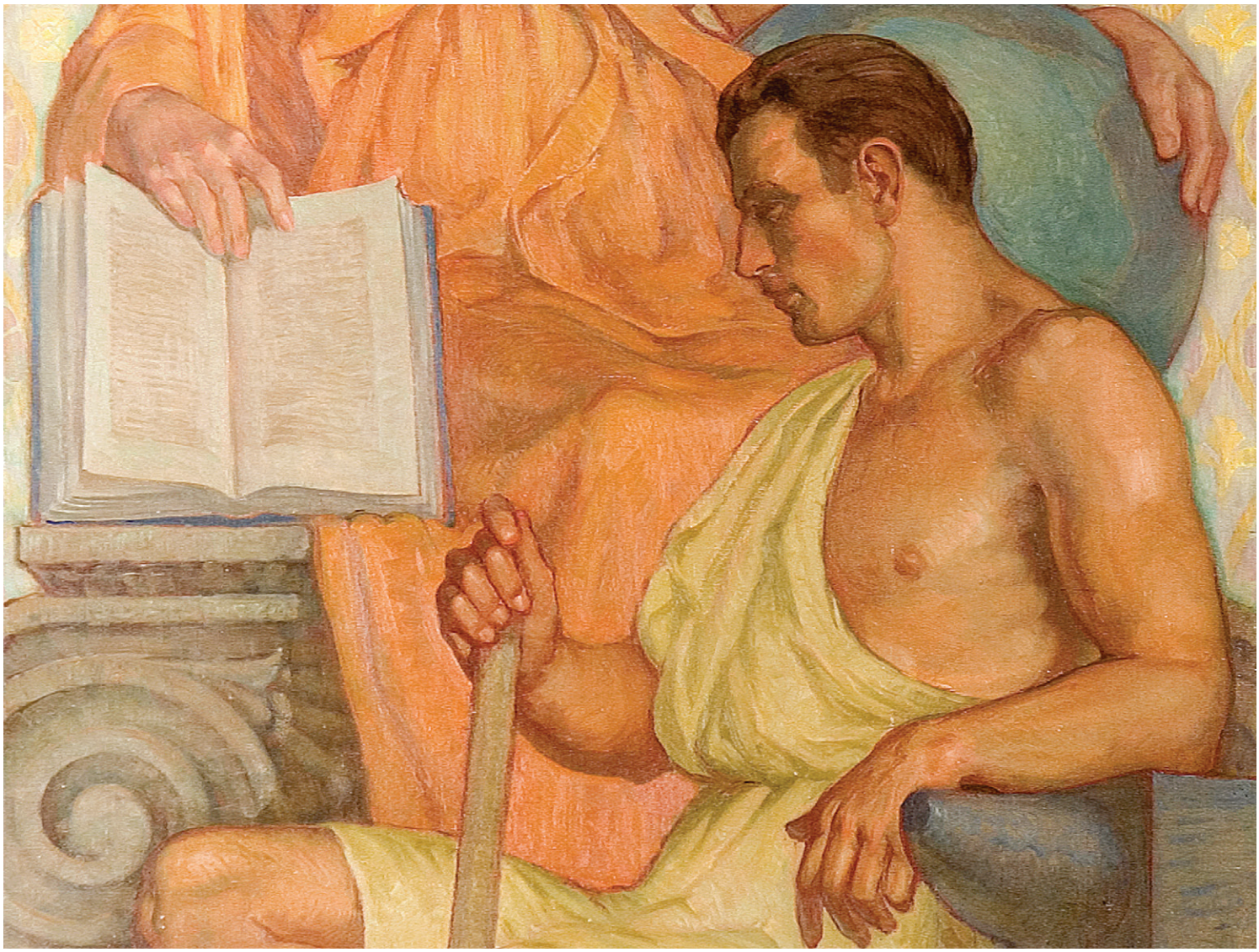
THE SUPREME COURT *of* OHIO



February 2021
OHIO BAR EXAMINATION

Multistate Essay Examination
Questions & Selected Answers

Multistate Performance Test
Summaries & Selected Answers

The Supreme Court *of* Ohio

FEBRUARY 2021 OHIO BAR EXAMINATION

Multistate Essay Examination Questions & Selected Answers
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Published June 2021

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OHIO BAR EXAMINATION

The February 2021 remote Ohio Bar Examination contained six Multistate Essay Examination (MEE) questions. Applicants were given two 90-minute test sessions to answer a set of three essay questions. These essays were prepared by the National Conference of Bar Examiners (NCBE).

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

The following pages contain the NCBE's MEE questions given during the February 2021 remote exam, along with the NCBE's summary of the MPT items given on the exam. This booklet also contains actual applicant answers to the essay and MPT questions.

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

Copies of the complete February 2021 MPT and its corresponding point sheet are available from the NCBE. Please check the NCBE's web site at www.ncbex.org for information about ordering.

QUESTION 1

QUESTION

A woman owned and operated a food-truck business. Business was good. The woman asked a man she knew to work with her. "It would be great if you'd help with my food-truck business. There is just not enough time in the day. I need someone to do the early morning produce shopping for me at the farmers' market. Are you interested?"

The man had a job as a night watchman and was looking for a way to make extra money. He answered, "Sure, I'm interested. Text me at night what type of produce you want me to buy in the morning when I get off work. The market opens just as I get off my night shift. I could stop by the market with my car and then drop off the purchases at your truck." He then asked, "And how much would I be paid?"

The woman responded, "Texting works for me. I'll go to the market with you the first few times to give you a general idea of what I'm looking for. But then you'd be on your own, making the choices of which vendors to use and which produce to buy. Please use your own credit card to make the purchases, and I'll reimburse you."

Then the woman paused and continued, "As for pay, I can afford to pay you only $20 per daily delivery. I know that's a bit low, but the business doesn't have the cash flow yet. So, my offer to you is that, in addition to $20 per day, I will give you 10 percent of the food truck's profits."

The man thought for a bit and said, "Okay. It's a deal." They shook hands.

For the first few months, the arrangement worked well. The woman sent texts to the man each night indicating the type of produce to buy, and the man selected and purchased the requested produce in the morning from vendors he selected. He then dropped the produce off at the woman's food truck. The man paid the vendors with his own credit card and later was reimbursed by the woman. Except for the man's purchase and delivery of the produce, the woman did all the work related to the food-truck business.

One morning, while parking at the market, the man negligently ran his car into a farmer's stall, causing extensive damage. The man truthfully told the farmer that although the accident was the man's fault, he had no money to pay for the farmer's damage and his automobile insurance had lapsed.

The farmer wrote the woman a letter demanding that she pay him for the losses caused by the man's negligence. The woman has asked her attorney what legal relationship she has with the man and what the liability implications would be in each case.

1. (a) Are the woman and man partners in the food-truck business? Explain.
   (b) Assuming that the woman and the man are partners in the food-truck business, would the woman be liable to the farmer for the damage proximately caused by the man's negligence? Explain.

2. (a) Is the man an employee of the woman? Explain.
   (b) Assuming that the man is an employee of the woman, would the woman be vicariously liable to the farmer for the damage proximately caused by the man's negligence? Explain.

3. (a) Is the man an independent contractor for the woman? Explain.
   (b) Assuming that the man is an independent contractor for the woman, would the woman be vicariously liable to the farmer for the damage proximately caused by the man's negligence? Explain.

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ANSWER

I. (a) The issue is whether the man and woman's relationship makes them partners.

A partnership as an agreement made by two or more people to manage a business for profit together. A partnership consists of managing the business together and sharing profits. There is a presumption that when profits are shared then the business is a partnership. This presumption is rebuttable though and does not exist in a normal employer-employee situation. The intent of the individuals governs whether a partnership exists and not any formal writing.

Here, the man and woman are not partners. The woman is operating the food truck business on her own and she speaks to the man about picking up produce for her. The man and woman go to the market together for a few days and then the man is solely responsible after that. The woman still fully operates the food truck, outside of the man getting her the produce, and decides which vendors to use for the produce. The man is compensated by the woman in the form of reimbursement for his purchases and he receives $20 per day. He also receives 10 percent of the food truck's profit. Because of this, there is a presumption that this is a partnership. However, this is rebutted because he does not participate in the management of the business and acts in a role that an employee would. Thus, because of this, the man and woman are not partners.

(b) The issue is if the man and woman are partners would the woman be liable for the man's negligent conduct.

When a partnership is created the partners are jointly and severally liable for the conduct of the other partners and also for the partnership when it is within the scope of the partnership. In order to satisfy a judgement against a partnership, all the partnership assets would first need to be exhausted and then the partners would become personally liable for the deficiency.

Here, assuming that a valid partnership did exist, the woman would be liable for the man's negligence. This is because the man was parking at the market when he hit the farmer's stall. This means that the man was acting within the scope of the partnership because his job was to go to the market and pick up the produce for the partnership for the day. Also, the farmer could bring an action against the man, the woman, or the partnership because they are all jointly and severally liable for the conduct of the partners. If the farmer brings an action against the partnership though, he would first need to satisfy the judgment using the assets of the partnership, he then can go after the partners personally for the remaining liability. Thus, if there was a valid partnership, the woman would be liable for the man's negligence because he was acting within the scope of the partnership.

II. (a) The issue is whether the man is an employee of the woman.

An individual is considered an employee when the conduct of the individual is within the control of the employer. Some factors to look at when determining if an individual is an employee are how regular their conduct is, how much control the employer has over the employee, does the company provide the tools needed for the task, is the individual responsible for their own expenses incurred in relation to the task.

Here, the woman has the man go to the produce market to pick up the produce she needs for the day. The woman goes to the market with the man to give him an idea of what she needs, but after a few times the man is responsible for going and picking the produce out himself. The man also provides his own transportation to and from the market. He pays for the produce and she reimburses him. Thus, because the woman does not control the man or provide the tools needed for the task, the man likely is not considered an employee of the woman.

(b) The issue is whether the woman would be liable for the man's negligence if he was an employee.

An employer is responsible for the negligence of an employee when the employee is acting within the scope of employment. The scope of employment is when the employee is acting for the benefit of the employer and is conducting actions that are relative to their responsibility. A frolic is a deviation from this and is not considered part of the scope of employment. Respondeat superior is when an employer is vicariously liable for the negligence of an employee.

Here, the man was parking at the market when he got into a wreck. This was because the man was going to pick up the produce for the woman. This was the man's duty as an employee. The man was acting directly within the scope of employment because he was doing what was asked of him by the woman. Because of this, the doctrine of respondeat superior would cause the woman to be liable for the negligence of the man.

III. (a) The issue is whether the man was an independent contractor for the woman.

An independent contractor is someone who is hired by an employer to complete a task but is not considered an employee. The same factors as discussed above are used to distinguish an employee and independent contractor.

Here, the man is likely to be considered an independent contractor. This is because the man had to provide his own vehicle to go pick up the produce. Also, the man was free to make his own decisions about which vendor and which produce to pick up for the woman. The man also had to cover his own expenses to get to and from the market. He also purchased the produce with his own money and the woman simply reimbursed the man. Thus, because of this the man is likely to be considered an independent contractor.

(b) The issue is whether the woman is liable for the conduct of the man as an independent contractor.

An employer is not likely to be found liable for the negligence of an independent contractor. This is unless the conduct was nondelegable, dangerous, or another situation in which the employer maintains liability because it is a nondelegable duty.

Here, the man was an independent contractor for the woman whose job was to go to the market and pick up produce. This is not an inherently dangerous activity or a task that is nondelegable for some reason. Because this is an independent contractor relationship the woman will not be liable for the man's negligence. Thus, because the man is an independent contractor the woman is not liable for the man's negligence.

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

QUESTION 2

QUESTION

On July 1, 2015, Testator duly executed a typewritten will that had only the following three dispositive provisions:

1. I give the portrait of my grandparents to my brother, Adam.
2. I give my antique bookcase to my sister, Beth.
3. I give all of my tangible personal property not otherwise effectively disposed of to the person I have named in a letter I signed and dated June 15, 2015. I have put that letter in the night table drawer in my bedroom in my home along with this will.

Testator died on Feb. 10, 2019, a domiciliary of State A. Both the typewritten will and the letter of June 15 were found in the night table drawer. In clause 2 of the will, the phrase "antique bookcase" had been scratched out by Testator and immediately above it he had typed in the word "motorcycle." And, on the back of the will, the following language appeared wholly in Testator's handwriting: "I don't want Adam to have the portrait of my grandparents. I want it to go to my first cousin, Charles." No signatures appeared on the back of the will beneath this writing.

In the letter referred to in clause 3 of the will, Testator named his niece, Donna, who is Beth's daughter, as the beneficiary.

Testator's only surviving blood relatives are Adam, Beth, Charles, and Donna. In addition to the portrait of his grandparents, the antique bookcase, and the motorcycle, Testator's only other asset was a bank account with a balance of $10,000.

State A permits wills to be completely or partially revoked by the execution of a subsequent will or codicil, or by physical act or by cancellation when accompanied with an intent to revoke the will or codicil. State A law also provides that "unsigned holographic wills or codicils are valid." There are no other relevant statutes.

To whom should the property in Testator's estate be distributed? Explain.

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ANSWER

The first issue is whether Testator effectively revoked the gift of the portrait to Adam and effectively changed this gift to Charles. When he died, Testator was a domiciliary of State A, so State A law governs. State A permits wills to be completely or partially revoked by a physical act or by cancellation when accompanied with an intent to revoke the will or codicil. The majority of jurisdictions and the common law require a cancellation by striking through to actually cross or cover the text of the will. A writing on the back of the will, will not suffice. The UPC provides that a revocation can be written anywhere on the will, as long as there is also intent to revoke. State A law also provides that unsigned holographic wills or codicils are valid. A holographic will is one that is entirely in the testator's handwriting. A codicil will revoke a prior will if, when read together, the terms contradict. The later validly executed codicil will control.

Here, concerning the gift to Adam, the writing does not cross out any of the language of the will, but is on the back. In most jurisdictions, this will not suffice to revoke. But, if the jurisdiction follows the UPC this can revoke. Further, Testator clearly had an intent to revoke because he did not want Adam to have the portrait anymore. Because State A law allows unsigned holographic wills, the codicil on the back of the will is considered valid. It is entirely in the Testator's handwriting and evidences an intent to change his will. Moreover, the terms of the codicil conflict with the original will; the original will gave the portrait to Adam, but the codicil gives the portrait to Charles. Thus, the terms of the codicil will control, and Charles will receive the portrait.

The next issue is whether the Testator effectively revoked the gift of the bookcase to Beth and substituted it with the motorcycle. The rules regarding revocation stated above remain the same. When a testator revokes a gift relying on a mistake of law regarding the efficacy of the gift, the court may apply the doctrine of dependent relative revocation. In order for this doctrine to apply, the testator must revoke relying on a mistake of law, and the court must find that, but for the mistake, the testator would not have completed the revocation.

When the Testator scratched out the phrase antique bookcase, he physically crossed through that language. Further, he typed a different gift - motorcycle - evidencing an intent to revoke the gift of the bookcase. Thus, the gift of the bookcase was effectively revoked. But, the gift of the motorcycle was not effective. As stated previously, in order to be valid, a holographic unsigned and unattested gift must be entirely in the testator's handwriting. The typed word motorcycle was not in the Testator's handwriting, and was thus not effective. Beth will receive nothing, unless the court applies the doctrine of dependent relative revocation. Here, it seems that the Testator had no ill feelings about Beth receiving the bookcase and merely wanted her to receive the motorcycle instead. But, there is no strong evidence of this. If the court determines that the Testator would not have revoked the gift but for his mistake concerning the validity of his motorcycle amendment, the court will undo the revocation and give the bookcase to Beth. She will not receive the motorcycle regardless.

The next issue is whether the letter signed and dated June 15, 2015 was effectively incorporated by reference. In order for a document separate from a will to govern the disposition of property mentioned in the will, the document must be incorporated by reference. In order to be incorporated by reference, there are three requirements: (1) the document must have been in existence at the time the will was executed, (2) the will must evidence an intent to incorporate the document, and (3) the document must be sufficiently identified in the will. Here, the document was in existence because it was signed and dated June 15, 2015, and the will was executed July 1, 2015. Further, there is a clear intent in the will for the document to govern the disposition of the tangible personal property. Finally, the document is sufficiently identified because the date of the document is clear, and the Testator identified exactly where it could be found - the night table drawer in his bedroom along with the will (where it was, in fact, ultimately found). For these reasons, the letter was incorporated by reference, and the letter's terms govern. Donna receives all of the tangible personal property not otherwise effectively disposed of. This includes the motorcycle which was not effectively given to Beth. This would also include the bookcase if the court does not apply the doctrine of dependent relevant revocation, as discussed previously. The gift to Donna does not include the money, which is not tangible personal property.

The $10,000 was not effectively disposed of by the will, so it will pass via intestacy. Absent a living spouse, children, or parents, a testator's gift will pass in equal shares to his siblings. Testator has no living spouse, children, or parents. He does have two siblings - Adam and Beth. Thus, Adam and Beth will each receive $5,000 from the bank account.

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QUESTION 3

QUESTION

A man was driving his truck on a divided highway in State B when the truck collided with a car driven by a woman. As a result of the collision, the man lost control of his truck, which skidded off the road into a deep ravine. The woman's car was knocked into the highway median and rolled over several times before coming to a stop. The truck and its cargo were damaged beyond repair, but the man was not injured. The woman, on the other hand, suffered serious injuries. A passenger in the woman's car was also seriously injured.

Two lawsuits resulted from the collision.

In the first lawsuit, the man, a citizen of State B, sued the woman, a citizen of State A, in the United States District Court for the District of State A. The man alleged that the woman had caused the accident by negligently changing lanes while he was attempting to pass her and that he, the truck driver, had exercised due care and caution at all times. The man's complaint sought damages of $98,000—the value of the truck, trailer, and cargo. The woman answered the complaint, denying that she had driven negligently and asserting that the man had caused the accident by driving well above the speed limit and failing to look out for other vehicles on the road. The woman raised no other claims or defenses in her answer.

Following a bench trial in which both sides offered evidence as to the cause of the accident and the actions of each party, the judge entered judgment for the woman. The judge issued a short opinion finding, as a matter of fact, that "both the woman and the man operated their vehicles negligently" and that "both were at fault in causing the accident." The judge further correctly concluded, as a matter of law, that the contributory negligence law of State B applied. In addition, the judge concluded that the man could not recover because his negligence had contributed to the accident. The judgment was promptly entered denying all relief to the man and awarding costs to the woman. The man did not appeal, and the judgment became final three months ago.

One month ago, the woman and the passenger joined together in a second lawsuit. In this lawsuit they sued the man to recover damages for the personal injuries they had suffered in the accident as a result of his negligence. Like the woman, the passenger is a citizen of State A. This lawsuit was filed in the United States District Court for the District of State B. The woman and the passenger are each seeking damages well in excess of the $75,000 diversity-jurisdiction threshold, and their claimed injuries warrant such damages. The man has filed an answer denying liability and raising several defenses including that the claims by the woman and the passenger are precluded by the earlier suit.

1. Do the Federal Rules of Civil Procedure permit the woman and the passenger to join their individual claims in a single lawsuit against the man? Explain.

2. Is the woman precluded from bringing her claim as a result of the judgment in her favor in the lawsuit brought by the man in federal court in State A? Explain.

3. Is the man precluded from denying that he was negligent with respect to the passenger as a result of the judgment against him in the lawsuit he brought against the woman in federal court in State A? Explain.

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ANSWER

1. Joinder of Claims

Under the federal rules of civil procedure (FRCP), this is a problem of permissive joinder. Under this rule, a person may join a case as plaintiff and bring any claims against defendant that: 1) arise out of the same transaction or occurrence; and 2) there exists an issue of fact or law from that transaction or occurrence that is common to all plaintiffs in the case.

Here, the woman and passenger are attempting to join their individual claims in the lawsuit against the driver in federal court. The woman and passenger both suffered injuries as a result of their collision with the driver while riding in the car together. As such, the woman's claims and passenger's claims arise out of the same transaction (they share the same nucleus of operative fact and are logically related) and the man's negligence is an issue of fact and law that is common to both woman and the passenger. As such, the FRCP allows woman and passenger to join their claims since they meet the requirements for permissive joinder.

2. Claim Preclusion

Res judicata, i.e., claim preclusion, prohibits claims that have been or could have been brought in a previous proceeding. A claim is barred under claim preclusion when: 1) the claim arises out of the same case or controversy as the previous proceeding; 2) the identity of the parties is identical to that of the previous proceeding; 3) the decision of the court was final, made on the merits of the case, and made by a court of proper jurisdiction; and 4) the claim arises under the same cause of action that the previous claims were brought under. Claim preclusion also applies to compulsory counterclaims.

Here, the woman will be precluded from bringing her claim. The claim the woman is bringing now was a compulsory counterclaim and she was required to bring it in the original action as a defendant. A counterclaim is compulsory when it arises from the same nucleus of operative facts and rests upon the same facts and law to prove. Since the woman's claim was for damages from the same accident, she was required to bring it as a counterclaim against man in State A.

Since claim preclusion applies to woman's counterclaim, the analysis applies. The woman's claim of negligence/damages is one that arises out of the same accident as the one in the State A case. The woman is the plaintiff and the man is the defendant in this case, the party's identities are the same as the previous State A case (the added presence of passenger does not allow woman to circumvent claim preclusion). The decision of the State A court was final and made on the merits of the case since it weighed evidence and heard arguments. Lastly, the claim arises from the same accident as the woman's original claims in State A. As such, woman is precluded from bringing her claim as a result of the judgment.

3. Issue preclusion

Issue preclusion, unlike claim preclusion, precludes the re-litigation of an issue of law or fact that has already been decided. Issue preclusion can be used offensively or defensively. An issue is given preclusive effect when, 1) the issue was decided in a previous proceeding and the decision was made on the merits

of the case, 2) the issue was central, or at least considered, when making the decision, and 3) the party objecting to issue preclusion was a party to the previous case.

Here, the issue of the man's negligence was determined in the previous proceeding against woman. The determination of his negligence was central to the decision. The party objecting is man, a party to the previous suit. As such man cannot deny his negligence with respect to passenger.

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QUESTION 4

QUESTION

KeyCo, a company that manufactures keys, has had significant cash flow problems as a result of market trends away from keys and toward electronic locks. Accordingly, last year KeyCo borrowed money on three occasions.

On Feb. 1, KeyCo borrowed $200,000 from Firstbank. Pursuant to an agreement signed by both parties, KeyCo promised to repay the loan within two years and granted Firstbank a security interest in "all of KeyCo's assets" to secure its repayment obligation. On the same day, Firstbank filed a properly completed financing statement in the appropriate filing office, listing KeyCo as the debtor and indicating the collateral as "all of KeyCo's assets."

On April 1, KeyCo borrowed $400,000 from Secondbank. Pursuant to an agreement signed by both parties, KeyCo promised to repay the loan within four years and granted Secondbank a security interest in "all of KeyCo's equipment" to secure its repayment obligation.

On June 1, KeyCo borrowed $600,000 from Thirdbank. Pursuant to an agreement signed by both parties, KeyCo promised to repay the loan within six years and granted Thirdbank a security interest in "all of KeyCo's equipment" to secure its repayment obligation. At the time of this transaction, Thirdbank knew about KeyCo's transactions with Firstbank and Secondbank as described above.

On Aug. 1, Thirdbank filed a properly completed financing statement in the appropriate filing office, listing KeyCo as the debtor and indicating the collateral as "all of KeyCo's equipment."

On Oct. 1, Supplier obtained a judgment against KeyCo for an unpaid debt and, in connection with that judgment, obtained a lien on KeyCo's key-manufacturing machine.

Except as described above, no financing statements have been filed that list KeyCo as the debtor.

KeyCo has defaulted on its obligations to Firstbank, Secondbank, and Thirdbank. Each of those banks, as well as Supplier, is asserting an interest in the key-manufacturing machine.

1. Which banks, if any, have enforceable security interests in the key-manufacturing machine? Explain.
2. Which banks, if any, have perfected security interests in the key-manufacturing machine? Explain.
3. What is the order of priority of the enforceable security interests and Supplier's lien on the key-manufacturing machine? Explain.

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ANSWER

Attached Interests

Secondbank and Thirdbank have enforceable and attached security interests in the machine, but Firstbank does not. Article 9 of the UCC governs these transactions because they involve the loan of money in exchange for a security interest in collateral. Under Article 9, in order for a creditor to have an enforceable security interest against the debtor in a debtor's collateral, the creditor must attach that interest. A security interest is attached to collateral when the following three elements are accomplished: (1) a written or electronic security agreement covering the collateral, possession of the collateral, or control over the collateral; (2) the creditor gives the debtor value; and (3) the debtor has rights in the collateral. There are certain specifications for a security agreement. First, it must identify the debtor and the creditor. Next, it must be signed or authenticated by the debtor. Finally, it must sufficiently identify the collateral by using ordinary language or the terms to describe collateral found in Article 9. A super generic term such as "all assets" is not sufficient for a valid security agreement. If all of these elements are met, the creditor has an attached interest in the collateral.

Firstbank does not have an attached interest in the key-manufacturing machine. Although Firstbank gave value to KeyCo, and KeyCo has rights to control the key-manufacturing machine, Firstbank does not have a valid security agreement with KeyCo, nor does it have possession or control over the collateral. The security agreement is not valid because it does not sufficiently describe the collateral. Rather, it generically describes the covered collateral as "all assets." This does not suffice under Article 9, and Firstbank does not have an enforceable security interest in the machine against KeyCo.

Secondbank does have an attached interest because the written security agreement was signed by both parties, and covered "all of KeyCo's equipment." Equipment is defined under Article 9 as assets a business uses but does not sell or lease. The collateral is sufficiently described in the security agreement, and the machine would fall into the category of equipment. Further, Secondbank gave value in the loan, and KeyCo has rights in the collateral. Therefore, Secondbank has an enforceable and attached security interest in the machine.

For all of the same reasons, Thirdbank has an attached security interest in the machine. Thirdbank's security agreement sufficiently describes the collateral as equipment, it is signed, Thirdbank gave value, and KeyCo has rights in the collateral.

Perfected Interests

Thirdbank has a perfected security interest, but Firstbank and Secondbank do not. When an interest is perfected, it is enforceable against third parties. A security interest in equipment is perfected when the creditor obtains possession of the collateral, or an appropriate financing statement is filed with the secretary of state. A financing statement must include the names of the debtor and the creditor and identify the collateral. Unlike a security agreement, the financing statement need not specifically describe the collateral and generic terms can be used. If a security interest has not attached, it is not perfected until the time that it has validly attached.

Firstbank does not have a perfected interest because it does not have an attached interest. That being said, Firstbank did file an appropriate financing statement listing KeyCo as the debtor and indicating the collateral as "all of KeyCo's assets." This generic description is appropriate here, but the filing alone does not achieve perfection without attachment.

Secondbank does not have a perfected security interest because it never filed a financing statement and does not have possession of the collateral.

Thirdbank does have a perfected security interest as of Aug. 1, when it properly filed a financing statement. As previously stated, Thirdbank's interest is attached. And, Thirdbank filed a financing statement listing KeyCo as the debtor and indicating the collateral as "all of KeyCo's equipment." This suffices to perfect Thirdbank's interest.

Order of Priority

The order of priority, from highest priority to lowest, is: Thirdbank, Supplier, Secondbank, Firstbank. Among secured parties, the order of priority determines who has a superior right to the collateral. A perfected security interest will have priority over an unperfected security interest. Between two unperfected security interests, the first to attach prevails. Whether any secured party knows of the interest of another party is irrelevant. Between a perfected security interest and a judgment lien holder, the secured party prevails if it was perfected before the judgment lien holder obtained the lien. If the lien holder obtained the lien before the secured party's interest was perfected, the lien holder prevails. A lien holder will prevail over an unperfected secured party.

Here, Firstbank and Secondbank's interests are unperfected. Secondbank's interest prevails because its interest is attached, and Firstbank's interest is not. As between Secondbank and Thirdbank's interests, Thirdbank prevails because its interest is perfected. It is irrelevant that Thirdbank knew of the interests of Firstbank and Secondbank – it was up to Firstbank and Secondbank to perfect their interests.

Regarding Thirdbank and Supplier, Thirdbank's interest was perfected on Aug. 1, and Supplier obtained his lien on Oct. 1. Therefore, Thirdbank's interest has priority. Because both Firstbank and Secondbank's interests are unperfected, Supplier prevails over their interests.

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QUESTION 5

QUESTION

Thirty years ago, a man purchased a 170-acre tract of farmland. The farmland was bordered on the east by a county road that connected to the main street of a small town where the man worked in the local feed store. On the west, the farmland was bordered by a state highway.

Immediately after acquiring the farmland, the man built and moved into a house on its easterly portion. He constructed a vehicle shed on the westerly portion of the farmland in which he stored farm tractors and some of his cars. He then built a 10-foot-wide east-west gravel road that stretched across the entire farmland connecting the county road to the state highway. This gravel road allowed the man to travel between his house and the vehicle shed and also to drive tractors and cars out of the shed and onto the county road. It additionally gave him two routes from his house to the small town. It took the man 15 minutes to drive to town using the county road; using the state highway, which resulted in a more circuitous trip, took 45 minutes.

After building the gravel road across the farmland, the man usually used the county road to drive to work, although occasionally he used the state highway. On weekends, however, when he wasn't working, he frequently used the state highway because it allowed him to easily reach other towns where he visited friends.

Two years ago, the man conveyed the westernmost 90 acres of the farmland, including the vehicle shed, to a woman who worked in the same feed store as the man. This 90-acre portion included the western portion of the gravel road that the man had constructed across the property. The deed conveying the westernmost 90 acres to the woman did not mention the gravel road, and the deed was not recorded. The woman built a house on the 90 acres and moved in. She used the gravel road across the man's land to access the county road when driving to work.

One year ago, the woman conveyed her 90 acres to a friend, who moved into the house the woman had built. The friend worked in the same small town as the man and the woman, and the friend also used the gravel road across the man's land to access the county road. The deed conveying the property to the friend stated that the woman was conveying to the friend the 90 acres, together with "the right to use the gravel road" crossing the adjacent 80 acres owned by the man to reach the county road. This woman-to-friend deed was promptly recorded.

Five months ago, the man conveyed his 80 acres to a builder by a deed that made no mention of the gravel road. The builder paid the man fair value for the land and promptly recorded this man-to-builder deed.

Four months ago, the builder erected a barrier across the gravel road. The barrier prevented the friend from using the gravel road across the builder's land to reach the county road.

Three months ago, the friend recorded the man-to-woman deed.

The land is in a state that has a notice-type recording act and uses a grantor-grantee index. In this jurisdiction, the time to acquire an easement by prescription is 20 years.

1. Before the man's conveyance to the builder, did the friend have an implied easement from prior use over the man's 80 acres? Explain.
2. Assuming that the friend had an implied easement from prior use, did the builder take ownership of the 80 acres free and clear of that easement? Explain.

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ANSWER

Implied Easement from Prior Use

The friend had an implied easement from prior use. An implied easement from prior use arises when four conditions are met: (1) a once unified parcel is divided; (2) part of one parcel (the servient parcel) is used to benefit another parcel (the dominant parcel); (3) the use is continuous and apparent; and (4) the use is reasonably necessary for the use and enjoyment of the dominant parcel. The last element is not a strict necessity standard, rather, a reasonable necessity will suffice. An implied easement from prior use continues until terminated, even if the parcels change ownership, as long as the use continues and is apparent.

Here, the friend had an implied easement from prior use. First, the land was once a unified parcel under the ownership of the man. Second, he used the road on the eastern parcel to benefit the western parcel – he left his vehicles on the western parcel and travelled on the gravel road through the eastern parcel to reach the county road. It could also be argued that the eastern portion beneficially used the western portion to reach the highway, but it is not problematic that both parcels have an implied easement in the road. Moreover, this beneficial use continued even after the man sold the western portion to the woman, and after the woman sold the parcel to the friend. Both the woman and the friend continued to utilize gravel road over the eastern portion in order to reach work. Third, the use was apparent and continuous; all owners consistently used the gravel road to drive over the eastern parcel and reach the county road. Finally, the use is reasonably necessary for the use and enjoyment of the western parcel. Without the gravel road, the man, woman, and friend would have had to travel 45 minutes to work, rather than 15 minutes when using the gravel road. This makes the use of the gravel road reasonably necessary for the use and enjoyment of the western parcel. Again, this is not a strict necessity standard, so it does not matter that the highway would sometimes be used to reach work or other destinations. Lastly, there is no evidence suggesting that the easement was terminated.

Builder's Interest Relative to the Easement

Assuming the friend had an implied easement from prior use, the builder took ownership of the 80 acres subject to the easement because he had inquiry notice. A purchaser of land takes the land subject to an easement unless the purchaser is protected by the jurisdiction's recording act. This jurisdiction has a notice type recording act which means a purchaser is protected from an easement if they purchased the land for value and without notice of the easement. Notice can be actual, inquiry, or record. Inquiry notice arises when a reasonable inspection of the land would suggest the existence of an easement. Record notice arises when a reasonable record search would indicate the existence of the easement. This jurisdiction has a grantor-grantee index. An easement can terminate through prescription when the servient estate owner prevents the dominant estate owner from using the easement in a way that is open, hostile, continuous for the statutory period, and actual.

The builder paid value for the land and did not have actual notice because he was not actually aware of the easement. Regarding record notice, the builder would have looked in the grantor-grantee index under the man's, his grantor's, name and noticed that there were no other conveyances because

the man-to-woman deed was not recorded until two months after the builder obtained the land. Thus, even though the woman-to-friend deed was recorded with a mention of the easement, the builder would not have known to look for conveyances from the woman. The builder therefore did not have record notice, but the builder would have had inquiry notice. A reasonable inspection of the land would have clearly indicated the existence of the gravel road. With this notice, the builder should have inquired about the existence of any easements. Therefore, the man is not protected under the recording acts and owns the land subject to the easement. Moreover, the builder only began blocking the gravel road four months ago, so he cannot terminate the easement by prescription 20 years has passed.

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

QUESTION 6

QUESTION

A grocer planned to open a supermarket and needed shopping carts for her store. On March 1, she went to the showroom of a shopping-cart supplier to look at a variety of samples of modern shopping carts. After looking around the showroom, the grocer pointed to a shopping cart that bore a price tag of $125 and said to the supplier, "These are the carts I want for my store. When can you get me 100 of them?" The supplier said that he could deliver 100 of those shopping carts to the grocer's supermarket within 30 days. The grocer responded, "That's great. Please ship me 100 of these shopping carts by March 31, and I will wire you payment of $12,500 as soon as they arrive." The supplier said, "You've got a deal!"

On March 2, the grocer sent the supplier an unsigned note, handwritten on plain paper, stating in its entirety: "It's a pleasure doing business with you. This will confirm the deal we made yesterday for 100 shopping carts at $125 each." The supplier received the note on March 4 and read it immediately but never responded to it in any way.

On March 31, the grocer received an envelope delivered by an express delivery service. Inside the envelope was a document printed on the supplier's letterhead. The document stated, in its entirety: "Thanks so much for your business. The 60 shopping carts you ordered from us are on the way. Be on the lookout for our delivery truck – it may even arrive today! Please send us payment of $7,500 (60 carts x $125/cart) as soon as you receive the carts."

Later that day, the supplier's truck arrived at the grocer's supermarket, and the truck driver said to the grocer, "I've got 60 shopping carts for you in the truck." The grocer replied, "I didn't order 60 shopping carts; I ordered 100. You go back to your boss and tell him to send me the right order." The grocer refused to allow the truck driver to unload the 60 shopping carts from the truck and did not pay for them.

The grocer would like to sue the supplier for breach of contract for failing to deliver 100 shopping carts.

Is there an enforceable contract requiring the supplier to sell 100 shopping carts to the grocer for $125 each? Explain.

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ANSWER

I. The elements of a contract are met in the oral agreement for 100 shopping carts.

The first issue is whether the oral exchange between the grocer and the supplier contained the elements of a valid contract.

Contracts for the sale of goods are governed by Section 2 of the Uniform Commercial Code (UCC), with goods defined as "things moveable" at the time of contracting. A valid contract contains four elements: offer, acceptance, intent, and consideration. An offer is a party's manifestation of intent to enter into a bargained-for exchange, and acceptance is a party's manifestation of intent to accept the offer on the offeror's terms. Consideration is a legal detriment or bargained-for-exchange.

Here, the supplier's action of placing shopping carts on the floor with a price tag of $125 likely constituted an offer by a commercial vender. Moreover, after the grocer inquired about whether the supplier could supply 100 shopping carts, the supplier indicated that he could do so in 30 days, clarifying that the offer of a shopping cart for $125 was good up to that amount. The grocer accepted this offer by telling the supplier to "Please ship me 100 of these shopping carts by March 31" in exchange for a $12,500 payment on arrival. The $12,500 payment was sufficient consideration for the contract, and the supplier's statement, "You've got a deal," manifested clear intent to enter into the contract.

In conclusion, all four elements of a contract are met, and the parties entered into a valid, oral contract for 100 shopping carts for $125.

II. The Statue of Frauds will prevent enforcement of the oral agreement for 100 shopping carts, but will allow enforcement of the agreement up to 60 shopping carts.

The next issue is whether the oral agreement between the grocer and supplier, even though valid as a contract, is enforceable under the UCC Statute of Frauds.

Under the UCC Statute of Frauds, contracts for sale of goods over $500 must be in writing. The writing must be sufficient to show the existence of a contract between the parties, must describe the material terms of the contract, including the quantity of goods, and must be signed against the party against whom enforcement is sought. A writing is enforceable only up until the quantity of goods named therein. The definition of "signed" under the UCC is broad, and includes any mark sufficient to show the party's intent to adopt the writing as their own. Letterhead may be sufficient to act as a signature.

Under the "merchant confirmatory memo" exception to the UCC Statute of Frauds, an oral contract for sale of goods may be enforceable if one merchant sends to another a written memo detailing the material terms of the oral agreement, of which the receiving merchant has reason to know, and the receiving merchant either acknowledges the agreement or does not respond within 30 days. However, a merchant confirmatory memo – like any other writing sufficient to satisfy the Statute of Frauds – must be signed.

This contract was for a sale of 100 shopping carts at a total price of $12,500, which means that it is subject to the UCC Statute of Frauds. Unless the grocer can produce a writing sufficient to satisfy the statute of frauds, the contract will be unenforceable.

A. The grocer's March 2 note to the supplier is not sufficient to enforce a contract for 100 shopping carts at $125.

Just a few days after the parties entered into an oral agreement for sale of 100 shopping carts at $125, the grocer sent the supplier a note stating the essential terms of quantity and price. The supplier received the note, read it, and did not respond. However, the problem is that the grocer's note was handwritten and unsigned, on blank paper. There was no indication – such as a logo, or letterhead, or even the grocer's name – that the grocer was authorizing the document. An unsigned document will not qualify for the "merchant confirmatory memo" exception, and therefore, the grocer's March 2 note will not result in an enforceable contract for 100 shopping carts.

B. The Supplier's March 31 document will allow enforcement of the contract for 60 shopping carts, but not for 100.

Although the March 2 note is not sufficient to satisfy the statute of frauds, the supplier's March 31 note is sufficient. The note contained the essential terms of price and quantity, and most importantly, was printed on the supplier's letterhead. This letterhead acts as a signature and renders the contract between the supplier and the grocer enforceable. However, the supplier's note stated that the grocer ordered "60 shopping carts," not 100. Even though this is a misstatement of the oral agreement between the parties, the contract is only enforceable as to the quantity of goods named in the writing: here, 60 shopping carts.

III. Conclusion

In conclusion, there is not an enforceable contract requiring the supplier to sell 100 shopping carts to the grocer for $125 each. Instead, there was an enforceable contract for 60 shopping carts, which the grocer was free to reject as non-conforming with the original agreement.

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

MPT 1

IN RE MILLS (FEBRUARY 2021, MPT-1)

In this performance test, the client, Charlotte Mills, is considering whether to pursue legal action against Ramble Group (Ramble) for breach of contract. The dispute arises from an event planning engagement that Mills undertook for Ramble. After Mills had begun preparations for the event (a spring festival with a 5K run), Ramble decided to use another event coordinator. The task is to draft an objective memorandum analyzing whether there is an enforceable contract between Mills and Ramble and what damages Mills may be able to recover in an action for breach of contract. Examinees must consider the import of Mills's written proposal (which was not signed by either party) and review the email exchanges between Mills and Ramble's owner, Kathryn Burton, to determine whether the elements required for contract formation are present. The File contains the instructional memorandum from the supervising attorney, a summary of the client interview, the written event planning proposal, and email correspondence. The Library contains three Franklin appellate cases.

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ANSWER

To: Isabel Banks

From: Examinee

Date: Feb. 23, 2021

Re: Charlotte Mills matter

A binding contract requires the following elements: (1) offer; (2) acceptance; (3) intent to create a legal relationship; and (4) consideration. *Daniels v. Smith.*

The first question is whether there was an offer. There is no mistake that Charlotte Mills (Mills) on behalf of Mills Event Management (MEM) made an offer of event planning services to Ramble Group (Ramble) through Kathryn Burton (Burton). On June 4, 2020, Mills emailed Burton a proposal identifying MEM and Ramble, outlining the scope of MEM's services, detailing the parties' responsibilities, naming the event, and stating the amount of payment for the services. The only missing information was the venue and date, which were to be determined.

The next question is whether Ramble accepted MEM's offer. In *Daniels v. Smith*, the crux of the parties' dispute was whether the parties' agreement had to be reduced to a writing to form a valid contract. Defendant Smith sought Plaintiff Daniels' assistance in planning demolition on her land. She submitted a bid form to Daniels that included plans and specifications for a warehouse she wanted to build where the buildings were razed. Daniels reviewed and proposed changes to the plans and submitted a revised bid form. Daniels and Smith then met and Smith stated no further changes were needed. The next day, Daniels stated he could build the warehouse for $227,000. Smith countered with $220,000 and Daniels orally accepted the offer. The following day Daniels emailed a standard construction contract embodying the agreement. Smith never replied. Daniels drove by the construction site to find another contractor performing the work. Smith alleged that the agreement was unenforceable because she never signed the construction contract.

Smith argued that because they had reduced their agreement to a writing, the writing had to be signed to form a binding contract. *Green v. Colimon.* The court rejected Smith's argument. The court held that in *Green*, the parties had never reached a meeting of the minds during negotiations, which is critical to contract formation. The *Daniels* court added that it had rejected a similar argument in *Alexander v. Gilligan*, where after several email exchanges between them embodying the terms of their agreement, the plaintiff presented a written contract for defendant's signature but defendant refused to sign. The court held that the formal written contract was only evidence of the agreement. Parties can agree orally or by email and form a binding contract which doesn't require a signed writing.

The circumstances in *Daniels* are similar to our case. On June 7, 2020, Burton replied to Mill's June 4 email to say that she had reviewed the June 4 proposal and that "everything looks good." Burton inquired about the fees but did not reject the offer. Mills replied the same day, explaining her fee structure and how she reached the $15,000 base fee for her services. On June 8, Burton replied that the fee structure "sounds fair" and informed Mills that the event would be held the first weekend of April. This satisfied the date of the event, a term left open in the June 4 proposal. Mills confirmed her April availability

the same day. Mills advised reserving two venues Ramble was considering for the event. On June 9, Burton directed Mills to get started on web design for the event and replied the she would be sending Ramble's deposit by the end of the same week, closing "I'm looking forward to working with you." Mills replied the same day, "Sounds great!" adding that she would secure the venues as soon as she received Ramble's deposit. Ramble sent the deposit and Mills began working as agreed. However, Ramble never sent the signed agreement.

We are on solid legal ground should Ramble claim that it had to sign the proposal to create a binding contract with MEM. As noted by the *Daniels'* court in its analysis of *Alexander*, the several email exchanges between Mills and Burton show that MEM and Ramble had reached a meeting of the minds. The proposal MEM sent included all the terms of their agreement. Burton inquired only about the fee structure and stated that Mills' explanation was reasonable. In her June 9 email, Burton instructed Mills to get started on the Springfest web design and that she looked forward to working with MEM on the event planning. Mills replied the same day that she would get started on securing venues as soon as she received the deposit. Ramble sent the deposit and Mills started working, securing permits, paying permit fees, preparing a budget and master plan for the event, creating a new Springfest website, reserving alternate venues, and contacting musicians to perform. This shows a valid agreement between Ramble and MEM.

The next question is whether there was an intent to create a legal relationship. In *Daniels*, the court found that Smith's oral statement to Daniels "Let's get this thing rolling" made clear that the parties intended to be legally bound by their agreement. *Daniels*. Here, Burton on behalf of Ramble stated that the proposal "looked good," directed Mills to get started on website design, stated that she looked forward to planning the event with Mills, and sent a deposit as requested by Mills. Mills in turn said "sounds great" and got started on the work. The parties clearly intended to be bound by their agreement.

The final issue is whether there was any consideration. In *Daniels*, the parties agreed by phone that Smith would pay $200,000 for Daniels's services. *Daniels*. In our case, Burton agreed to pay $15,000, saying that it was a reasonable price, after Mills explained the fee structure. In exchange, Mills promised to provide event planning services for the Springfest. Ramble also sent $2,000 to Mills as an initial deposit, after which Mills got started on the work. There was consideration to support the agreement.

Because the agreement meets all the requirements to form a binding contract under *Daniels*, MEM's agreement with Ramble is enforceable. Even if Ramble contends that the agreement needed to be in a signed writing, the argument will not prevail under *Daniels*. The writing was only evidence of an agreement already formed between MEM and Ramble.

The next question is whether Ramble has any other defenses. In *Daniels*, the court noted that the Statute of Frauds did not apply because Daniels and Smith had agreed that Daniels would construct the warehouse in less than three months. *Daniels*. Franklin Civil Code Sec. 20 provides that if an agreement, by its terms, cannot be performed within a year of its being memorialized it must be in writing. *Daniels*. In this case, Ramble might assert that the agreement could not be performed in a year. This argument will fail. As explained above, Burton agreed to the terms of Mills' proposal on June 9, 2020. The proposal itself left the date of performance "to be determined." The parties agreed that to the first weekend in April, when Springfest is typically held. From June 9,

2020 to the first weekend of April 2021 is less than a year. Therefore, by the terms of the agreement, the contract could be performed in less than a year and did not need to be evidenced by a writing.

The next issue is whether Ramble breached its contract with MEM. In *Daniels*, Daniels discovered by driving by the site that Smith had arranged for another contractor to complete the construction. The court held this was a breach. In our case, Mills began working on the planning of the event and worked all summer 2020 until she received a call from Burton on Aug. 20, 2020 that Ramble had contracted with another event planning company for Springfest 2021. This call breached the contract.

The final question is what damages may be awarded to MEM as a result of Ramble's breach. In *Daniels*, Daniels claimed that he lost a total of $57,500 due to Smith's breach. The amount was $50,000 in lost profits and $7,500 in expenses he incurred. Smith contended that Daniels' damages were uncertain due to uncertainty surrounding the costs of Daniels' performance. The court rejected Smith's argument and affirmed the damages. The court held that while unascertainable damages cannot be recovered, estimates may be taken for a damages figure, provided the estimates are reasonable. *Daniels*. In our case, Mills emailed Burton a proposal detailing cost estimates totaling $15,000 for Mills' services. Burton inquired about the fee structure and Mills explained the fees for MEM's services. Burton stated that such fees were reasonable. Should Ramble question the fees as cost estimates, MEM's proposal and Burton's email exchange with Mills will evidence that Ramble understood and accepted the estimate. Mills will be entitled to $15,000 for expectation damages under the contract.

The next question is whether Mills incurred any other damages as a result of the breach and whether these damages will be offset by the $2,000 deposit Ramble paid Mills. Franklin Civil Code Sec. 100 provides that damages proximately caused by a breach of contract and sustained in the ordinary course of performance are recoverable. *Daniels*. In this case, Mills' out of pocket expenses totaled $3,000 incurred for the work she performed during the summer 2020.

MPT 2

STATE V. KILROSS (FEBRUARY 2021, MPT-2)

This performance test requires the examinee to draft a persuasive argument in support of a motion to exclude the use of certain evidence at trial. The State of Franklin has charged the client, Bryan Kilross, with robbery of a liquor store. Because Kilross has no alibi witnesses, it is likely that he will have to testify in his defense, but defense counsel is concerned that Kilross's prior felony conviction for robbery will prejudice his case. The examinee is asked to draft the argument in support of a motion to preclude admission of the prior conviction as impeachment under Franklin Rule of Evidence 609. The File contains the task memorandum from the supervising attorney, the firm's guidelines for writing persuasive briefs, the transcript of the client interview, a file memorandum from an investigator, a copy of the indictment for the previous robbery charge, and a transcript of the plea hearing for that charge. The Library contains the Franklin statutes defining the crimes of theft and robbery, Franklin Rule of Evidence 609, and two appellate cases.

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ANSWER

To: Marie Smith

From: Examinee

Date: Feb. 23, 2021

I. The court should refuse to admit evidence of the victim's robbery conviction because the State cannot show that it requires or contains an element or fact of deceit and the State cannot meet the heightened balancing test for use against a criminal defendant.

(a) Robbery does not require an element of dishonesty and the prior record does not contain a fact of dishonesty, therefore the State should not be able to impeach the defendant under Rule 609(a)(2).

Under Rule 609 of the Franklin Rules of Evidence (FRE), a witness's character for truthfulness may be attacked by evidence of a criminal conviction for a crime that was punishable by death or imprisonment for more than one year and, if sought to be admitted in a criminal case, the probative value of the evidence must outweigh its prejudicial effect to the defendant. FRE 609(a)(2) further provides that any crime, regardless of punishment must be admitted if the court can readily determine that establishing the elements of the crime required proving-or the witness's admitting-a dishonest act or false statement.

Thorpe provides an analysis of crimes that fall within FRE 609(a)(2) which generally allows use of a crime for impeachment when an element of dishonesty was involved. According to *Thorpe*, dishonesty means, broadly, a "breach of trust, including a lack of . . . probity or integrity in principle," "lack of fairness," or a "disposition to betray." More narrowly, cited in *Thorpe*, "dishonesty is defined as deceitful behavior, or a disposition to lie, cheat, or defraud." *Thorpe* concludes that while robbery may fit in the broad definition, it does not fit in the narrow definition because robbery is a crime of violent, and not deceitful, taking. *Thorpe* further holds that the federal legislative history with this Federal Rule of Evidence, which is identical to the Franklin Rule of Evidence, intended the narrow meaning. Therefore, only those crimes that require proof of an element of misrepresentation or deceit, such as perjury, false statement, etc. bear directly on a witnesses' propensity to testify truthfully and thereby meet the FRE 609(a)(2) definition. More specifically, even though theft is a predicate offense to robbery, the courts have not been willing to accept that theft is inherently deceitful, since Franklin Criminal Code (FCC) Section 25, which outlines theft, does not have deception as an essential element.

Here, Kilross' prior conviction is also for robbery, therefore, like *Thorpe*, it will not meet 609(a)(2) requirements based solely on proof of elements. FCC 29 provides the elements of robbery, which are, in short, intent to commit theft, taking property of another, in the presence of a person, by force, threat of force, or sudden snatching. None of these elements, which are identical to those in *Thorpe*, require dishonesty. It is unlikely that an elemental argument will be made by the State given the clear legislative history in this issue; however, if the State advances such an argument it should quickly be dismissed as inconsistent with the case law and legislative intent.

However, *Thorpe* also discusses an amendment to the FRE 609(a)(2) that appears to expand the breadth of the rule by adding "facts in the record

[that] establish an act of dishonesty or false statement." The reality of this amendment to both the Franklin and Federal rules does not dramatically alter the prior understanding of the rule; rather, it allows only for a proponent to offer information to show that the fact-finder was required to find dishonesty, false statement, etc., even where the criminal code for the specific crime did not itself contain an essential element of dishonesty. The Federal Advisory Committee commented on this amendment to caution against a "mini-trial," in which a proponent can plumb the record of the previous proceeding. However, notwithstanding that note, the Franklin Appeals Court in *Frederick* held that a proponent could impeach with a plea in a shoplifting case, which alone would not be sufficient as shoplifting does not require a showing of deceit or dishonesty, because at the plea hearing, Frederick admitted to lying about contents of bag while she was shoplifting. *Thorpe* held that lack of information of such factual dishonesty or deceit from the prior record rendered the robbery conviction inadmissible as impeachment evidence under FRE 609(a)(2).

Kilross is more like *Thorpe* than *Frederick*, therefore, this amendment to the rule will not impact its admissibility under this section. Like *Thorpe*, there is no record of fact or admission by Kilross to the effect of false statement, deceit, or dishonesty. An examination of the hearing shows that the indictment merely outlines the elements of robbery under FCC 29 and the plea hearing provides only admission to the elements of the crime, which has already been shown to be insufficient for FRE 609(a)(2) admission. The statement by Kilross that the money was returned to the store is a factual admission that may or may not be true; however, the prior record contains no probe into that statement. Therefore, even if the State advances that the money was not returned, the statement is not admissible under this rule because the prior record would not contain the falsity. Under the legislative history or the rule and using the comment to the amendment, the court is not to conduct a mini-trial into the prior record and to ask about the truth of that statement would be a probe into the prior record inconsistent with the intent of the rule.

(b) The court should not allow the impeachment of the Defendant under FRE 609(a)(1)(B) because the probative value does not outweigh the risk of unfair prejudice.

While the conviction is inadmissible under FRE 609(a)(2), impeachment is also available under FRE 609(a)(1)(B). *Hartwell* concerns use of a prior felony conviction under FRE 609(a)(1)(B). In *Hartwell*, the trial court admitted a six-year-old conviction for felony possession of firearm to impeach Hartwell for the identical federal offense, felony possession of a firearm. *Hartwell* provides that FRE 609 allows the use of the conviction to impeach; however when the proponent seeks to impeach a criminal defendant, a heightened balancing test must be satisfied under FRE 609(a)(1)(B) before admission. *Hartwell* outlines four factors to be used in the balancing test (1) nature of the prior crime involved; (2) when the conviction occurred; (3) the importance of the defendant's testimony; and (4) the importance of the credibility of the defendant.

Here, the robbery conviction falls within this section because it is a felony punishable by more than one year, despite the time actually served for the offense. Defendant concedes that they are not outside of the umbrella of this rule because of the time served for the crime lasting less than one year. However, this conviction is inadmissible because it cannot pass the heightened balancing test outlined in the rule.

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

First, the nature of the prior crime concerns the impeachment value of the prior conviction and the similarity to the charged crime. Impeachment value refers to how probative of truthfulness the prior crime is and similarity to charged crime considers the elements of each charge. Here, robbery is a crime of violence and according to *Hartwell*, violent crimes have the lowest impeachment value for truthfulness as they are not inherently deceitful; in fact, violent crimes are quite the opposite and require direct confrontation. The fact that robbery also requires theft only makes it slightly more probative than assault. More importantly, not only does robbery have a low impeachment value, but here, it is identical to the crime charged. In *Hartwell*, the court holds that when the crime charged is identical to prior conviction, it is highly prejudicial as the risk of influencing the jury is high. *Hartwell* cites the Committee notes on FRE 609 that are pertinent to this issue as they provide that there is an inherent danger that the evidence will be used as character evidence instead of impeachment. This means that it is very likely that a fact-finder would use the "bad person" theory when presented with this prior conviction, which means they will assume that the defendant is a bad person who has committed this crime in the past and therefore, they must have committed it in the case at hand. This danger must be confronted as it runs afoul of the justice system which provides that a person must be proven guilty on the present facts beyond a reasonable doubt and not convicted based on prior facts and convictions. Therefore, given the relatively low impeachment value and the identical nature of the two crimes, this factor weighs heavily against admissibility.

Second, the age of the prior conviction completely excludes those more than 10 years old and within the 10 years considers that the probative value generally diminishes with time. Here, the conviction is 8 years old, which, although it does not meet the automatic disqualifying time limit, it is close. This means that the probative value is almost always allowed under the rule since more time has elapsed since the crime. More importantly, Kilross has not been convicted of any non-traffic offenses since this conviction which tends to show it is no longer probative of Kilross' character. Therefore, the old age of the conviction and the lack of subsequent non-traffic convictions tends to weigh against admission.

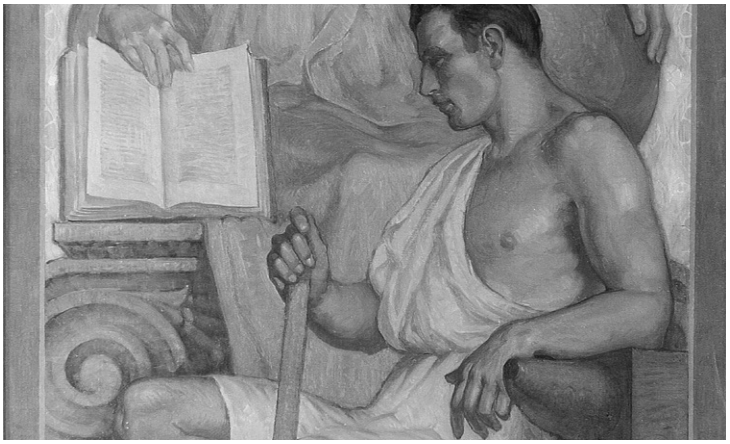
Third, the importance of the defendant's testimony. This element causes the court to consider whether the defendant is the only rebuttal option and whether the risk of impeachment with the offense will prevent the defendant from testifying. Here, the defendant is the only witness to rebut the charges of the State, which makes his testimony important. Moreover, the State's case rests on one witness, which increases the strength of Kilross' testimony. In *Hartwell*, the court heavily considered that Hartwell was the only rebuttal witness and that there was a risk Hartwell would not take the stand if the impeachment conviction could be used. Kilross is in a similar situation where his alibi is based on his testimony, which makes it important to his defense, but there is a risk to testify if this conviction is admissible. Therefore, because Kilross is the only rebuttal witness against the State's relatively weak case based on one witness, the risk of not taking the stand if the conviction is admissible as impeachment weighs against admissibility.

The final factor in the balancing test is the importance of the defendant's credibility. This factor considers the subject matter of the defendant's testimony such that significant issues testified to by defendant would raise questions about credibility that should be attacked, whereas unimportant

matters or uncontested matters in the case would lessen the need to attack for credibility. Here, for the same reasons discussed in factor three, the defendant's testimony is important as it establishes his alibi against the State's weak case. Therefore, Kilross' credibility is relevant. Therefore, this element weighs toward admissibility.

On balance, even though the final factor weighs toward admissibility, the relatively low impeachment value, high risk of prejudice, low probative value of the crime, and critical importance of a defendant's ability to defend themselves, the prior robbery conviction must be excluded. The probative value is extremely low on these facts and even if it were higher, it would not be able to overcome the extremely high risk of unfair prejudice present here. To allow a prior conviction that is 8 years old and identical to the charged crime when the criminal defendant is the only witness in their favor would be against all prior Franklin case law, inconsistent with the intent of the impeachment rule, and most notably a manifest injustice.

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



On the cover:

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

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