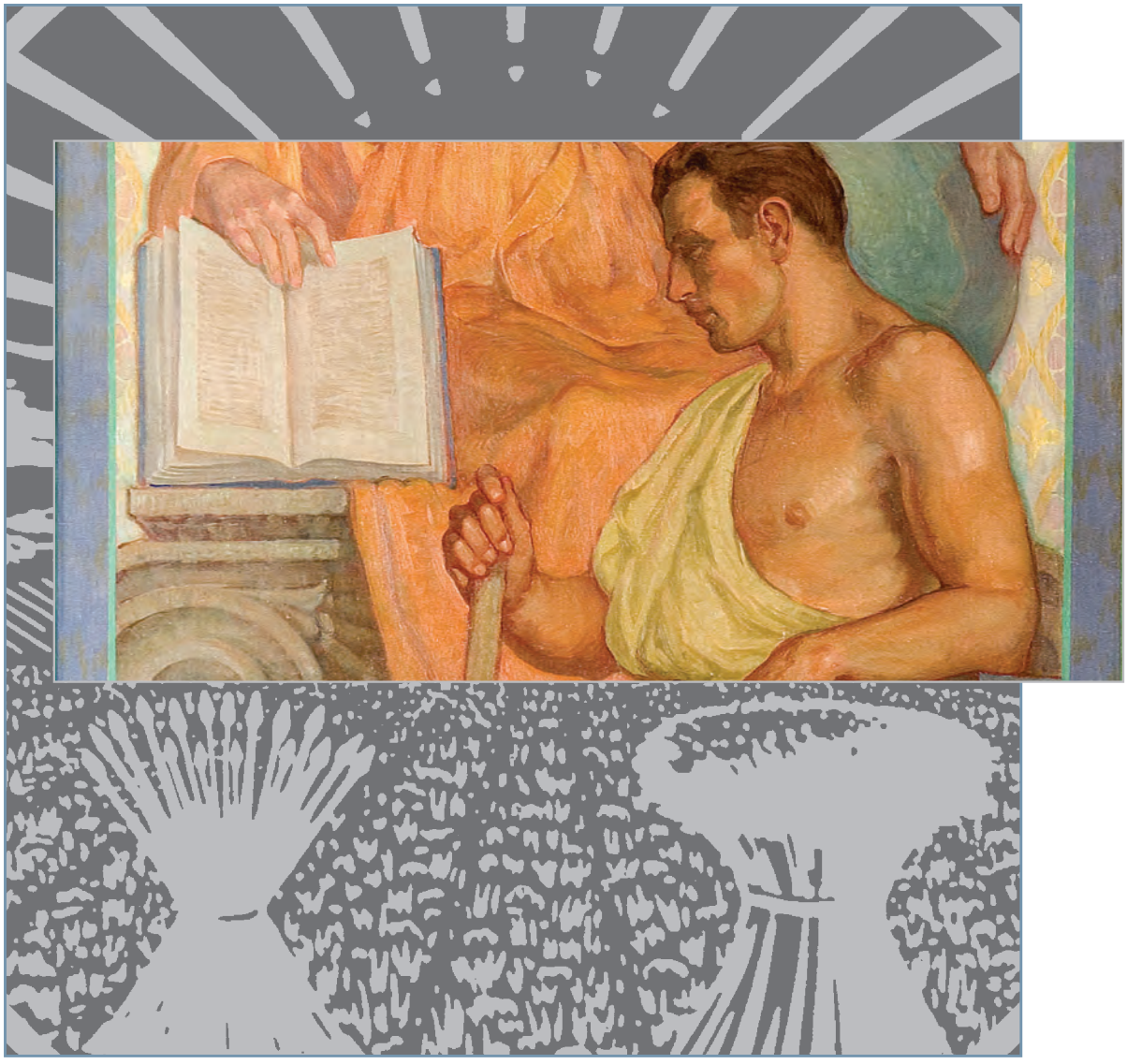
THE SUPREME COURT *of* OHIO

July 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

JULY 2013 OHIO BAR EXAMINATION

Essay Questions & Selected Answers

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OHIO BAR EXAMINATION

JULY 2013 OHIO BAR EXAMINATION

Essay Questions and Selected Answers

MPT Summaries and Selected Answers

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

The essay and MPT answers published in this booklet merely illustrate above-average performance by their authors and, therefore, are not necessarily complete or correct in every respect. They were written by applicants who passed the exam and have consented to the publication of their answers. See Gov.BarR. I5(C). The answers selected for publication have been transcribed as written by the applicants. To facilitate review of the answers, bar examiners may have made minor changes in spelling, punctuation, and grammar to some of the answers.

Copies of the complete July 2013 MPTs and their corresponding point sheets are available from the NCBE. Check the NCBE's website at ncbex.org for ordering information.

QUESTION 1

Q

Wilbur owns horse-riding stables in Anywhere, Ohio. He has two employees, Buck and Tex. Wilbur, who has no cell phone, had arranged to take a several-month vacation to a remote area of Montana where nobody would be able to reach him. The night before he left, he told Buck, "You will be in charge while I'm gone. I want you to manage my business. If that old tractor breaks down, you can have it either repaired or replaced, so long as the expenditure is necessary in the direct operation of the business."

1. During Week 1 of Wilbur's vacation, the tractor necessary for use in the business broke down and could not be repaired. Buck purchased a new tractor that was fully functional and equipped with standard features. He also purchased very expensive after-market wheel rims for the tractor, which he planned to install at a later date to make the tractor look "wicked cool." He made these purchases using company funds.

2. During Week 2, Buck fired Tex over a dispute with a customer, which had involved Tex yelling at the customer and wiping manure on the customer's face. In the past, Wilbur had made all the hiring and firing decisions, but had on occasion done so pursuant to Buck's recommendations.

3. During Week 3, Buck discovered that one of the horses had a contagious disease that threatened the lives of all the other horses. Believing that Wilbur would want him to do so, Buck had Vet, a veterinarian, treat the horse and vaccinate all the others against the disease. Buck paid for Vet's services using company funds.

4. During Week 4, a customer, Howdy, was seriously injured in a fall while horseback riding. Buck had forgotten to have Howdy sign a standard liability release form that Wilbur wanted all patrons to sign before a ride. Buck called an ambulance and accompanied Howdy to the emergency room. Using company funds, Buck paid the cost of the ambulance and the emergency medical treatment, believing that Wilbur would have wanted him to do that to preserve Howdy's goodwill and to potentially avoid litigation.

5. During Week 5, Buck hosted the stable's Annual Hog Roast, which has historically been hosted by Wilbur during that same week every year as a marketing event to show customer appreciation. Buck paid for the event with company funds. To make the event even more sensational, he also took the unusual measure of raffling off Landbiscuit, one of Wilbur's most prized stallions.

6. During Week 6, Buck decided to go on a short vacation, so he asked his friend Calamity if she would run the business while he was gone. Calamity agreed to do so without pay and as a favor to Buck. Before Buck left, he told Calamity to "make sure the horses are treated like people while I'm away." Calamity, an interior designer by trade, purchased horse-sized designer couches for use by the horses in their stalls. When Buck returned from vacation, he laughed out loud at the sight of the couches, but felt obligated to reimburse Calamity since she had misconstrued what he meant. Therefore, Buck reimbursed Calamity for the cost of the furniture using company funds.

Under applicable principles of agency law, would Wilbur be justified in asserting that Buck had exceeded his authority in carrying out the acts described at each of the enumerated points? Discuss your answers fully. Do not discuss apparent authority.

A

An agency relationship exists when there is mutual assent, and the agent agrees to act for the principal's benefit and under the principal's control. There is an agency relationship between Wilbur and Buck because they agreed that Buck would work for the benefit of Wilbur, and Wilbur exerted control over him as his employer. There are four types of authority that authorize an agent to act on behalf of the principal. Apparent authority is not relevant here. The other three are actual express authority, actual implied authority, and ratification. Express authority occurs when the principal, either through words or actions, explicitly authorizes certain conduct. There is ratification when the principal knows the terms of a contract and accepts the benefits of the contract. Agents also have a duty to follow reasonable instructions.

1. Wilbur would be justified in asserting Buck exceeded his authority in buying the wheel rims. Wilbur gave Buck actual express authority to repair the tractor by explicitly telling him he could do so, but limited Buck's actual authority by only allowing repairs if they were necessary. Since the tractor could not be repaired, Buck was allowed to purchase the new tractor, but the rims were unnecessary because they had no purpose other than aesthetics. Buck also violated his duty to follow reasonable instructions.

2. Wilbur would not be justified in asserting Buck exceeded his authority in firing Tex. He gave Buck the express authority to manage the business. Express authority to manage impliedly includes the ability to fire when it is reasonable to do so. Tex egregiously assaulted a customer, so it was reasonable for Buck to fire him in order to properly manage the business. Buck had implied authority.

3. Wilbur would not be justified in asserting Buck exceeded his authority by treating the horses. Again, Buck was left with the express authority of managing the business. Buck had implied authority to treat and vaccinate the sick horses because it was reasonable to do so in order to carry on the business of a horse-riding stable. It was directly related to the business.

4. Wilbur would not be justified in asserting Buck exceeded his authority by paying for Howdy's medical expenses. Buck was left with the express authority of managing the business. Buck had implied authority to make reasonable decisions relating to customer relations. Paying the bill, especially after Buck made a mistake on behalf of the business by failing to obtain a waiver, is a reasonable step for a manager to take.

5. Wilbur would not be justified in denying liability because of Buck's failure to obtain a waiver, either. Buck's failure is not a major deviation from the scope of Buck's employment. Wilbur will therefore be liable.

6. Wilbur would be justified in asserting Buck exceeded his authority by paying for the couches. Wilbur did not give Buck express authority to purchase horse couches. Horse couches are also not reasonably related to carrying out the management of the business as they have no use. Wilbur never ratified the horse couches by accepting their benefit himself. Therefore, Buck acted outside the scope of authority in purchasing the horse couches. He also likely should have never delegated management to Calamity, and she unreasonably interpreted his instructions.

QUESTION 2

The private litigants in the following situations have challenged the described government laws/policies of the State of Franklin in federal court on the grounds that the laws/policies violate their rights under the Equal Protection Clause of the United States Constitution.

1. In an attempt to combat the dramatic increase in pregnancies among unmarried teenagers, the State of Franklin enacted a statutory rape law, which defines unlawful sexual intercourse as "an act of sexual intercourse with a female, not the wife of the perpetrator, where the female is under the age of 18 years."

   Abe and Benita, two love-struck 17 year olds, decided to consummate their relationship on the night of their senior prom. The two engaged in consensual sexual intercourse. Upon learning that Benita had engaged in sexual intercourse, Benita's mother reported Abe to the local law enforcement authorities. Abe was arrested and charged with violating Franklin's statutory rape law.

   At trial, it was established that Abe and Benita had been dating for more than two years and had been faithful to each other during their relationship. After graduating from high school, the two were planning on getting engaged.

   The court found Abe guilty of violating Franklin's statutory rape law and sentenced him to six months in the Franklin Juvenile Detention Center. Abe appealed the conviction.

2. The Franklin State Highway Patrol Personnel Review Board recently revised its hiring criteria for all employees of the State Highway Patrol. One of the revisions required that all employees of the State Highway Patrol be United States citizens. The Personnel Review Board defended the citizenship requirement as serving the state's interest in undivided loyalty in protecting and serving the general public. Charles, a legal alien residing in Franklin, applied for a position as a State Highway Patrol Officer. Out of all the applicants, Charles was the most qualified for the position. Charles was not offered a position with the patrol based solely on the new citizenship requirement. David, also a legal alien residing in Franklin, applied for a position as a clerk in the fleet management division of the State Highway Patrol. Out of all the applicants, David was the most qualified for the position. David was not offered the clerk's position based solely on the new citizenship requirement. Charles and David both sued the state.

3. As a way to recognize the personal sacrifice veterans make in order to serve their country in time of war, the State of Franklin passed a law giving all veterans who qualify for state civil service positions consideration for appointment ahead of any qualifying nonveterans. The statutory preference is available to any person who was honorably discharged from the United States Armed Forces after at least 90 days of active service, at least one day of which was during wartime.

   Elaine attempted to enlist in the Armed Forces, but was declared medically unfit for duty. Since that time, she has worked as an employee of the state. During her employment with the state, Elaine has taken and passed several open competitive civil service exams for better jobs. While Elaine has received some of the highest scores in the state, she has repeatedly been ranked below male veterans who received lower scores. Frustrated, Elaine sued the state. During the trial, evidence was presented demonstrating that 95 percent of the veterans living in Franklin were males; less than five percent were female.

How should the federal court rule in each case? Explain your answers fully.

A

The EPC applies to states through the 14th Amendment to the US Constitution. SCOTUS has developed three tests to analyze EPC cases. The proper test to be applied depends on the class of people asserting a Constitutional violation. The highest test is strict scrutiny. Strict scrutiny requires the government to prove that a law is the least restrictive means of achieving a compelling government interest. Strict scrutiny applies to classifications based on race, national origin, ethnicity, and alienage for state laws, unless a fundamental state service is involved. Intermediate scrutiny requires the government to prove that a law is substantially related to an important government interest. This test applies most often to gender classifications. The rational-basis test governs all other classifications. Rational basis only requires a law to be rationally related to a legitimate state interest. An EPC claim will only succeed for intentional acts. A state must make a gender classification on the face of a law, apply the law intentionally to discriminate, or pass a law with discriminatory intent for EPC to apply.

1. Abe is unlikely to successfully challenge Franklin's statutory rape law. The court will apply intermediate scrutiny, and Franklin will have the burden of proof because the law makes a classification based on gender. The state will argue, successfully, that teenage pregnancy is an important state interest. Teenage pregnancies can create a host of problems for the state from unwanted children, increased abortions, and health of the mother. Preventing sexual intercourse with females under 18 is substantially related to reducing teenage pregnancies because only female teenagers can become pregnant. Unlike females, males cannot become pregnant. SCOTUS has upheld state laws for statutory rape that differentiate on gender because women can get pregnant and men cannot. The court will do the same here and uphold the law as applied to Abe despite the gender classification.

2. Charles will likely fail in his challenge, while David will likely succeed. Strict scrutiny generally applies to classifications by states based on alienage. However, rational basis is used when a fundamental state service is involved. Serving as a State Highway Patrol officer is a fundamental state service. As such, only a rational basis will be required. Here, a desire to have loyal employees is a rational means of achieving the state's interest in having loyal employees in fundamental positions. Serving as a file clerk, on the other hand, is not a fundamental state service. As such, strict scrutiny applies. Although having loyal state employees is likely a compelling state interest, Franklin's law is not the least restrictive means of achieving that interest. A loyalty oath or background check could be conducted instead. And, US Citizens can be disloyal, so the law is underinclusive. David will likely succeed, while Charles will likely fail, as a result of the different tests that are applied.

3. Elaine is likely to fail in her suit. A classification based on military service is subject to rational basis review. A desire to reward veterans is a legitimate state interest, since encouraging military service is important to the country and state's protection. And, giving benefits to veterans is a rational way to advance the legitimate interest. Elaine will argue the law is a disguised gender classification, since 95% of beneficiaries are males, but Elaine's claim is likely to fail. EPC only applies to intentional discrimination. This law does not classify based on race on its face. The application is also neutral because it applies equally to men and women. Also, there is no evidence of intent to discriminate by the legislature. The mere fact there is a disparate impact on females does not establish the necessary intent to trigger intermediate scrutiny. As a result, Elaine loses.

QUESTION 3

Officer Older (Older) and Officer Younger (Younger), two Anytown, Ohio police officers, recently were dispatched to a local home to investigate a child neglect complaint. No one answered the officers' knocks at the door, but the officers heard voices of children coming from the second floor of the home. They became further concerned about the safety of the children inside when they detected a strong chemical aroma coming from the home. Older, a 20-year veteran of the Anytown Police Department, recognized the distinct smell, which he knew to be associated with the illegal home production of methamphetamine. Knowing that methamphetamine production posed a risk of explosion and that the fumes were toxic, Older opened the door (which was not locked) and walked inside. Younger followed. Once inside the home, Older followed the chemical smell across the living room and into the kitchen, and Younger followed the sound of the children's voices upstairs.

In the kitchen, Older saw and smelled what he believed to be a methamphetamine lab and began seizing all items on the kitchen stove and counter that he believed, based on his experience, were associated with methamphetamine production. Just then, Homeowner walked into the kitchen, and Older immediately told him that he was under arrest. Homeowner started to open a kitchen drawer, but Older ordered him to get down on the floor on the far side of the kitchen, and Homeowner complied. Concerned that Homeowner may have been reaching for a weapon in the kitchen drawer, Older opened the drawer and saw a handgun. Using his handheld computer, he made a records check, which revealed that, due to a recent conviction, Homeowner was prohibited from owning or possessing a firearm. Older then seized the handgun.

Meanwhile, upstairs, Younger followed the sound of children's voices and discovered Homeowner's 6 year-old twins in an upstairs bedroom. Younger asked them if he could take a look around the other rooms upstairs and they replied, "Sure." Younger proceeded to search all of the rooms upstairs. He opened the door to a separate bedroom and, from the doorway, he saw additional firearms and evidence of an extensive drug manufacturing and trafficking business in the home. He walked into the room and seized the firearms and drug evidence.

Homeowner was charged with various drug- and firearms-related crimes. He filed a motion to suppress all evidence of his alleged crimes, asserting that the officers had violated his Fourth Amendment right against unreasonable searches and seizures by:

1) Entering his home and going into the kitchen and his children's upstairs bedroom;
2) Seizing the items on the kitchen stove and counter;
3) Opening the kitchen drawer and seizing the firearm;
4) Searching the entire upstairs of his home; and
5) Seizing the evidence found in the separate bedroom.

How should the court rule as to each of the assertions in Homeowner's motion to suppress? Explain your answers fully.

The answers printed in this booklet were selected because they were among the better answers written

A

The 4th Amendment protects against unreasonable searches and seizures by government factors. A person is protected when he or she has a reasonable expectation of privacy. Generally, a warrant based upon probable cause and issued by an impartial magistrate or judge is required to search a person or home, but there are exceptions that allow for warrantless searches, seizures, and arrests.

1. The officers lawfully entered the home, kitchen, and children's bedroom. Although a warrant is generally required to enter someone's home, as that person has a reasonable expectation of privacy in their own home, one exception is when there are exigent circumstances, such as the risk of losing evidence, while in hot pursuit, or when there is an emergency. Here, Older recognized the smell of meth manufacturing, which he knew to be volatile, toxic, and explosive, coupled with the knowledge that children were inside by hearing the voices. This created sufficient exigent circumstances for the officers to enter the home without a warrant to remove the children and prevent an explosion. The officers were also allowed to move about the house to accomplish each of these goals, which required going upstairs and following the smell into the kitchen. Therefore, the officers lawfully entered the home, bedroom, and kitchen, and the court should rule against Homeowner.

2. Older lawfully seized the items on the stove and counter. Again, while a warrant is generally required, there is an exception for when the items are in plain view. If an officer is lawfully in the place where he is standing and sees conspicuous items in plain view that are immediately recognizable as contraband, the officer may seize those items. Here, Older was lawfully in the kitchen (see #1) and saw the meth lab on the counter and stove. He immediately recognized it as contraband, and, therefore, was lawful in seizing it. Therefore, the seizure of these items is lawful and the court should rule against Homeowner.

3. Older's seizure of the gun from the drawer was not lawful. Without a warrant, Older would have to rely on another exception to the warrant requirement: search incident to lawful arrest. An officer may lawfully arrest someone in public based upon probable cause without a warrant, but require an arrest and search warrant to enter a home to make an arrest in someone's home. Here, the officer had no arrest warrant, so the arrest may be unconstitutional as a warrantless arrest in someone's home. However, assuming the arrest is lawful, the officer may conduct a lawful search incident to the rest of the area within arm's reach of the arrestee and may do a protective sweep if he believes accomplices may be lurking. Here, the facts tell us that when Homeowner was placed under arrest, he was on the other side of the room, out of arm's reach of the drawer. The officer also could not expect to find an accomplice in the drawer, and, therefore, no protective sweep will save this search. Therefore, the search of the drawer was unlawful and the evidence obtained should be suppressed.

4. Younger's search of the entire upstairs was unlawful. In order to make a valid warrantless search, Younger would have needed to believe there were other children in danger in the other rooms to search under the exigent circumstances exception, or do so with the consent of the occupants. Here, he did not think there were others in danger. In addition, while an officer may rely on apparent consent to search, the consent must be voluntary and knowing. The children were too young to know what they were agreeing to. Therefore, this was unlawful.

5. Younger's search was unlawful. Even if the children's consent was sufficient to search the common areas upstairs, the children could not consent to search someone else's room (parent). They have no authority to do so, and an officer may not rely on such consent. This search was unlawful.

QUESTION 4

Businessman operates a factory that manufactures shelving for installation in retail stores. Last year, he decided to expand his operation by purchasing the equipment needed to construct the shelving and installing the equipment in an unused portion of his factory. The following transactions occurred during the same year and in the following sequence:

- **May 1**: Businessman got a loan from Bank 1 to buy the equipment, and Bank 1 executed a security agreement granting a security interest in the equipment.
- **May 5**: The equipment was delivered.
- **May 10**: Businessman got a loan from Bank 2 to purchase some of the material needed to make the shelves, and Bank 2 took a security interest in "all of Businessman's equipment and inventory." Bank 2 perfected its security interest on the same day.
- **May 15**: Bank 1 perfected its security interest related to the May 1 loan.
- **May 15**: Bank 3 made a loan to Businessman to pay the contractor who was modifying the space in Businessman's factory. Bank 3 took a security interest in "all of Businessman's inventory" and perfected it on the same day.
- **May 25:** Big Box, Businessman's largest customer, entered into a written agreement with Businessman to purchase a large amount of shelving for its newest store. The agreement specified the installment payments that Big Box was required to make to Businessman over the next two years.
- **June 1**: In need of cash for operating expenses, Businessman took a loan from Bank 4. Bank 4 received a security agreement granting a security interest in "all of Businessman's notes and obligations related to his accounts receivable."
- **June 3**: Businessman sold the installment contract with Big Box to Friend. Friend, unaware of Bank 4's security interest in the contract, paid Businessman in cash and took possession of the contract.
- **June 5:** Bank 4 perfected its security interest related to the June 1 loan.

Businessman has now defaulted on all of his obligations. Which secured party has priority in each of the following situations:

1. Bank 1 versus Bank 2 with respect to Businessman's equipment?
2. Bank 2 versus Bank 3 with respect to Businessman's inventory?
3. Bank 4 versus Friend with respect to the installment contract?

Explain your answers fully.

1. Bank 1 has priority to the equipment. Under Ohio Commercial Law, generally the first party to perfect a security interest has priority to the interest. However, if one party executes a purchase money security interest and perfects within 20 days of the date of delivery of the collateral, it will take priority over any other security interest in the collateral. A purchase money security interest is one where a loan is given to purchase specific items, and those specific items are used as the collateral for the security agreement. Here, Bank 1 gave Businessman a loan to buy the equipment, and it retained a security interest in the equipment. Bank 1, therefore, has a purchase money security interest. On May 5, the equipment was delivered, and on May 15, Bank 1 perfected its security interest in the collateral. Therefore, since Bank 1 perfected its purchase money security interest within 20 days of the delivery of the collateral, its security interest is superior and has priority over all other security interest, including Bank 2's, which was perfected first.

2. Bank 2 should be granted priority to the inventory. Under Ohio law, a purchase money security interest in inventory will have priority over all other security interests in the same inventory if it was perfected within 20 days of the delivery of the inventory and notice is given in a timely manner to all those who have a security interest in the same inventory. Here, Bank 2 had a purchase money security interest because it gave Businessman a loan to purchase items necessarily consumed in the ordinary course of his business, which is classified as inventory. Bank 2 perfected its purchase money security interest the same day it gave the loan. There were no other secured parties claiming an interest in the inventory at the time, and, therefore, Bank 2 was not required to put anyone on notice. Even if Bank 2 did not have the benefit of the purchase money security interest, it would still have priority under the general rule that the first to perfect wins. Therefore, Bank 2 has priority to the inventory of Businessman.

3. Bank 4 should have priority to the accounts and notes of Businessman. Under Ohio Commercial Law, a buyer of accounts and notes will take free of any claims to the accounts and notes only if they are a buyer in the ordinary course of business. A buyer in the ordinary course of business is one who purchases an item from a seller that is an item the seller usually sells in the course and operation of its business. Here, Businessman is engaged in the business of manufacturing and selling commercial shelving. He does not ordinarily sell accounts and notes in the day-to-day operations of his business. Therefore, Friend is not a buyer in the ordinary course of business, and he will not take free of Bank 4's claim to the instrument. Bank 4 will have priority in the accounts and notes.

QUESTION 5

Q

Phil and Deb were involved in an auto accident in Anytown, Ohio. Phil timely filed a complaint in the Common Pleas Court for Anytown alleging he sustained bodily injuries as a result of Deb's negligence. The complaint included a proper jury demand. Deb filed an answer denying the allegations of the complaint; her answer did not include a jury demand. The parties then conducted discovery.

During the course of discovery, Phil's attorney decided a bench trial would be preferable for his client and filed a motion to withdraw Phil's jury demand. Deb opposed the motion. The Judge ruled that Phil was not permitted to withdraw the jury demand. The case proceeded to trial.

During the voir dire of the jury panel, the Judge advised the parties that she would conduct the examination to save time. Counsel for Phil had no objection, but Deb's counsel requested the opportunity to ask additional questions. The Judge refused the request.

After the questioning of the prospective jurors had been completed, the Judge allowed the parties to challenge the panel. There were no challenges for cause. Counsel for Phil used a peremptory challenge in the first round and counsel for Deb passed. In the second round of jury challenges, counsel for Phil exercised a peremptory challenge and counsel for Deb passed. In the third round of jury challenges, counsel for Phil passed and counsel for Deb passed. Phil whispered to his counsel that he did not like juror number five. Counsel for Phil then sought to exercise his third peremptory challenge. The Judge denied the request.

Counsel for Phil, unhappy with the composition of the jury, advised the Judge he wished to voluntarily dismiss the case. The Judge refused this request and required Phil's counsel to proceed.

Following the presentation of the evidence, closing arguments, and the instructions to the jury, the Judge provided the jury with a general jury verdict form and specific interrogatories to be answered in writing. The jury reached its decision and when reviewing it, the Judge noted that the interrogatory responses conflicted with the verdict entered on the general jury verdict form. When this was pointed out to counsel, Deb's attorney requested the Judge to either send the jury back for further deliberation or order a new trial. The Judge refused and, instead, ordered judgment to be entered in accordance with findings of the specific interrogatories.

Was the Court correct in each of the above-described rulings? Explain your answers fully.

A

1) Motion to Withdraw Jury Demand

The court correctly denied Phil's motion. Under the Ohio Rules of Civil Procedure, once made, a party may not withdraw a demand for a jury trial without the consent of all parties to the case. Here, Phil demanded a jury trial in his pleadings, but later sought to withdraw it over Deb's objection. Because Deb, an opposing party and defendant, did not consent to the withdrawal of the jury demand, Phil was not permitted to proceed without a trial by jury. Deb's failure to make her own timely jury demand in the pleadings is immaterial. Therefore, the court correctly denied the motion.

2) Voir Dire

The court improperly denied Deb's request to ask additional questions during voir dire. A judge may ask questions and generally assist in conducting voir dire during civil litigation, and parties may waive their right to question the jurors. However, if requested, the court may not deny the parties the opportunity to question the witnesses. Here, the judge indicated that he would participate in voir dire, which is permissible, but wrongfully denied the parties the opportunity to question the jurors themselves. This violated Deb's right to conduct voir dire, and her motion to ask additional questions was wrongfully denied. The court incorrectly ruled on the motion.

3) Peremptory Challenges

The court correctly denied Phil's request. During voir dire, parties may assert peremptory challenges by proceeding through the disqualification in "rounds" of challenges. Voir dire continues until both parties have exhausted their peremptory strikes and any permissible "for cause" strikes, which is evidenced by both parties passing on the exercise of a challenge in a particular round. Following a "pass" by each party during a round of voir dire, voir dire ends and the selected jurors are impaneled, with any alternate jurors set aside in reserve. Here, Phil's counsel exercised two peremptory challenges, one in each of the first two rounds, while Deb's counsel remained silent. When both passed in the third round, the judge properly terminated voir dire and could deny Phil's belated attempt to assert a third challenge. The court correctly denied Phil's request.

4) Voluntary Dismissal

The court improperly denied Phil's motion to voluntarily dismiss the case. Under the Ohio Rules of Civil Procedure, a party may move for voluntary dismissal once as a matter of course at any time prior to trial, unless a compulsory counterclaim has been filed under Rule 13 (a), which would prohibit the dismissal of the case. Here, Phil's motion occurred after the jury was selected, but before trial began. Therefore, Phil's counsel could properly dismiss the action without prejudice upon motion. Any subsequent motion would be subject to the court's discretion, and, in the interests of justice, could be treated as a dismissal with prejudice. Therefore, the court improperly denied Phil's motion to voluntarily dismiss the case.

5) Interrogatory

The court properly denied Deb's request. Under the Ohio Rules of Civil Procedure, when a jury delivers a general verdict which is accompanied by interrogatories, the court cannot enter judgment inconsistent with the interrogatory responses. If the interrogatories are inconsistent with the judgment, the court may select one of three options in its discretion: return the jury for further deliberation; order a new trial; or, enter judgment in accordance with the interrogatories. Here, the judge properly entered judgment consistent with the interrogatories. The court properly exercised its discretion in doing so, and was not bound by Deb's requests for a new trial or for further deliberations. Therefore, the court properly denied Deb's request.

QUESTION 6

The following transactions all occurred in Anywhere, Ohio. The deeds referred to below are properly recorded.

Blackacre

Twenty-five years ago, Carl conveyed Blackacre to Andy by deed, stating, "I convey Blackacre to Andy as long as Blackacre is primarily used for residential purposes, but if Andy primarily uses Blackacre for other than residential purposes, then I convey Blackacre to my son, Brad."

Andy, an accountant, moved onto Blackacre and built a single-family residence in which he lived. The house has a finished basement about equal in square footage to the rest of the living space in the house. About five years ago, Andy decided to retire, close his downtown accounting office, and do work for a few preferred clients out of his home in Blackacre. Andy converted his basement into an office, waiting room, and storage facility for his reduced accounting practice. Andy, his wife, and children continued to live in the remainder of the house.

This year, Carl died, leaving his entire estate to Brad. Brad, after learning that Andy has his office in his home, asserts that he is now the owner of Blackacre. Andy refuses to vacate Blackacre and Brad has threatened legal action.

Whiteacre

Thirty years ago, Pat conveyed Whiteacre, a single family home, by deed stating, "I convey Whiteacre to my friend Kathy, for life, then to my son, Len, if he marries, but if he does not marry, to my other children equally."

Kathy immediately moved to Whiteacre and she resided there with Bob, her son, until her death this year. Kathy bequeathed Whiteacre to Bob in her Last Will and Testament. Bob continues to reside in Whiteacre and refuses to move, claiming that, "My mother, Kathy, left me Whiteacre in her will."

Pat is now 82 years old. Aside from Len and Tom, she has no other children. She is in very poor health. Her son, Len, entered into a same-sex marriage with Arthur. The marriage is not recognized as valid in Ohio.

Len does not expect Pat to live much longer and is making plans to move to Whiteacre with Arthur.

Tom believes that he will own Whiteacre upon Pat's death and is negotiating to sell Whiteacre to Developer.

1. Regarding Blackacre, what arguments can Andy and Brad each make to support his claim of fee ownership, and who is likely to prevail?
2. Regarding Whiteacre,
   (a) What is the nature of the interest, if any, of each of the following: Pat, Len, Bob, and Tom?
   (b) Can Tom currently convey fee simple title to Developer?

Explain your answers fully.

A

1. Andy has a fee simple subject to an executory interest. Andy has a fee simple because, as long as Andy uses Blackacre for residential purposes, he is entitled to the property in fee simple absolute. Andy will argue that although he has moved his office into his basement, he still uses Blackacre primarily for residential purposes. He will emphasize that his wife and children continue to live in the house and it continues to be his home, despite the small portion of his house that has been converted to office use.

   Brad has an executory interest in Blackacre. An executory interest is an interest in a third-party grantee that operates to cut short the preceding estate upon the occurrence of some event. Here, Brad gets Blackacre in fee simple absolute if Andy uses Blackacre for purposes other than residential. Brad will argue that Andy no longer uses Blackacre for residential purposes because he has moved his office into his home. Brad will assert that Andy uses Blackacre for commercial purposes, as evidenced by his accounting practice in the basement of his home, which took up a large portion of the home. He will argue that Andy was entitled to Blackacre in fee simple, but if Andy used it for a purpose other than residential, the property went to Brad.

   Andy will likely prevail. Andy was entitled to use Blackacre for residential purposes. Any other primary purpose use would divest Andy of his rights in Blackacre. However, the words "primarily" indicate that Carl intended that as long as Andy's primary use is residential, other secondary uses are permissible and will not divest his interest.

2.(a) Len has a contingent remainder in fee simple. Len's interest is a remainder because it flows immediately and naturally from the prior estate, which ends upon Kathy's death. The remainder is contingent, and not vested, because Len must satisfy a condition prior to becoming entitled to Whiteacre. Len must get married during his lifetime in order to be entitled to possession of Whiteacre.

   Bob has nothing. Kathy cannot convey more than she has. A life estate in Kathy's life ends upon Kathy's death. Kathy had a life estate in Whiteacre. Kathy was entitled to live on Whiteacre with Bob during her life, but once she died, she no longer had any rights in Whiteacre and could not convey anything to Bob.

   Pat has a reversion in Whiteacre. A grantor retains a reversion whenever she conveys less than the full duration of her estate or when there is a gap in seisin in which the property reverts back to the grantor. Here, after Kathy's life estate ended, the property would pass to Len if he marries. Although Len is currently in a same-sex marriage not recognized, he still may enter into a recognized marriage during his life, at which time he would be entitled to Whiteacre. Until Len dies, we will not know whether he got married and, thus, becomes entitled to Whiteacre. Therefore, Pat has a reversion, which may be divested at anytime Len enters into a recognized marriage.

   Tom has an executory interest subject to open. Pat's conveyance to "her other children" is a class gift because it is a gift to unnamed individuals, which is subject to more later-born individuals being included in it. Here, although Pat is 82, under the fertile octogenerian rule, Pat is presumed to still be able to have more kids, adding to the class. It is an executory interest because it divests the prior estate upon a certain happening of events. Here, if Len does not marry, the property goes to the children.

2.(b) Tom cannot currently convey the property in fee simple to Developer because Tom's interest is subject to open, meaning Pat may have more kids before Tom dies unmarried (closing the class), which will become part of the class and entitled to a share of Whiteacre. Tom's interest in Whiteacre is subject to partial divestment. He cannot convey it in fee simple now.

QUESTION 7

Q

Jane rented a home in Anytown, Ohio, for several years. When her cable TV system failed, Dick came to make repairs and restore her television services. Through this chance encounter, a romance between Dick and Jane blossomed.

After a period of steady dating, Dick moved in with Jane and lived with her in her home for the next few months. Dick and Jane each had keys to the cars, the house, and the garage.

One day Dick and Jane got into an argument and Jane told Dick to "leave and never come back." Dick complied with Jane's request for him to leave because he thought it was just a storm that would shortly blow over. Dick telephoned the house for the next three days to talk to Jane, but she would not answer the phone.

Dick then went to the house to talk to Jane, but she did not respond to his knocking on the door, so he assumed that Jane was not home. Dick needed to get his belongings from inside the house, but he had forgotten his keys to the house and garage. When he tried the front door, he found it unlocked, so he opened it and entered the house. Dick retrieved all of his belongings and also grabbed a six pack of beer from the refrigerator. Since he was still upset over the break up with Jane, Dick kicked the floor lamp hard enough to hurt his foot and knock the lamp over, shattering the bulb and breaking a vase. Dick then limped out of the house and headed toward his car.

The noise of the lamp crashing to the floor awakened Jane, who was sleeping in the guest room during the above occurrences. She went downstairs to investigate and discovered that the lamp's bulb had exploded when the lamp crashed to the floor and that a spark from the bulb ignited the curtains nearby. Jane was able to quickly tear the curtains down and extinguish the fire with her nearby fire extinguisher.

Jane ran out the open front door to investigate and saw Dick limping toward his car. She caught up to him and confronted him. Jane threatened Dick with the knife she had grabbed from the kitchen and took back the beer Dick had taken from her refrigerator. Jane ordered Dick to give her "all the money" in his wallet to pay for the damage to the lamp and the curtains. Dick surrendered all $98.00 in his possession.

1. With what criminal offenses, if any, can Dick be charged, and can he be convicted of any of them?
2. If Dick is convicted of multiple charges, is there merger of any of the offenses and, if so, what are the resultant crimes?
3. With what criminal offenses, if any, can Jane be charged, and can she be convicted of any of them?

Explain your answers fully.

A

1. Burglary – Dick can be charged and convicted of burglary. In Ohio, burglary is using force, deception, or intimidation to trespass into an occupied structure with the intent to commit a crime. Here, this was clearly an occupied structure as Jane lived there and was actually present at the time (although she need not be present for it to be occupied). Dick used force by opening the door, and this was a trespass because he clearly did not have permission, as he was told to "never come back." Even though Dick had been living there, he was only a guest, and his permission to be there was expressly revoked by Jane, the lawful possessor of the home. While it is not from the fact whether Dick intended to commit a crime when he entered, it can be inferred from the facts that he may have because he stole beer and kicked over the lamp/vase. Even so, he had the intent to commit the crime while he was trespassing on the premises, so he could be convicted of burglary.

   Trespass – Dick can be charged with criminal trespass. Trespassing is entering the property of another without permission. As mentioned above, Dick clearly lacked permission even though he had keys. He was merely a guest of Jane's until she kicked him out, at which point he had no lawful right to possess or enter the property. By entering, Dick committed a trespass.

   Theft – Dick can be charged and convicted of theft. In Ohio, theft includes the commonlaw theft offenses of larceny, false pretenses, larceny by trick, and embezzlement. Here, Dick committed a larceny, which is the taking and carrying away of the personal property of another with the intent to permanently deprive the owner. Here, Dick took and carried the beer from the fridge to his car, all while intending to permanently deprive Jane of the beer. There is no indication that the beer was Dick's. Therefore, Dick can be convicted of theft.

   Arson – Dick can be charged with arson, although he might not be convicted. Arson is knowingly or recklessly creating a substantial risk of harm to a building by means of fire or explosion. Here, it is possible that kicking over a lamp near a curtain recklessly creates a substantial risk of harm to the building, especially in light of the fact that a fire did actually occur. However, this is a close call for a jury, but it is possible he will be convicted.

   Destruction of Property – Dick can be charged and convicted of destruction of property. Destruction of property occurs when someone recklessly destroys the property of another. Here, Dick destroyed Jane's lamp and vase by kicking it and also her curtains due to the ensuing fire. Therefore, Dick can be convicted of destroying Jane's property.

2. Dick's trespass merges into the burglary charge, and the destruction of property merges into the arson charge. Because trespassing is a necessary element of burglary, Dick will only be charged with burglary and not with trespassing, as it is a lesser included offense. One cannot commit burglary without first trespassing. Therefore, the trespass will merge with the burglary. Likewise, the destruction charge will merge with arson, as you cannot commit arson without destroying property.

3. Assault– Jane can be convicted of assault. In Ohio, assault encompasses common law assault and battery. Assault is knowingly threatening physical harm by means of a deadly weapon. Here, a knife is a deadly weapon, and Jane threatened Dick with it. Therefore, Jane could be convicted of assault with a deadly weapon.

   Robbery – Jane can be convicted of robbery. In Ohio, robbery occurs when committing or fleeing from a theft; one carries or uses a deadly weapon; or one uses or threatens to use force. Here, Jane committed theft (as defined above) by taking Dick's $98 intending to deprive him of that money. To complete the theft, Jane used a weapon and threatened Dick with the knife. Therefore, Jane committed robbery.

QUESTION 8

Troy had always been a resident of Jackson, Ohio. He was raised by his mother, Mary, who was divorced from Troy's father, Frank. Frank resided in Downtown, Ohio, and had not had any contact with Troy since Troy was in grade school.

In 1995, Troy married Jane and they had one child, Rob. Troy and Jane divorced in 2000. As part of the divorce decree, Troy was obligated to pay Jane $25,000 on or before January 1, 2015, or upon Troy's death, whichever occurred first. Troy decided to satisfy his obligation by leaving Jane $25,000 in his will. Jane subsequently remarried and moved out of state, and Troy lost all contact with his son, Rob. Rob was eventually adopted by Jane's second husband, and Troy has had no contact with Rob since 2001.

Troy subsequently married Ann, who had a daughter, Beth, from a previous marriage. Troy was very close with Beth; however, he never adopted her.

In 2010, Troy executed a valid Ohio will (Will), which had the following dispositive provisions:

1. I give $25,000 to my ex-wife, Jane, to satisfy the obligations of my divorce decree.
2. I give all the rest and residue of my estate to my wife, Ann, if she survives me by at least 30 days. If Ann does not survive me by 30 days, I give all the rest and residue of my estate to my mother, Mary.

There were no other dispositive provisions included in the Will.

In 2011, Jane contacted Troy and said she needed $15,000 and that if Troy would give her the money, she would consider it as a partial payment of the $25,000 that Troy owed her under their divorce decree. Troy wrote a check to Jane for $15,000 accompanied by a receipt, which provided:

> I am giving you $15,000 as a partial payment against the amount required under our divorce decree and as a partial payment of amounts I have provided for in my Will. Please sign a copy of this note and return to me.

Troy signed the note and forwarded the note and check to Jane. Jane cashed the check, but she did not sign and return the note.

Troy's mother, Mary, died in 2012. In January 2013, Troy and Ann were involved in a serious accident. Troy died at the scene of the accident. Ann died 14 days later from her injuries. Ann's valid will left her entire estate to Beth.

At the time of Troy's death, Troy had $75,000 in a bank account titled solely in his name. He also owned a $50,000 life insurance policy on his life, which named Ann as a beneficiary. There were no contingent beneficiaries listed in the policy. The policy indicated that to receive the proceeds a beneficiary needed to survive Troy in accordance with the Ohio statute involving simultaneous death and survivorship laws.

Jane, Rob, Beth, and Troy's father, Frank, have all survived Troy by more than 30 days. The executor of Ann's estate (Executor), together with Jane, Rob, Beth, and Frank, have all asserted a claim to some or all of Troy's property.

How should a court rule on each of the claims, and to whom and in what proportion should the bank account and the life insurance proceeds be distributed? Explain your answers fully.

The answers printed in this booklet were selected because they were among the better answers written

A

The court should find that Jane gets $10,000 from the bank account; Rob likely gets nothing; Ann's estate gets the life insurance money, which then passes to Beth; and Frank gets $65,000.

Jane: Jane gets $10,000. Usually, will devises to ex-spouses are revoked upon divorce. But here, the devise was made after the divorce to satisfy the divorce decree. Thus, the devise is valid. Ordinarily, a lifetime gift is not treated as an advancement unless accompanied by a contemporaneous writing, signed by the testator, indicating otherwise (a writing by the donee acknowledging the gift also suffices). That is satisfied here even though Jane did not return her acknowledgment. However, this situation is more likely ademption by partial satisfaction. This occurs where a will beneficiary receives some or all of the will devise while the testator is still alive. Since part of the devise, here $15,000 of the $25,000, has already been satisfied, that part is adeemed. Jane is still entitled to the rest of the money, so she gets $10,000 from the bank account.

Rob: Rob likely cannot inherit from or through Troy. Usually, children can inherit from and through their natural parents. However, an exception applies where the parents divorce, the father's parental rights are terminated, the mother remarries, and the new husband adopts the child. All of that happened here. The facts do not specify that Troy's parental rights were severed, but he has not had any contact with his son for twelve years, and another man adopted him. Since the adoption exception has been met, Rob cannot inherit from and through Troy.

Ann's estate: Ann's estate gets the $50,000 life insurance policy because she was the designated beneficiary. Life insurance policies are non-probate assets and do not pass through probate, so the will has no effect on them. According to the life insurance policy, Ann was only required to survive Troy for the statutory period, which is 120 hours in Ohio. She did survive for that period, so her estate gets the life insurance policy. Ann's estate does not get the residue of the estate because the will specifically provided that she must survive Troy by 30 days. Again, the statutory period is 120 hours, but a will's provision stating otherwise controls. Since she did not survive Troy by 30 days, Ann's estate does not get the residue of Troy's estate.

Beth: Beth does not inherit from or through Troy because step-children do not inherit by intestacy unless there are no grandparents, descendants of grandparents, or next of kin who are alive to take. They may have had a close relationship, but Troy never adopted Beth and did not provide for her in the will. However, since Beth is the sole beneficiary of Ann's will, she will take the $50,000 life insurance policy after it passes through Ann's estate.

Frank: Frank gets the rest of the bank account money, which is $65,000. The residue of Troy's estate would have gone to his mother Mary, but she predeceased Troy. In Ohio, there is an anti-lapse statute, which means that this devise would not fail, but would pass to Mary's living descendants. But Troy is her only child, and her grandson Rob cannot inherit from or through Troy, which means Rob also cannot inherit from Troy's parents. So the residue will pass by intestacy. Since Troy has no children that are permitted to inherit, the next line to look to is his parents. His mother is deceased, so the money goes to his father. Troy has not had contact with his father since he was in grade school, but there is no indication that Frank's parental rights were severed or that Mary remarried someone who then adopted Troy. Thus, Frank may still inherit from Troy, so he gets the $65,000.

QUESTION 9

Doctors Alexander and Bennett were oral surgeons who practiced in a partnership as the only oral surgeons in Anywhere, Ohio. All of their patients came from referrals from local general dentists and their marketing efforts were directed to the local general dentistry community. Dr. Bennett was a very sociable, charismatic, and likeable oral surgeon, while Dr. Alexander was very professional, matter of fact, and did not have a warm personality. Dr. Bennett had been mentioned in an article in the local newspaper as having a warm personality and being very personable with his patients.

A trend developed that more patients were requesting Dr. Bennett than Dr. Alexander. As this trend continued, Dr. Alexander's attitude toward patients grew worse and finally both doctors agreed to dissolve their partnership and go their separate ways. Within a year, Dr. Alexander had virtually no patients, while Dr. Bennett's practice was rapidly growing and was very successful. Dr. Alexander, angry and desperate, set out to recapture a larger share of the oral surgery business from Dr. Bennett.

Dr. Alexander was a presenter at a local dental continuing education program. Most of the local general dentists were in attendance when, during his presentation on ethical behavior for dentists, Dr. Alexander mentioned that, ". . . For example, Dr. Bennett would on occasion become uncomfortably cozy with some of his female patients when they were being treated. Is this wrong?" Dr. Alexander smiled and winked at the group in a knowing way to suggest that something inappropriate had been taking place.

Dr. Alexander wrote a letter to the editor of the local newspaper, complaining that, "Dr. Bennett occasionally had sexual relations with some of his female patients while the patients were under anesthesia." The newspaper refused to publish this letter.

The allegations made by Dr. Alexander against Dr. Bennett were entirely false. Dr. Bennett was never improper with any of his patients. As a result of Dr. Alexander's actions, Dr. Bennett stopped receiving referrals from the local general dentists and lost nearly all of his business.

Finally, Dr. Alexander filed a lawsuit in the local common pleas court, alleging that Dr. Bennett wrongfully took patients away from Dr. Alexander. The only consequence to Dr. Bennett of this lawsuit was the annoyance and expense of defending it. There was no legal basis for this lawsuit and, after prolonged discovery, Dr. Bennett filed a motion for summary judgment, which was granted by the court, declaring the lawsuit frivolous. Dr. Alexander did not appeal that decision.

Dr. Bennett filed suit against Dr. Alexander to recover damages for loss of his business. The complaint contained three counts: Count 1: Defamation based on Dr. Alexander's remarks at the continuing education program; Count 2: Defamation based on the letter Dr. Alexander sent to the newspaper; and Count 3: Malicious civil prosecution based on the frivolous lawsuit.

As to the defamation claims, Dr. Alexander asserted the affirmative defenses that Dr. Bennett was a public figure and, therefore, fair game for comment and that Dr. Bennett suffered no special damages.

1. What must Dr. Bennett prove to make out a *prima facie* case of defamation in Count 1, how should the court rule on Dr. Alexander's affirmative defenses, and is Dr. Bennett likely to prevail on this claim?
2. What must Dr. Bennett prove to make out a *prima facie* case of defamation in Count 2, how should the court rule on Dr. Alexander's affirmative defenses, and is Dr. Bennett likely to prevail on this claim?
3. What must Dr. Bennett prove to make out a *prima facie* case of malicious civil prosecution in Count 3, and is he likely to prevail on this claim?

Explain your answers fully.

A

1. Count 1 – In order to make out a prima facie case for defamation for the remarks at the dental conference, Bennett must show that Alexander intentionally published a defamatory statement to a third party injuring Bennett's reputation. He must also show that the statement was false and that Alexander was at least negligent as to its falsity. Bennett does not need to prove special damages.

   Traditional defamation of a private individual over a matter of private concern requires only an intentional publication to a third party of a defamatory statement damaging one's reputation. However, when the defamation is over a matter of public concern, the plaintiff must prove the statement was false and some level of fault (negligence as to the falsity of the statement). If the defamed person is a public figure, then the plaintiff must show the defendant acted with malice (or knowing or reckless disregard for the statement's falsity). One can become a public figure by becoming a celebrity (actors, athletes), through elected office (politicians), or by injecting themselves into the public eye. Here, Bennett is not a public figure, despite the local newspaper article. He is not famous and there is no indication he has injected himself into the public eye other than advertising or marketing his services. However, the statement is likely over a matter of public concern. The treatment of patients affects the entire community and any potential patients. Therefore, the defamation here is regarding a private individual in a matter of public concern.

   Bennett, however, does not need to prove special damages. Slander (spoken defamation) requires a showing of special damages. However, in cases of slander per se, special damages need not be shown, as they are presumed. Slander per se occurs when a defamatory statement is made that relates to: i) a person's reputation in their profession, ii) a person having some loathsome disease, iii) a person committing a crime of moral turpitude, or iv) a woman's chastity. Here, the defamatory remarks made to the dental program were clearly reflective of Bennett's professional judgment and reputation and, therefore, this is slander per se, and special damages need not be shown.

   As discussed above, Alexander's defenses should fail. Bennett need not show special damages as this is slander per se, and Bennett is not a public figure.

   Bennett should prevail on Count 1. Alexander published a defamatory statement by speaking it to the crowd. The statement was false, as Bennett has not had any improper relations. It was damaging to his reputation. Moreover, Alexander was negligent as to its falsity. He had no basis for believing what he said was true and likely said it out of pure spite. Therefore, Bennett should prevail on Count 1.

2. Count 2 – Bennett must prove the same elements discussed above for Count 2. Again, Alexander's defenses fail, as this is private party and public concern, so falsity and fault must be shown, in addition to the traditional defamation elements. Also, this is libel (written defamation) because Alexander wrote the letter to the newspaper and special damages are presumed in libel suits. Again, both of Alexander's defenses fail.

   Bennett should prevail here as well. As mentioned above, Alexander was at least negligent as to the falsity as he had no basis to make the claims he did. The statements were false. It does not matter that the paper didn't publish the letter, because publication is met when the statement is intentionally communicated to a third person, as it was here. Bennett prevails.

3. Count 3 – Bennett must show that Alexander knew his claim had no basis is fact, and was only initiated to annoy or for some improper purpose. Here, if Alexander has a good-faith belief Bennett unlawfully stole his patients, Alexander will win. However, it appears he sued to annoy or harass, so Bennett should win.

QUESTION 10

Andy owns and operates a company that makes widgets. In order to increase sales, Andy decided to create and launch an advertising campaign for his company's products. Bert owns and operates an advertising agency and has worked with Andy in the past.

The following events occurred in the following sequence.

1. On January 1, Andy published a detailed description on both the company Web page and in trade magazines, stating what he wanted done and how much he was willing to pay. On January 2, Bert sent a formal response, stating that he would perform the work as described on Andy's Web page for the price Andy had posted, provided the payment was in a lump sum. In order to induce Andy to act quickly, Bert stated that the terms of his response would remain open for 30 days.

2. On January 29, Andy left a voicemail message on Bert's phone saying he (Andy) had received a number of responses to the posting on his Web page and needed more time to "think it over." Bert replied on February 1 by sending a signed letter to Andy stating, "If you'll pay me $100, I'll hold off starting work on our contract until March 3." Andy mailed Bert a check for $100.

3. On March 3, Andy called and again left a voicemail message on Bert's phone stating, "OK. I'll need the entire campaign laid out and in my hands by April 15. However, I won't be able to pay you in a lump sum as you set forth in your January 2 response to me. Instead, I'll pay in equal monthly installments." Bert listened to the message on March 5, but did not respond. Instead, he began work, incurring time and expense in the project.

4. On April 10, Bert called Andy to tell him that things were on schedule and to set up a meeting for delivery of the campaign layout. Andy expressed surprise and said, "Well, I never heard back from you, so I contracted with another ad agency to do the campaign. I'm sorry, but you're out of luck." Bert replied, "You're the one who's out of luck. I expect to finish my work, and I'm going to send you a bill." Andy said, "Sorry, I'm not going to pay you anything." Bert immediately, on April 10, filed suit against Andy for breach of contract.

    1. Was a contract between Andy and Bert formed in the scenario described in No. 1 above?
    2. What was the legal effect of the exchange of communications described in scenario No. 2 above?
    3. Was an enforceable contract formed between Andy and Bert as a result of the facts stated in scenario No. 3 above?
    4. Was Bert entitled to commence suit on April 10 on the basis of the facts described in scenario No. 4 above?

Explain your answers fully.

The answers printed in this booklet were selected because they were among the better answers written

A

You may presume that the statute of frauds does not apply and the agreement is not governed by the Uniform Commercial Code.

1. A contract was not formed between Andy and Bert in scenario No. 1

In order for a contract to be formed, there must be an offer, acceptance, and consideration. An offer is made where the offeror manifests the power of acceptance in an offeree. A request for bids is not an offer, but rather a request for offers.

Here, when Andy published the description for the advertising campaign, he was not making an offer, but was inducing offers from advertisers. When Bert responded, he made an offer to do the work for the price Andy desired, which gave Andy the power of acceptance. Because Andy had not yet accepted, and no consideration was given, a valid contract was not formed.

Therefore, a contract was not formed.

2. The legal effect of scenario No. 2 was to hold Bert's offer open, making it an irrevocable firm offer until March 3

An offeror has the power to revoke an offer at any time before acceptance, unless consideration is given for the offeror to hold the offer open for a specified period of time, which in turn makes the offer irrevocable by the offeror.

Here, when Andy told Bert that he needed more time to contemplate Bert's offer, which he had indicated would only stay open until January 31, Bert essentially agreed to extend the offer if Andy gave Bert $100. This $100 is valid consideration for Bert's offer to be a firm offer until March 3.

Therefore, a firm offer was created.

3. An enforceable contract was formed between Andy and Bert in scenario No. 3

An acceptance is only valid if it is the mirror image of the offer. Where the acceptance changes the terms of the offer, it is not an acceptance, but rather a counter-offer. Offers/counter-offers may be accepted by either a promise or a performance, unless the offeror specifies a particular manner of acceptance.

Here, when Andy told Bert that he accepted, but that he would be making payment in monthly installments, he did not accept Bert's offer, but rather made a counter-offer to Bert, which Bert could accept by either performance or a promise to perform. Bert did not respond to Andy, but he did begin work on the campaign, not just mere preparation, on March 5, so this constitutes a valid acceptance, and, thus, a contract was formed on March 5.

Therefore, a contract was formed between Andy and Bert.

4. Yes, Bert was entitled to commence suit on April 10

An anticipatory repudiation is when a party acts in such a manner that causes the insecure to reasonably believe that the initial party will breach the contract. If there is reasonable belief that a party might repudiate, the insecure may seek adequate assurances from the party. If such assurances are not made, the insecure party may treat such anticipatory repudiation as a breach and can bring suit for such immediately, rather than waiting for the repudiating party's performance to become due.

Here, Andy caused Bert to have reasonable grounds for insecurity when Andy told him that he had hired another agency. Because Andy did not give Bert any adequate assurances that he would not breach, Bert was justified in immediately bringing suit on April 10, although Andy's performance of payment was not due until April 15. However, Bert should have immediately ceased work on April 10, in order to mitigate the damages of Andy's breach.

Therefore, Bert is entitled to commence suit on April 10.

QUESTION 11

Husband and Victim, residents of Anytown, Ohio, had been married for several years and had three children. In early 2010, they began having marital problems, and in October 2010, Victim filed for divorce and Husband moved out of the couple's home. In late December 2010, Victim was found dead in her bathtub. The autopsy revealed that her death was a homicide. Husband was charged with, and eventually tried for, the murder of Victim.

The investigation revealed that at about 6 p.m. on November 1, 2010, while Victim, Victim's mother, and the children were having dinner, Husband entered the house unexpectedly and engaged in an argument with Victim's mother. Husband then physically removed the children and left. Victim ran out the back door and into Neighbor's house next door.

At the trial, Prosecutor presented the following items of testimony:

1. Neighbor testified that shortly after 6 p.m. on November 1, 2010, Victim ran into Neighbor's house, threw herself onto the sofa, curled into a fetal position sobbing, and exclaimed, "Husband is going to kill me! I don't think I'll ever see my children again."

2. Counselor, who had been meeting with Victim for several months preceding Victim's death, testified that during a counseling session with Victim in late November 2010, Victim stated that she was afraid of Husband.

3. Doctor testified that, in early December 2010, he saw Victim in the emergency room at the hospital and treated her for a swollen lower lip, a cut on the bridge of her nose, and facial bruising. At that time, Victim stated, "Husband beat me with his fists."

4. Victim's Sister (Sister) testified that on the Friday after Thanksgiving in November 2010, Victim drove to Sister's home, which is about 50 miles from Anytown. They intended to go for an afternoon of shopping at a local mall. Sister immediately noticed bruising on Victim's arms and asked her what had happened. Victim told Sister that, as she was leaving her home to meet Sister, Husband pushed Victim down onto the driveway and began kicking her.

Defense counsel timely objected to each item of testimony on the ground of hearsay, and the court overruled each objection.

Was the court correct in overruling each of the objections? Explain your answers fully.

A

1. Neighbor's Testimony

The court was correct. Hearsay is an out-of-court statement offered for the truth of the matter asserted. Hearsay is inadmissible, unless a hearsay exception applies. Here, Neighbor's testimony includes an out-of-court statement made by Victim. If this statement is being admitted for the truth (e.g., Husband was indeed going to kill Victim) and does not fit into a hearsay exception, it is inadmissible. Under these facts, the excited utterance hearsay exception will apply. Under this exception, statements made after a stressful event while the declarant is still acting under the stress are admissible notwithstanding their hearsay character. Here, Husband had just argued with Victim's mother and taken the children, all while in the presence of Victim. This was a stressful event and Victim was still acting under the stress because she was sobbing, she "exclaimed," and the explanation point. Therefore, the court is correct to allow the statements because the excited utterance exception applies.

2. Counselor's Testimony

The court was correct. Here, Counselor's testimony contains an out-of-court statement that is presumably being admitted for the truth (Victim was afraid of Husband). Accordingly, that statement must fit into a hearsay exception or it is inadmissible. The then existing state-of-mind exception applies here. Under this exception, a statement of declarant's then existing state of mind is admissible notwithstanding the hearsay rule. Here, Victim said that she was afraid of Husband. This is a statement of her state of mind at the time she was talking to Counselor. Therefore, the court was correct because the statement is admissible as a then existing state of mind.

3. Doctor's Testimony

The court was not correct. Here, Doctor's testimony contains an out-of-court statement that is presumably being admitted for the truth (e.g., Victim had been beaten by Husband). Thus, there must be an applicable hearsay exception or the statement is inadmissible for hearsay purposes. Statements made pursuant to medical treatment are admissible even though they are hearsay, provided they relate to the medical condition being treated. Here, Victim was seeking medical treatment for a swollen lip, cut, and facial bruising. The statement that Victim was beat by fists is relevant to treatment because how the injuries occurred could have an impact on the treatment given by Doctor. However, the fact that Husband inflicted the beating is not relevant to treatment. Thus, part of the statement is admissible (e.g., beating with fists), but part of the statement is inadmissible (e.g., Husband was the beater).

4. Sister's Testimony

The court was not correct. Here, Sister's testimony as to the appearance of bruises and the fact that Victim drove 50 miles from Anytown are not hearsay because they are facts and not statements. However, the testimony as to Victim's account of the beating by Husband is hearsay because it incorporates Victim's out-of-court statements. To be admitted for the truth, Victim's account of the beating must fit into a hearsay exception. Here, there is no applicable hearsay exception. The present sense impression exception might have applied if Sister had lived close to Victim and the statement occurred immediately after the beating. However, since Sister had to drive 50 miles, the present sense impression exception is not applicable. Therefore, the court was not correct because there is no applicable hearsay exception.

QUESTION 12

Lawyer, a lawyer practicing in Anytown, Ohio, was acquainted with the Jones family in that he was currently representing Junior Jones in a traffic matter and had previously represented Junior's sister, Sister Jones, in a divorce proceeding.

While waiting in traffic court one day for their matter to be called, Junior told Lawyer that his elderly grandmother, Grandma, had taken a fall and broken her hip. Junior said that Grandma was currently in the hospital and was showing signs of dementia and short-term memory loss. Junior said he believed that Grandma, who had substantial assets, needed help in managing her affairs and asked Lawyer to meet with him and Grandma. Junior said he would pay Lawyer's fee for the consultation with Grandma.

Lawyer met with Junior and Grandma in the hospital room, and together they discussed Grandma's family and her finances. Grandma was able to relate the names of her children and grandchildren, but seemed confused about the nature and extent of her assets. With prompting from Junior, her confusion seemed to dissolve. Grandma expressed concern about the expense of having Lawyer present, and Lawyer told her not to worry, it was being taken care of.

Based on that single discussion, Lawyer went back to his office, set up a "new client matter" file entitled "Grandma Jones Matter." He drafted a durable power of attorney from Grandma in favor of Junior, which, at Junior's direction, included a provision authorizing Junior to make gifts to family members, including himself. Lawyer presented the power of attorney to Grandma, who signed the document later that day, with all legal formalities required by statute for durable powers of attorney. Grandma's only instruction to Lawyer was, "Do not let them put me in a nursing home." Lawyer sent the original power of attorney and a bill to Grandma in care of Junior. Junior promptly paid the bill by money order. Lawyer put the office copy of the durable power of attorney in the Grandma Jones Matter file and placed it with his "closed files."

Two months later, Sister made an appointment to meet with Lawyer and told him that Junior had recently used Grandma's money to purchase a luxury automobile and that he also had placed Grandma in a nursing home. She made it clear that she did not want Junior to know that Lawyer had learned of these facts from her.

Later, Grandma phoned Lawyer and asked him to free her from the nursing home and recover control of her money from Junior, offering to pay for his services.

The following day, Junior phoned Lawyer to tell him that he had a letter from Grandma's physician stating that she suffers from mild dementia and requires the assistance of a guardian to manage her affairs. He asked Lawyer to prepare the necessary papers to file in probate court to have Junior appointed as guardian for Grandma. Junior stated that time was of the essence, as he wanted to file before Sister learned of the physician's letter and filed a competing application to be guardian.

What ethical issues, if any, are presented under the Ohio Rules of Professional Conduct by each of the following:

1. Lawyer's meeting in the hospital room to discuss Grandma's affairs in the presence of Junior?
2. Lawyer following Junior's instructions as to the content of the power of attorney?
3. Lawyer's acceptance of payment from Junior for the consultation with Grandma?
4. Lawyer's "closing" of the Grandma Jones file?
5. Sister's request to keep confidential the facts she disclosed to Lawyer during their meeting?
6. Grandma's request for help in getting her out of the nursing home and regaining control of her money?
7. Junior's request for assistance in having himself appointed guardian?

Explain your answers fully.

A

1. Lawyer arguably breached the duty of confidentiality to his client, Grandma.

   A lawyer owes the client a duty of confidentiality. Confidential information can only be released with the client's permission or when disclosure is impliedly authorized because it is within the scope of representation. Also, lawyers may accept payment from third parties for services rendered to a client. But the lawyer must clarify with the third party that the client is the client and not reveal any confidential information about the client. Furthermore, the lawyer must abide by the decisions made by the client, not the third party. Here, Junior offered to pay for Grandma's attorney's fees for her initial consultation with Lawyer. Initial consultations should be private because confidential information would be shared during that meeting. Lawyer should have asked Junior to leave, even if Grandma didn't ask Junior to leave.

   Still, Junior was arguably acting as an agent for Grandma at that time and was reasonably necessary for the session. Indeed, his presence helped her remember key details necessary for the representation. That does not excuse, however, Lawyer from making it clear to Junior that Grandma was the potential client and telling Grandma that she had the right to meet privately with the attorney.

2. Lawyer should not have followed Junior's instructions. Grandma was the client, not Junior. Lawyer has a duty to act in her best interests, not necessarily Juniors. There was a serious risk here that Junior was self-interested and would misrepresent Grandma's wishes. Furthermore, Lawyer knew that Grandma verged on incompetence. In such a situation, he should have appointed a guardian for her to ensure that her best interests were being represented by an independent, neutral third party not subject to benefits from Grandma's will.

3. Lawyer is free to accept payment from a third party, but Lawyer must make it clear to the third party who the client is, that the client makes all decisions, and that Lawyer owes the client, not the third party, the duty of confidentiality.

4. Lawyer may label a client file as closed, but cannot unilaterally terminate a client relationship without first communicating with the client and without having a sufficient reason for doing so. A conflict of interest would be sufficient.

5. It was permissible for Lawyer to meet with Sister at her request, but the Lawyer should have made clear that he represents Grandma, owes her the duty of loyalty, and if it would assist Grandma, disclose any information Sister may have given to him.

6. Grandma's request for help should have attuned Lawyer to the conflict of interest that then existed between her and Junior. A lawyer cannot represent two clients at the same time when those two clients' interests conflict in a present matter. Lawyer should have either declined the case at that point because of this conflict or withdrawn from representation.

7. At this point, the conflict of interest is apparent. Lawyer should have declined representing Junior and probably withdrawn entirely from representing either one, due to Lawyer's knowledge of confidential information that could help either side and would force Lawyer to breach his duty of confidentiality to them.

MPT 1

Monroe v. Franklin Flags Amusement Park

In this performance test item, examinees are associates at a law firm representing the Franklin Flags Amusement Park. Franklin Flags is being sued for negligence by Vera Monroe, a patron who was injured at the amusement park's haunted house attraction the previous Halloween. Ms. Monroe claims three acts of negligence on the part of the park: after being frightened by a staff member dressed as a zombie, Ms. Monroe ran into a wall, breaking her nose; upon leaving the haunted house, she slipped on a muddy path, injuring her ankle; and finally, she fell and broke her wrist after being startled by another staff member in a scary costume. Examinees' task is to draft the argument section of a persuasive brief in support of the park's motion for summary judgment, refuting each of Ms. Monroe's claims that the park was negligent and is liable for her injuries. The File contains the instructional memorandum, guidelines for drafting persuasive briefs, and excerpts from the deposition transcripts of the plaintiff, the general manager of the park, and a park staff member. The Library contains two Franklin Supreme Court cases that address liability for dangerous conditions and how a duty owed to patrons is modified on Halloween.

A

To: Rick Lasparri
From: Examinee
Date: July 30, 2013
Re: Monroe v. Franklin Flags Amusement Park

Please find below the argument section for the Motion for Summary Judgment that you requested I prepare on behalf of our client, Franklin Flags Amusement Park ("FFAP"), against Vera Monroe ("Monroe") in Monroe v. Franklin Flags Amusement Park.

Introduction:

The Court should grant FFAP's motion for summary judgment. FFAP is not negligent in its preparation of the haunted house at its park and is not responsible for the injuries that occurred to Monroe during her visit to the haunted house. This is because FFAP: (1) adequately trained its staff in the case of emergencies; and, (2) Monroe's injuries did not result from any sort of dangerous condition that was the fault of FFAP or reasonably preventable by FFAP. Under Larson v. Franklin High Boosters Club, Inc., a binding Franklin Supreme Court case, a motion for summary judgment will be granted "when there is no genuine dispute of material fact and the moving party is entitled to summary judgment as a matter of law." Further, a "material fact" is one that would "influence the outcome of the controversy." The depositions and materials presented to the court do not present any disputes of material fact as to this case. Rather, the depositions make clear that the FFAP is entitled to judgment as a matter of law.

I. FFAP was not negligent in the last room of the haunted house because there was no unreasonable danger and it adequately instructed the staff

FFAP was not negligent in its preparation of the last room of the haunted house. First, FFAP did not have a duty to guard against Monroe acting in fear from an actor in a haunted house that Monroe chose to enter. Further, the "dangerous" condition that led to Monroe's injury was a wall, a condition that FFAP could not reasonably remove and one that Monroe could have seen. Finally, its employee, Camilee Brewster ("Brewster") was adequately trained in how to help in case of emergency and attempted to provide Monroe with assistance after her injury. As a result, there was no breach of duty by FFAP to Monroe.

Larson v. Franklin High Boosters Club, Inc., sets the test for negligence in the case of a haunted house operated at an amusement park. Under Larson, the court considers "1) what duty was imposed on defendant under the particular circumstances at issue, 2) whether there was a breach of duty that resulted in injury or loss, and 3) whether the risk, which resulted in injury, was encompassed within the scope of the protection extended by the imposition of that duty." In Larson, the plaintiff put forth the duty as set by that of Dozer v. Swift, which stated the duty of the Defendant was to act reasonably under the circumstances and not put others in positions of risk. However, the Supreme Court of Franklin in Larson noted a different duty for an operator at an event designed to be frightening and patrons are expected to be surprised.

In Larson, an operator "does not have a duty to guard against patrons reacting in bizarre, frightened, or unpredictable ways." Patrons know ahead of time that this is the purpose of the event. Therefore, the court noted that an organization is not negligent simply by admitting someone to a haunted house. However, the organization is liable if it did not use reasonable care in inspecting and maintaining the premises and equipment furnished so that the haunted house is safe for the intended purpose. Further, the personnel must have adequate instruction and supervision should some sort of event happen. Under this standard, the court in Larson held there was a genuine dispute of material fact and denied the amusement park's motion for summary judgment. In this case, the Plaintiff, an older man, brought his grandchildren to the amusement park with him. Upon being frightened in a room, he fell and broke his ankles. The court denied the motion for summary judgment because there wasn't any evidence on the record as to whether the park's staff had adequate instruction regarding what to do in the case of an emergency.

Under these circumstances, the record clearly indicates not only that FFAP took proper care in creating the haunted house, but also that its personnel were adequately trained in case of an emergency. Therefore, unlike in Larson, the Court should grant FFAP's motion for summary judgment. First, as is clear in Larson, FFAP does not owe a special standard of care to Monroe simply by letting her into the haunted house. Rather, the appropriate duty for this case is whether FFAP took reasonable care in inspecting and maintaining the premises and its equipment so the haunted house was safe. Further, there must have been adequate training to the staff at the house. Monroe may cite to Costello v. Shadowland Amusements, Inc. as proof of FFAP's negligence. In this case, the Plaintiff was scared in a room and fell over a bench placed in the middle of the room. However,

the circumstances here are clearly different. FFAP placed no objects in the room that could lead to injuring a patron. Rather, Monroe's injury was the result of running into a wall. Monroe would know of this wall simply by entering the room, even if it was unlit. Further, FFAP could not take reasonable precautions to prevent Monroe from running into the wall. Finally, unlike in Larson, there is evidence here from Mike Matson's ("Matson") deposition that the park had staff around to watch for dangers. Therefore, FFAP did not violate its duty of care in creating and maintaining the premises.

Lastly, unlike in Larson, the record makes clear that FFAP took steps to adequately train its staff and provide safety precautions in case of injury. For example, each room had a trained staff member to help in case of emergency. Further, there was a doctor on premises that the staff were told to call if there was an emergency. In the last room, the "zombie," played by Brewster, had lifeguard training and was in charge of responding to accidents that occurred in that room. At the time of Monroe's injury, she even attempted to help Monroe after she ran into the wall and broke her nose. Brewster could not have prevented Monroe's refusal of assistance or fleeing from the scene. Over all, despite the duty owed to Monroe under these circumstances, FFAP did not breach this duty. Therefore, FFAP is not responsible for the injury that resulted to Monroe while she was in the last room of the haunted house.

II. FFAP was not negligent in the graveyard because the mud was not an unreasonable danger and Monroe could have foreseen this danger

FFAP is not responsible for the injury that occurred to Monroe in the graveyard that followed after the haunted house. Monroe was aware of the danger presented by the mud because she knew it had rained for three full days before her trip to the haunted house. Further, given the time of year, late October, Monroe would know of the possibility of slipping in the mud. The graveyard was well lit and FFAP had not placed any dangers within the graveyard. Lastly, FFAP had staff near the graveyard to help in case of injury.

As discussed above in Section I, Larson v. Franklin High Boosters Club, Inc., sets the appropriate standard for negligence in this case. FFAP had a standard to act reasonably and not put others in a position of risk. It must also ensure its haunted house and graveyard are prepared with reasonable care and that the onsite staff had adequate training. Further, the case of Parker v. Muir, a binding Franklin Supreme Court case, provides a defense to amusement parks. In Parker, the court noted an owner is answerable for damages from a dangerous condition only if the owner knew of this dangerous condition, the damage was preventable with reasonable care, and the owner failed to exercise such care. The safety history of an organization is relevant to this question. Further, the observability of the danger by the potential victim is relevant. The danger "must be of such a nature as to constitute a danger that would reasonably be expected to cause injury to a prudent person using ordinary care under the circumstances." For example, in Parker, the plaintiff's injury stemmed from falling on rocks in a cornfield maze. The plaintiff had been on site several times and had even warned others of the possibility of rocks. The mere presence of these rocks was not enough to hold the organization liable for this injury. This, combined with the organization's perfect safety record, demonstrated the defendant's lack of negligence.

FFAP did not violate its duty toward Monroe in the preparation of the graveyard. First, the lighting in the graveyard was adequate, as indicated by Monroe. The graveyard had little lights along the entire pathway. Further, Matson made clear that there was no one in the graveyard to scare the patrons. This area was merely intended to continue the "spooky effect" of the haunted house in order to scare patrons. However, this was still part of the haunted house. The patron should expect this "spooky effect" upon entering the haunted house. FFAP is not responsible for bizarre fear from a patron. Rather, under Larson, FFAP is only responsible for creating the graveyard with reasonable care and adequately training staff to help with or prevent injuries. The graveyard simply was meant to be a spooky exit from the haunted house. It was adequately lit and had no unreasonable dangers. Lastly, the staff member at the edge of the graveyard, whose purpose was to "scare" patrons, had been instructed to help anyone who injured themselves in the area. This included instruction to help call the doctor and help the victim in whatever way was necessary. Therefore, under the standard set by Larson, FFAP did not breach a duty in its creation of the graveyard.

Monroe may argue that, similar to the park in Costello v. Shadowland Amusements, Inc., FFAP failed its duty because the graveyard had a dangerous condition – the slippery mud. She may argue that, unlike the rest of the park, the graveyard lacked paved paths and, therefore, constituted an unreasonable risk to potential victims. However, Parker and Larson made clear that the plaintiff's awareness of a condition may be taken into account in determining if the defendant breached a duty to

the plaintiff. In other words, although assumption of risk is not a defense, the "plaintiff's knowledge and conduct may be considered in determining whether, under the particular circumstances at issue, the defendant breached a duty to the plaintiff." In this case, Monroe herself admitted that there had been rain without letup for the three days prior to her visit to the haunted house. Further, this was late October, a cold time of year that could lead to this mud being slippery. As a result, the defense available to FFAP in Parker is available here and works to prevent liability to FFAP for Monroe's injury in the graveyard.

III. FFAP was not negligent for placing an actor at the end of the haunted house who was properly instructed and a part of the haunted house

Lastly, FFAP is not responsible for the injuries that occurred to Monroe at the end of the graveyard. The staff member there was still part of the haunted house. Therefore, Monroe should have been prepared to be scared while she was still in the haunted house. Further, the staff member was adequately trained to prevent injuries to any invitees into the park and to help them in case of injury. The appropriate standard and defenses to Monroe's injuries are set forth in Larson and Parker, as discussed above in Sections I and II. Under these standards, it is clear that, while FFAP did owe a duty to Monroe, FFAP did not violate its duty and is not responsible for the resulting injuries to Monroe.

Monroe should have been aware that a potential scary or frightening thing could happen when exiting the park. This is clear because she was still within the haunted house and graveyard when she was scared by the staff member. Therefore, FFAP is not responsible for the bizarre reaction of Monroe to this fright. Rather, FFAP is only responsible for using reasonable care in creating this area and adequately training its staff. This area was still well lit by the rest of the park and there was only one staff member there to scare invitees of the park. This man was trained to help anyone who was hurt upon being scared in the park. In fact, he even attempted to approach Monroe when she was scared, but her boyfriend yelled at him to leave. Therefore, FFAP was unable to help her when she fell. Further, FFAP did not put anything in the park that she could trip over. Rather, she simply fell over herself. This is similar to the Plaintiff in Larson, who tripped over his own feet. However, unlike Larson, the record makes clear that the staff member was in charge of helping Monroe and was trained to bring her to a doctor. FFAP is not responsible for her refusal to go to a doctor.

FFAP is not responsible for Monroe's injuries and is entitled to judgment as a matter of law. First, it held no duty to prevent bizarre reactions by Monroe. Second, it only needed to use reasonable care in creating the premises. Third, it needed to adequately train.

MPT 2

Palindrome Recording Contract

Examinees' law firm represents the four members of the rock band Palindrome, who have retained it to negotiate a recording contract with Polyphon, an independent recording label. Polyphon has presented the band with a detailed contract, and examinees are asked to redraft certain provisions of that contract to comport with the band's contractual demands and objectives. In particular, the band is concerned about artistic control of its recordings, licensing of the band's trademark, and use of the band's images and trademark for marketing purposes. Examinees are asked not only to redraft those contract provisions, but also to explain why changes are being made to each, and to analyze legal aspects or complications involved with each provision, if there are any. The File contains the instructional memorandum, a transcript of an interview by the assigning partner with the leader of the band, an agreement among the band members concerning the division of income, and selected provisions of the recording contract. The Library contains a Franklin statute concerning contracts for personal services and two cases discussing the assignment and licensing of trademarks.

A

TO: Levi Morris
FROM: Examinee
DATE: July 30, 2013
RE: Palindrome Recording Contract

I have redrafted several provisions of the Palindrome/Polyphon contract ("Agreement") for review. These redrafted provisions will better meet Palindrome's wants and needs, and will comply with Franklin law.

1. Definitions: "Artist" or "you"

The definition of "Artist" or "you" should read as follows: "'Artist' or 'you' shall mean Palindrome Partnerships." This language was changed to reflect the band's desire to do all business through Palindrome Partners, as evidenced by their partnership agreement. In addition, this language will prevent future conflicts. The initial language stated that the terms referred to the band both collectively and individually. The band noted in its partnership agreement that all decisions about the band must be made unanimously. Clarifying that "Artist" or "you" refers to the partnership will avoid any conflicts that might arise if Polyphon seeks to have one band member make a decision without consulting his or her bandmates.

3.03: Contract Term

Section 3.03 of the Agreement should read as follows: "The initial Contract Period will begin on the date of this Agreement and will run for one year. You hereby grant Polyphon two (2) separate options, each to extend the term of this Agreement for one additional Contract Period of one year per option ("Option Period"). In the event that you do not fulfill your Recording Commitment for the initial Contract Period or any Option Period, that period will continue to run and the next Option Period will not begin until the Recording Commitment in question has been fulfilled. This Agreement shall terminate after you fulfill the Contract Period and the Option Periods, or after four (4) years, whichever is sooner."

This provision was altered to reduce the number of Option Periods from 8 to 2. This was done because the contract period and each option period required the completion of one album. Palindrome expressed that it does not want to put out more than 3 albums under the Polyphon label, unless Polyphon treats them very well. Reducing the number of Option Periods ensures that Palindrome will not be obligated to put out more than 3 albums if Polyphon does not treat them well. A termination clause was also added to the Agreement. Under Franklin Labor Code § 2855(b), a contract to render personal service in the production of phonorecords is unenforceable after 10 years. The current contract provision states that each Contract Period or Option Period continues to run until it is completed, at which point the next period begins. Since each Period appears to be able to run indefinitely, it is possible that the Agreement could run for 10 years, or at least for more than Palindrome's desired 4 years. The added clause states that the Agreement will terminate either after the obligations are fulfilled, or automatically after 4 years. This is advantageous to Palindrome because it ensures that the Agreement will end after 4 years, but it also gives Palindrome a bit of wiggle room in the event that they do not finish an album within a year, by leaving in the language allowing the Contract Period and Option Periods to run longer than one year if necessary.

4.01: Approvals

Section 4.01 of the Agreement should read as follows: "Artist shall, in its sole discretion, make the final determination of the Masters to be included in each Album, and shall have the sole authority to select one or more producers to collaborate on the production of each Master and each Album."

This provision was altered by transferring the power to determine which songs go on the album and which producers help make it from Polyphon to Palindrome Partners. Since the definition of "Artist" or "you" was also changed, this term now gives the discretion to select songs and producers to the partnership, where all agreements must be made unanimously. This new term will help Palindrome maintain its artistic integrity.

8.01: Trademark

Section 8.01 of the Agreement should read as follows: "Artist warrants that it owns the federally registered trademark PALINDROME (Reg. No. 5,423,888) and hereby licenses the trademark to Polyphon. Polyphon may use the trademark on

such products as it sees fit to license, subject to the approval of Artist. Polyphon shall ensure that the products it offers with the Palindrome trademark meet the standards of quality of the trademarked goods established by Artist. Polyphon shall lose the right to sell products under the Palindrome trademark if Polyphon's products do not meet such standards of quality. Polyphon shall retain one-fourth of the income derived from the production and sale of such merchandise, and Artist shall receive three-fourths of such income."

This provision was greatly altered. First, instead of completely transferring the trademark rights to Polyphon, the new agreement simply licenses the trademark, as the band desired. Second, the new provision gives the band the power to control what type of merchandise Polyphon markets under the trademark, by giving Palindrome the power of approval. Third, a quality-control provision has been added to ensure that the licensing agreement is not held invalid, as explained below. Finally, the Agreement has been altered to meet the band's desire to give Polyphon one-fourth of the income from the merchandise it produces, instead of all of it.

The clause transferring the trademark had to be altered, because as it stood, it was an invalid trademark transfer. In Panama Hats of Franklin, Inc. v. Elson Enterprises, LLC (Dist. of Franklin, 2004), the court noted that a trademark is used to identify and distinguish goods, and to indicate the source of the goods. For that reason, "the trademark cannot be divorced from the goods themselves." Therefore, "short of a transfer of other assets of a business with the trademark, a trademark cannot be transferred without, at the very least, a simultaneous transfer of the good will associated with the mark." Otherwise, the transfer is viewed as an "assignment in gross" or a "naked" transfer, which is not valid. Additionally, it may cause the assignor to lose all rights in the trademark, leaving it open for use by a subsequent person. In the original clause, nothing was transferred with the trademark, meaning that it was an assignment in gross or a naked transfer. In addition to going against Palindrome's wishes to retain their trademark, this clause would have caused Palindrome to lose the trademark entirely and would have opened the door to other interested merchants.

The quality-control and termination provisions were added to the altered Agreement to create an enforceable licensing agreement. In M&P Sportswear, Inc. v. Tops Clothing Co., (Dist. of Franklin, 2001), M&P licensed the right to make clothing under a certain name to Tops, but failed to include a quality-control or termination provision. Thus, when the quality of clothing produced by Tops was subpar, M&P was unable to bring an action or trademark infringement. The court noted that "any trademark proprietor who licenses the trademark to another must assure, in the license agreement, that the goods or services offered by the licensee meet the standards of quality of the trademarked goods established by the trademark proprietor. Failure to do so causes the mark to lose its significance as an indication of origin." Such a loss may be considered an abandonment of the mark, which results in the cancellation of the registration of the trademark. Therefore, the inclusion of the quality-control provision and the termination clause ensures that Palindrome will have a valid licensing agreement and will not run the risk of losing their control over the trademark.

8.02: Marketing

Section 8.02 of the Agreement should read as follows: "Artist hereby authorizes Polyphon, subject to Artist's approval, to use Artist's, and each member of Artist's, name, image, and likeness in connection with certain marketing or promotional efforts and to use the Masters in conjunction with the advertising, promotion, or sale of goods or services approved by Artist. Polyphon shall not use Artist's, or each Member of Artist's, name, image, and likeness in connection with the marketing or promotional efforts of alcohol or drugs, and Polyphon shall not use the Masters in conjunction with the advertising, promotion, or sale of alcohol or drugs."

This clause was changed to give Palindrome the right to approve any marketing or promotional efforts Polyphon makes, instead of giving Polyphon sole discretion to use the band's image however it sees fit. Additionally, a provision has been added to specifically prohibit Polyphon from using the band's image or any of its songs for the promotion of drugs and alcohol. This second layer of protection was added with an eye for negotiation. Polyphon is unlikely to approve a term granting the band the ultimate approval right with respect to marketing and advertising. However, Polyphon may be more willing to agree to the prohibition on using the band to market alcohol and drugs. For that reason, the prohibition was included to ensure that even if Polyphon will not agree to giving Palindrome the approval right, the band will still be protected from having its image or songs used to promote drugs and alcohol.

Conclusion

The contract terms as edited should work both to closely follow Palindrome's wants and needs and to ensure that the contract complies with Franklin law.

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