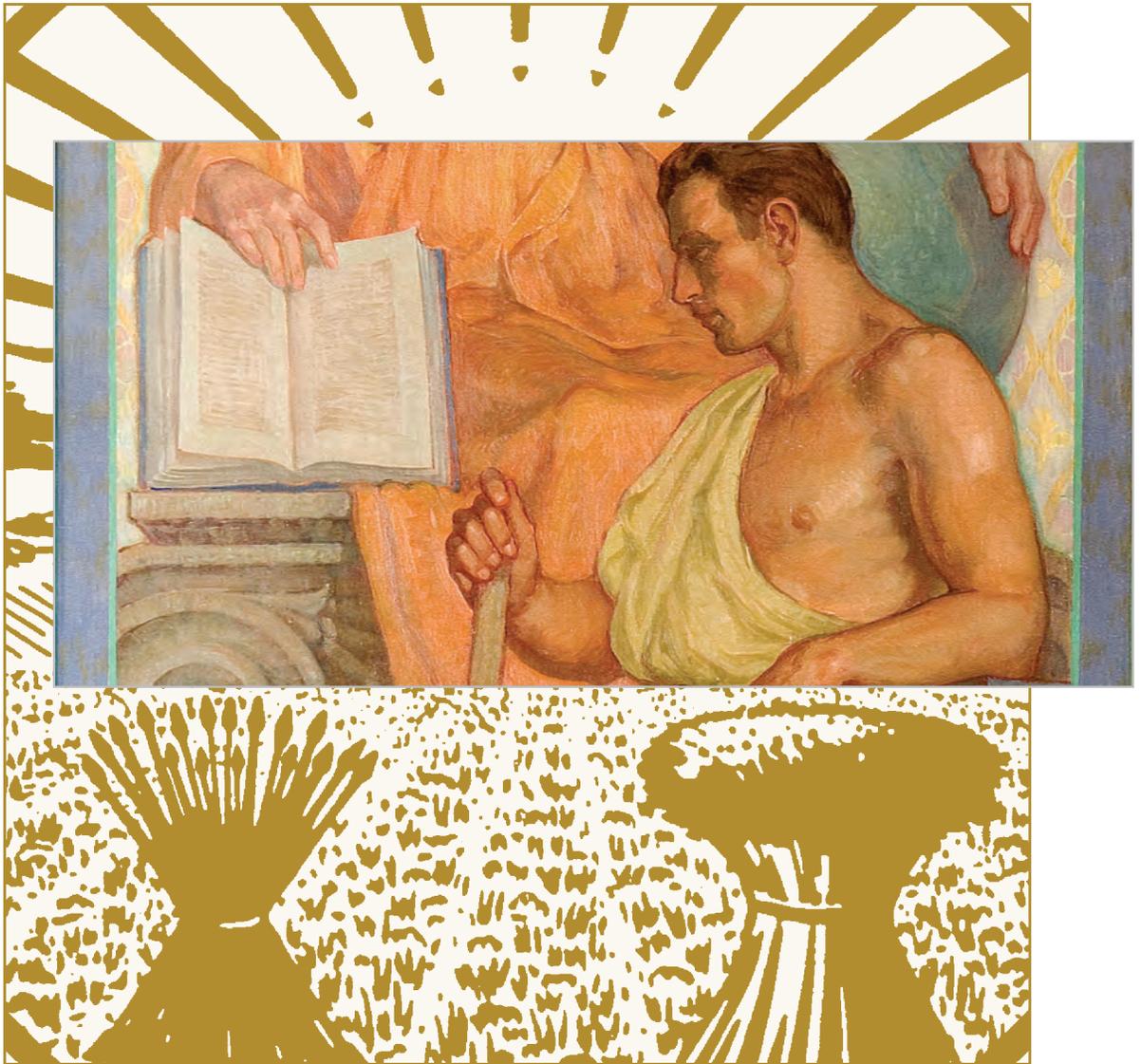




THE SUPREME COURT *of* OHIO

February 2014 Ohio Bar Examination Essay Questions & Selected Answers Multistate Performance Test Summaries & Selected Answers



On the cover:

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

THE SUPREME COURT *of* OHIO

FEBRUARY 2014 OHIO BAR EXAMINATION

Essay Questions & Selected Answers

Multistate Performance Test Summaries & Selected Answers



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OHIO BAR EXAMINATION

FEBRUARY 2014 OHIO BAR EXAMINATION

Essay Questions and Selected Answers

MPT Summaries and Selected Answers

The February 2014 Ohio Bar Examination contained 12 essay questions, presented to the applicants in sets of two. Applicants were given one hour to answer both questions in a set. The length of each answer was restricted to the front and back of an answer sheet.

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

The following pages contain the essay questions given during the February 2014 exam, along with the NCBE's summaries of the two MPT items given on the exam. This booklet also contains some actual applicant answers to the essay and MPT questions.

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

Copies of the complete February 2014 MPTs and their corresponding point sheets are available from the NCBE. Check the NCBE's website at www.ncbex.org for information about ordering.



QUESTION 1

Mom, a single parent with one son, Son, lives in Anytown, Ohio. When Son started kindergarten in the fall, Mom hired Babysitter to watch Son after school until Mom arrives home from work. They agreed that Babysitter would watch Son at Mom's home for \$10.00 per hour. Mom leaves Babysitter a list of instructions and, because Mom is very careful about Son's diet, the list includes what to give Son for snacks and dinner. Babysitter usually brings some of her own activities for Son, which Mom has encouraged her to do, because Son enjoys activities that are different from the ones he has at home. When Babysitter is not sitting with Son, she babysits for a number of other families in town.

During May, Son started playing on a t-ball team and, because the weekday practices began before Mom arrived home from work, Babysitter agreed to drive Son to the practices in her own car. Mom paid Babysitter additional money for gas and suggested that she take North Street to the ball field to avoid road construction. One afternoon Babysitter did not have time to make the dinner that Mom had left in the refrigerator, so she decided to take South Street, a parallel route to the ball field, because it had Anytown's only Burger Place, where she could pick up a quick dinner for Son.

After Babysitter bought food for both of them at the Burger Place drive-through, they ate in the car while Babysitter continued driving. Babysitter soon discovered that the remainder of South Street was slow and bumpy because road crews were in the process of repaving it. The uneven road surface caused Babysitter's french fries to fall to the floor of her car and, as she bent down to retrieve them, she did not initially notice that Flagger was standing in the road just ahead of her, signaling oncoming traffic to stop to allow a construction vehicle to cross the road. When Babysitter saw Flagger, she hit the brakes and stopped her car. Although she would have hit Flagger, he jumped out of the way to avoid being hit by Babysitter. Unfortunately, Flagger jumped in the path of the oncoming construction vehicle. Flagger was struck by the construction vehicle and seriously injured. Although the driver of the construction vehicle saw Flagger at the last minute, he was unable to stop the vehicle because his employer had failed to repair the brakes, which were known to be faulty.

Flagger intends to file a civil suit against Mom in an Ohio court.

What legal doctrine should Flagger assert as the basis for his claim that Mom is liable for injuries resulting from Babysitter's negligence? What defenses, if any, might Mom assert? Based on application of the facts, would Flagger be likely to prevail against Mom? Explain your answers fully.

Vicarious Liability – Respondeat Superior

Flagger should assert the legal doctrine of Respondeat Superior to impose vicarious liability on Mom. Normally, a third party is not vicariously liable for the torts of another. Under Respondeat Superior, an employer may be held liable for the torts of the employee if unintentional torts were committed within the scope of employment. Additionally, generally independent contractors do not impose liability on their employer for the torts they commit, but a court is likely to find there was a master/servant relationship that imposes liability if the employer exerts sufficient control over the conduct of the employee.

To be liable for an employee's torts, the employee must have first committed a tort. Babysitter committed negligence when she took her eyes off the road and hit Flagger. Negligence is a breach of a duty of reasonable care owed, which causes damages. A duty is owed to foreseeable plaintiffs to act as a reasonably prudent person would in the circumstances. Babysitter acted unreasonably by taking her eyes off the road in a construction zone. Babysitter caused Flagger's injuries because, but for her delayed braking and breach of duty, Flagger would not have jumped out of the way. Mom would likely defend against Babysitter's tort by asserting that the construction vehicle's intervening negligence was not foreseeable, but that argument would fail because automobile malfunctions in the street are foreseeable. Thus, Babysitter is liable in tort to Flagger for the injuries he sustained.

The court will find that an employer/employee relationship existed between Mom and Babysitter. Mom would likely defend against the claim by asserting that Babysitter was an independent contractor and not an employee, but the argument will fail. Mom exerted sufficient control over Babysitter's conduct by providing activities, listing Babysitter's duties, identifying what Babysitter should feed Son, and identifying the route that Babysitter should take. Mom would unsuccessfully argue that Babysitter was an independent contractor by providing her own activities and using her own car to take Son to practice. However, the fact that the work performed took place in Mom's home, and Babysitter was paid an hourly rate like an employee, suggest there was a master/servant relationship. Thus, Mom's control over Babysitter's conduct is sufficient to impose vicarious liability.

Mom would assert that Babysitter was acting outside of the scope of employment when Babysitter took South Street, rather than North Street as "suggested." With regard to acting in the scope of employment, vicarious liability remains on an employer when an employee takes a minor detour. A frolic (a major detour), however, is outside of the scope of employment and relieves the employer of vicarious liability. To determine whether a detour is a frolic or is a minor detour, courts examine whether or not the employee was acting in the employer's interests. Here, Babysitter was acting in Mom's interest. She was driving Son to practice, and she was feeding Son as was normally required of her. Though the stop at Burger Place may not have been per Mom's instructions, it was still in furtherance of Mom's interests to feed Son and get him to practice.

Thus, Mom will be held vicariously liable for Babysitter's negligence.

Defenses

Mom may assert that Flagger's jumping out of the way was unreasonable negligence on his part, and should thus reduce Babysitter's and Mom's liability. Such an argument will fail, however, because Babysitter's negligence created risk of harm to Flagger, and Flagger acted reasonably because he would have been hit by Babysitter had he not jumped out of the way. Thus, he was not comparatively negligent.



QUESTION 2

The following lawsuits involving challenges under the United States Constitution were filed in the appropriate federal courts by parties having proper standing:

1. **Merchants v. FA4:** The City of Franklin Association for the Advancement of African Americans (FA4) was formed to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate race-based discrimination. Upon learning that several white-owned businesses in Franklin were not complying with federal civil rights laws, FA4 organized a boycott of those businesses. The boycott lasted for quite some time and had a devastating economic impact on those businesses (Merchants) that were subject to the boycott. Merchants sued FA4 for malicious interference with their businesses and for violations of the state's antitrust laws on the ground that the boycott had diverted African-American customers of the white merchants to other merchants and thus, had unreasonably limited competition between merchants that had traditionally existed. FA4 defended on the ground that its boycott is protected activity under the First Amendment.

In preparation for the trial, Merchants requested that FA4 provide a list of the names and addresses of all of its members. Merchants alleged that all such documents were necessary for adequate preparation for the trial. FA4 refused to provide this list. Merchants filed a motion to compel production of the list, which the court granted over FA4's objections. FA4 did not comply with the production order and, for this failure, was adjudged in civil contempt and fined \$100,000. FA4 appealed the contempt judgment on the grounds that the court could not constitutionally compel disclosure.

2. **Club, et al. v. International Do Good:** The Franklin Do Good Club (Club), a nonprofit corporation, was formed as a local chapter of a federally funded entity known as International Do Good (International). The Club's purpose is to provide humanitarian service, to encourage high ethical standards in all vocations, and to help build world peace and good will. Individuals are admitted to Club membership according to a classification system based on business, professional, and institutional activity in the community. Although women are permitted to attend meetings, give speeches, receive awards, and form auxiliary organizations, International's constitution excludes women from membership. Club decided to admit women to active membership. As a result, Club's membership in International was terminated. Club and two of its women members filed a lawsuit alleging that the termination violates the United States Constitution.
3. **Andy v. Texico:** The State of Texico has recently experienced several terrorist attacks in government office buildings. After each attack, anonymous tweets, emails, and social media posts appeared claiming that a group calling itself Texico to Mexico (TtM) has carried out these attacks. TtM is an organization dedicated to seceding from the United States of America. Its Mission Statement states that it will "use any means necessary" to accomplish its stated goal. It is believed, but has never been proved, that TtM has been successful in carrying out these attacks through members and sympathizers working in the government buildings who are providing TtM with vital information necessary to gain access to the buildings and carry out these attacks. In response, the State of Texico has imposed a requirement that all State of Texico government employees sign an oath stating the following: "I am not a member of TtM or of any group advocating the use of force to achieve secession from the United States of America." When Andy, a low-level clerical worker for the State of Texico, politely declined to sign the oath without giving a reason for not signing it, the State of Texico fired him from his job. Andy sued the State of Texico for unlawful termination, asserting that firing him for refusal to sign the oath violated his constitutional rights.

How should the federal courts rule on the constitutional challenges asserted in each of the following cases:

- A. The lawsuit filed by Merchants against FA4?
- B. The appeal of the contempt judgment filed by FA4?
- C. The lawsuit filed by Club and its women members against International?
- D. The lawsuit filed by Andy against the State of Texico?

Explain your answers fully. You may assume that in each case there is the requisite state action.

MERCHANTS v. FA4 (suit). FA4 is likely to be successful. The 1st Amendment prohibits Congress from abridging the freedom of speech, and it applies to the States through the Due Process Clause of the 14th Amendment. To regulate the content of speech, which is what these laws would do, the State must have a compelling reason unrelated to the suppression of speech, with necessary means. Here, the merchants would lose. FA4 has a liberty interest in speaking out against the stores who are violating the Federal Civil Rights Laws. The law, if enforced, would chill the speech. This is a matter of public concern. Assuming that these statements are true, and are not made with known falsity, the FA4 will win, since there is no actual malice.

MERCHANTS v. FA4 (contempt). FA4 is likely to be successful. The First Amendment protects individuals' rights to associate with one another. The Supreme Court has held that requiring disclosure of group members is unconstitutional if it is likely to have a chilling effect on group membership. Thus, the Court struck down a law requiring the NAACP to disclose its group membership. Here, the merchants have not provided specific reasons for the names of the group members (i.e. adequate preparation for trial is insufficient). Due to the racially charged nature of this suit, and in the community at large, disclosure might have a chilling effect on FA4's group membership. Thus, the contempt charge should be lifted.

CLUB v. INTERNATIONAL. Club is likely to win, assuming there is state action. A state may not discriminate against others on the basis of gender. Gender-based classifications must undergo intermediate scrutiny, whereby the state must have an important purpose that is narrowly tailored. Moreover, the Supreme Court has found that states need a persuasive justification. Here, there is no purpose for an anti-gender rule that is discriminatory on its face. Thus, the court will find that this is against the constitution.

ANDY v. TEXICO. Andy likely will win. As noted, group association is protected under the 1st Amendment. The Supreme Court held that States may punish "illegal group membership" if (1) the group's purpose is illegal, (2) an individual knowingly is a member of the group, and (3) the individual encourages or partakes in the illegal activity. Here, although TtM wants to secede and has said it will do all it can to do so, it has not been proved that TtM is committing terrorist acts. Although a state may require public employees to take an oath to support the constitution and oppose violently overthrowing the government, this oath "that I am not a member of TtM or any group advocating the use of force to achieve secession" is overly broad and has a chilling effect on group membership. TtM is not proved to be an illegal group. Thus, Andy wins.



QUESTION 3

Acme Co. (Acme) is a manufacturer and supplier of household appliances, with its corporate headquarters located in Anywhere, Ohio. Helen, who is the bookkeeper for Acme, keeps the company checkbook and handles all financial transactions for the company. Since last year, Helen has been under serious internal investigation by Acme for embezzlement, because it believes she is writing company checks to herself. The investigation is not known by the public, but is known by a few employees of Acme.

In January of this year, the following negotiable instruments were issued with the stated events subsequently occurring:

1. Helen with full authorization issued a negotiable promissory note in the amount of \$10,000 (with Acme as the payor) to Brown for 50 aluminum sinks to be delivered by Brown to Acme. Brown signed a purchase order obligating Brown to deliver the sinks. Brown in turn indorsed the note to Supplier and instructed Supplier to credit the \$10,000 due from Acme to his account with Supplier to pay for future orders of materials by Brown. The company, from which Brown ordinarily purchased sinks, went out of business, so Brown was unable to deliver the sinks to Acme. Supplier, having credited Brown's account as instructed, demands payment from Acme on the note, and Acme refuses to make payment, arguing that since the sinks were never delivered, no consideration exists for the note.
2. Acme believed that, after a spirited negotiation, it had settled a legal dispute with Customer involving an Acme refrigerator that exploded. Acme issued a company check to Customer on its account at State Bank in the amount of \$5,000, payable to Customer. While Acme and Customer had verbally agreed upon the settlement, nothing was ever reduced to writing; not even an email existed. Accordingly, Helen typed on the back of the check (in the indorsement area) the following release of claim language:

“Accepted by Customer in full satisfaction and settlement of all issues alleged by Customer involving the exploding refrigerator.”

Customer electronically indorsed and cashed the check, but because he uses electronic check sorting and indorsement machines, Customer himself never saw the words that Helen had written on the back of the check. Customer subsequently disagreed that the parties had ever agreed to a settlement for \$5,000 and sued Acme for \$100,000 in damages. Acme has filed a motion in court moving for an order enforcing the settlement based upon the language that Helen placed on the back of the check cashed by Customer.

3. Helen took a blank company check and filled it out to pay \$15,000 (which Acme did not owe to Helen) to Helen, signed it as the company bookkeeper and then indorsed it over to Jones to pay for some furniture that Jones sold to Helen for her home. This was an act of embezzlement by Helen as she was not authorized to write the check to herself. Jones, however, had no idea that the check was not a legitimate check from Acme to Helen and she told him it was “a bonus.” Jones delivered the furniture to Helen's home and then Jones indorsed the check to Bart for the purchase of Bart's motorcycle. Bart was an employee of Acme. Bart knew that Helen was under investigation by Acme for embezzlement activities and he seriously doubted the validity of the check, but he accepted the check anyway without asking questions. Bart's personal philosophy (Live to Ride) was tattooed on his chest, and he always adhered to the age-old saying that “a bird in the hand should not be released too quickly.”

Who should prevail on each of the following claims:

1. Supplier versus Acme for payment of the \$10,000 on the note?
2. Acme versus Customer to enforce the settlement?
3. Bart versus Acme for the \$15,000 check?

Explain your answers fully.

To be a negotiable instrument, the Note must be in writing, signed by the maker or drawer, made payable to order or bearer, for a sum certain, and payable upon presentment or demand.

Supplier v. Acme – Acme will not prevail in a lawsuit against Supplier. Helen had the authority to issue a Promissory Note to Brown for the delivery of sinks, and Brown was a holder in due course because he took for Maker and without notice of defects. Brown indorsed the Note, negotiating it to Supplier for a future credit. Supplier is a holder of the Note. To qualify on his own, as a holder in due course, Supplier would have to take for value, in good faith, and without notice of any problems with the Note. Since Supplier did not give value in exchange to Brown, it would not qualify as a HDC. Giving an individual a future credit, which has not been utilized, is not providing value to Brown. As such, Supplier takes subject to the personal defenses of Acme, the defense being that the sinks were never delivered. However, Supplier takes under the Shelter Rules and will prevail.

Acme v. Customer – Acme will prevail against Customer as this was an enforceable accord and satisfaction between the parties. There was an actual dispute, the parties settled the dispute, and the limited indorsement on the back of the check with the release language satisfies any writing requirement that was lacking. Qualified indorsements are effective against the payee only as long as they do not affect negotiability. The language was clear, and the use of electronic scrutiny and indorsement will not prevent Acme from enforcing the full satisfaction. Once the check was cashed, the money was accepted, and the dispute was over.

Bart v. Acme – Helen, who despite being under investigation for embezzlement, still has access and privileges to access and use the Company checkbook. Although Helen did not have the authority to write this particular check, when an employee is in a position, such as a bookkeeper, and they fraudulently write checks, the Company will not be allowed to challenge the forgery pursuant to the entrusted employee rule. This is not a real defense to a holder in due course. Jones took the Note as a holder in due course. He gave value, the furniture, in good faith and without any reason to suspect there was a problem with the check. Bart, however, is not himself a HDC because he accepted the check from Jones with knowledge that Helen was suspected of embezzlement. He even doubted the validity of the check. Bart did give value for the check, his motorcycle. Under the Shelter Rule, although Bart is not himself a HDC, he takes under the shelter of Jones, who took as a HDC from Helen. In addition, any defense of fraud against either Jones or Bart would fail pursuant to the entrusted employee rule. It does not matter what Bart suspected as long as he did not participate in Helen's unlawful actions.



QUESTION 4

Scott and Andrew, friends and coworkers at Company Fun, were fans of rival football teams. On the day of the matchup between the teams, Scott and Andrew put on their jerseys and went to the game to cheer on their respective teams. Unfortunately for Scott, the outcome of the game was pretty much decided by halftime when Andrew's team led the game 49 to 0. As they were walking down the steps to the concession stand, Scott, infuriated by the score and Andrew's incessant barbs about Scott's team, intentionally shoved Andrew sending him tumbling down the concrete steps. As a result of the fall, Andrew broke his right arm.

With their friendship shattered like the bones of his arm, Andrew retained an attorney and timely filed a lawsuit against Scott in the Court of Common Pleas of Anytown, Ohio, seeking compensation for his broken arm and for lost wages for time missed from Company Fun while he recuperated.

Scott's attorney timely answered the complaint and served discovery requests seeking copies of the following:

- a) Andrew's complete personnel file from Company Fun;
 - b) Medical records and bills from the emergency room where Andrew's arm was set;
 - c) Medical records and bills from Andrew's family doctor for the past 15 years;
 - d) Medical records and bills from Andrew's mental health care provider; and
 - e) Witness interview notes taken by Andrew's attorney of the stadium employees who assisted Andrew after the fall.
1. As to each of these requests, what objections, if any, can Andrew's attorney properly assert, and how would the court likely rule on each? Explain your answers fully.
 2. What is the proper method under the Ohio Rules of Civil Procedure for asserting an objection to a discovery request? Explain your answer fully.

Personnel File

Andrew can assert that his complete personnel file from Company Fun is irrelevant and too voluminous and costly to produce. He would argue that the records contain private information that is unrelated to the current case. Scott would likely respond that the information is relevant and it might go to damages. The judge would likely agree with Scott, as Andrew is seeking lost wages and any information contained in the file might be used at some point in proving or calculating damages. Further, the file is not protected by a privilege or the Work Product Doctrine and it does not seem as if it is being requested to harass Andrew. Depending on the size of the file, the judge may limit the production to any wage-related information within the file as the rest of it may be irrelevant, and, if too costly to reproduce, may be excluded.

Emergency Room Medical Records

Andrew will argue that his medical records from the emergency room are covered by the doctor-patient privilege. Scott can argue in return that, since the injury is directly related to the subject of the lawsuit, Andrew has waived any doctor-patient privilege he has in regard to the records. The court would likely agree with Scott as Andrew's arm injury is directly related to the lawsuit and he has put the condition of his arm at issue, thus, making any records about the treatment of the arm available for Scott to discover.

Past Medical Bills

Andrew can argue that the medical records and bills from the last 15 years are beyond the scope of the lawsuit and an unnecessary burden that will be costly to produce. Scott will argue that the records will go toward a possible defense that the arm was already injured and Scott's actions were not completely responsible for the current condition of Andrew's arm. Generally, medical records are discoverable, despite the doctor-patient privilege, when the condition in the records is at issue. This request, however, seems to be overly broad and beyond the scope of what is discoverable. The judge will probably not compel discovery of these items.

Mental Health Records

Andrew can argue that any records from his mental health care providers are not discoverable as they are protected by the psychotherapist-patient privilege. Mental health records are only discoverable if the party has placed his or her mental health at issue. Since Andrew's mental health is not at issue, the judge will deny this request.

Witness Statements

Andrew can argue that the notes taken by his attorney are protected by the Work Product Doctrine. Generally, notes taken by an opposing party's attorney are not discoverable unless the other party can show that the witnesses interviewed are unavailable or their statements cannot be obtained without substantial hardship. Scott would have to show a good faith effort to get statements from the witnesses. It does not seem as though the witnesses are unavailable or that their statements cannot be obtained without substantial hardship. Andrew may have to provide the names, if, after a good faith effort, Scott's attorney could not discover them.

Objecting to a Discovery Request

In order to object to a discovery request, the party must have a proper reason for doing so. After stating the objection, the attorney must then attempt to work it out with the opposing attorney to see if the parties can resolve the problem. If not, within 28 days after the request, the objecting party must submit to the court a motion for protective order. If the reason for objecting is a privilege or work product, the party asserting the objection must describe the information withheld as best as possible, without revealing it, and explain to the court why the information should not be produced.



QUESTION 5

Bill Goodhands was a successful financial advisor and money manager. Lovey Howell, a 92 year-old woman, was one of Bill's oldest and closest clients. Under Bill's supervision, Lovey's estate had grown over the years to be valued at over two million dollars. She had no living heirs and, under her will, her entire estate was to be left to her favorite charity, the Animal Protective League. She sent a copy of the will to the Animal Protective League.

Lovey suffered from a number of health problems including dementia. Her doctors did not expect her to live another year. With Bill's assistance, she was moved to the Sunny Acres Nursing Home in January of 2010 to receive around-the-clock care.

In the two years preceding Lovey's placement, Bill's personal financial circumstances had steadily deteriorated. To make matters worse, his wife Joan Goodhands moved out in June 2009 after announcing she would be seeking a divorce.

In March 2010, Bill met privately with his attorney, Atticus Kafee, to talk about changing Bill's will. At the end of the meeting, Bill said, "Incidentally, what are the penalties if at some point in the future someone should attempt to forge my will?" Atticus thought the question was strange, but looked up the criminal statute for him. Although Bill did not tell Atticus, Bill intended to draft and forge the signatures of Lovey and two "witnesses" to a document purporting to revoke all prior wills and leave Lovey's entire estate to Bill. He did so immediately upon returning to his office that day.

Meanwhile, Bill and Joan agreed, in a last-ditch effort to save their marriage, to attend counseling sessions with Reverend Gerald Walton, the same individual who had performed their marriage ceremony twenty years earlier. Bill called Joan at her apartment the night before the first session and pleaded with her to return home saying, "Something big has happened at work and everything will be back to normal, I promise!"

The counseling session the following day did not go well, with Bill raising his voice on several occasions accusing Joan of not sticking with him through the hard times. When he returned home he called Reverend Walton, apologized for his behavior, and said he had not been completely honest with him, indicating he "had recently done something at work totally against his nature," which had placed him under stress.

In May 2010, Bill visited his family physician, Dr. Jonas Salt, for stomach aches he had been suffering from over the last month. Suspecting a possible ulcer, Dr. Salt inquired about Bill's stress levels. Bill stated he had "acted against a client's wishes on an account and it was weighing heavily on his mind." Dr. Salt noted the comment in his chart and ordered further testing.

In June 2010, Lovey died. Two weeks later Bill produced the forged will at probate court.

Attorneys for the Animal Protective League contacted the district attorney and demanded an investigation. The investigation produced evidence of Bill's financial decline and health issues, as well as documents Bill created on his computer that included drafts of Lovey's purported will, naming Bill as a beneficiary. In July 2010, Bill was indicted on charges of forgery and attempted theft.

The district attorney wishes to call Atticus Kafee, Joan Goodhands, Reverend Walton, and Dr. Salt as witnesses to testify against Bill at his trial concerning the foregoing communications between Bill and each of them.

As to each of the communications, what objection might Bill's attorney make to prevent their receipt in evidence, what is the policy rationale behind each such objection, and how should the court rule on each? Explain your answers fully under Ohio law.

Aticus Kafee

Bill's attorney should object based on attorney-client privilege. Under the rules of evidence, an attorney cannot be compelled to testify to confidential communications made between a client and his attorney during the course of rendering professional services. Here, Bill asked his Attorney for the penalties for will forgery. This is a confidential communication between Bill and his Attorney made during the course of Mr. Kafee rendering professional legal services, namely changing Bill's will. Normally these communications would be privileged. However, there is an exception to this privilege if the communications were made in furtherance of a crime or fraud. Here, Bill used the advice to draft a forged will, in furtherance of both a crime and fraud. Therefore, the privilege will not apply and the attorney's objection should be overruled.

The policy is to assure complete honesty between a client and his attorney so the attorney can zealously represent his client to the best of his abilities. However, the privilege is limited so that a client (or an attorney) may not commit crimes and frauds under the auspice of attorney-client communications.

Joan Goodhands

Bill's attorney should object based on spousal privilege. There are two kinds of spousal privilege, the confidential communications privilege, held by both spouses. Additionally, in Ohio, a current spouse is deemed incompetent to testify against their spouse in a criminal trial. Here, there is nothing to suggest that Joan and Bill have finally divorced, only that they were intending to divorce. Therefore, if Joan does not want to testify, she will be deemed incompetent. However, she may waive this "privilege" and be found competent. The other privilege applies to confidential communications made during the marriage. In this privilege, both spouses hold the privilege and neither can testify over the other's objection. Here, the private communication, "Something big has happened at work . . ." was made during the marriage and, therefore, Bill can prevent its disclosure, even if Joan wishes to testify.

There is also a crime-fraud exception for spousal privileges. However, this particular communication could not be said to be in furtherance of the crime or fraud, merely notification of it. Therefore, the exception will not apply.

The policy for this privilege is to encourage communication between spouses with the goal of strengthening and supporting marriage.

Reverend Walton

Bill's attorney should make an objection based on privilege with Clergy. Ohio also recognizes privileged communications between members of the clergy and their congregants. The privilege works much the same as the attorney-client privilege, requiring confidential communications made during the course of rendering spiritual guidance. Here, Bill confidentially communicated with Reverend Walton over the telephone regarding his outburst during counseling. He disclosed the statement to Reverend Walton to apologize and seek guidance for his stress, ostensibly seeking spiritual guidance. Therefore, the objection should be sustained.

The policy rationale behind this privilege is to ensure honest and complete communication with members of the clergy for the purpose of obtaining spiritual guidance. Ohio is protective of efforts to maintain mental health and spirituality and encourages its citizens to seek guidance and assistance from trained counselors and professions, such as Clergy.

Dr. Salt

Bill's attorney should object on the basis of doctor-patient privilege. A confidential communication between a doctor and patient made for the purpose of diagnosis and treatment is privileged. Here, the doctor inquired about Bill's stress as related to his stomach aches. Bill answered truthfully to help diagnose the ache. Therefore, it is privileged. The policy is to encourage truth to aid accurate diagnosis and treatment.



QUESTION 6

In Anywhere, Ohio, the following events occurred:

1. Abe, an eccentric, contracted with Ben, a contractor, to have Ben construct a concrete monument of a three-legged dog on Abe's property for \$10,000. Abe designed the planned monument, which is so odd that it will likely decrease Abe's property value by \$10,000. Ben breached the contract by abandoning the work after the foundation for the monument was laid. It will cost Abe \$7,000 to have another contractor complete the work. Abe sued Ben for breach of contract.
2. Carl wrote a very bad novel about vampires, entitled "This Novel Sucks." Dale Publishing Company contracted with Carl to publish the novel and to provide Carl royalties on the number of copies sold. However, before printing a single copy, Dale Publishing Company sent Carl the following email: "We are breaching our contract with you. By the way, your novel does suck." Carl is unable to get his novel published elsewhere. Carl sued Dale Publishing Company for breach of contract.
3. Ed contracted to buy a used car from Frank for \$15,000. Frank breached the contract with Ed and refused to deliver the car as promised. Ed had arrangements to resell the car to Gil, a prospective buyer, for \$20,000. It would have cost Ed \$500 to have readied the car for resale. Ed spent \$200 searching for a suitable replacement vehicle to sell to Gil, but was unable to find one. Ed sued Frank for breach of contract.
4. Hal contracted to sell a store to Ira. After Ira spent \$40,000 to acquire inventory in anticipation of stocking the store, Hal breached the contract and sold the store to someone else. It is impossible to prove what profit (or loss) Ira would have made had the contract been performed. Ira sold the inventory for \$30,000 on the open market and abandoned the dream of owning a store. Ira sued Hal for breach of contract.
5. Julia, a renowned hipster poet, signed an exclusive contract with Ken, a theater owner, to perform poetry readings at Ken's theater for 10 weeks for \$1,000 per week. All shows sold out immediately. The contract contained the following provision: "A party that fails to carry out its obligations as agreed will pay \$10,000 as liquidated damages to the other party." After performing at Ken's theater for 6 weeks, Julia quit performing there and began performing at a theater owned by Ken's competitor. Ken found a suitable replacement for Julia without sustaining any actual losses. Ken sued Julia for breach of contract.
6. Lori contracted to buy a tract of land from Mary for \$2,000,000. Mary had a change of heart and refused to follow through on the contract for sale. Lori wants the sale to proceed to closing. Lori sued Mary for breach of contract.

For each of the above scenarios, what remedy or remedies are likely available for the non-breaching parties? Discuss your answers fully.

Do not discuss the Statute of Frauds

A When a party breaches a contract, the court aims to determine a remedy that is likely to put the non-breaching party in as good a position as they would have been if the contract had been fully performed. The normal measure of damages seeks to determine what the non-breaching party's expectancy would have been at the time of performance. When a party is in breach, the non-breaching party has a duty to mitigate the damages. Generally, monetary damages are awarded. However, in certain cases, specific performance is appropriate where the goods or services are unique and personal.

1. Abe's expectancy is a three-legged dog monument on his property, and he expects to pay \$10,000 for it. Unknown from the facts are whatever payments, if any, Abe made to Ben to lay the foundation. Those payments should be added to the \$7,000 to determine what it actually cost Abe to get the monument. If that amount exceeds \$10,000, that is the damages that Ben must award Abe. The fact that Abe's property value would have declined with the dog statue is irrelevant. The expectancy calculation is limited to the statue that was to be constructed for Abe and its value to him.
2. Dale Publishing would argue that damages for breach of a royalty contract are too speculative to be awarded. For damages to be awarded, they must be reasonably determinable. Here, there is no evidence of any sales of the book (as nobody picked up Carl's contract), so it is impossible to determine the quantity of books to be sold and to calculate Dale's expectancy. Dale may be entitled to keep any advance he received under the contract. Further, specific performance is generally not available in a services contract of this nature.
3. Frank will be liable for \$4,700 for breaching the contract, and perhaps more. The court will award Ed his lost profits from the expected sale of the car. Here, Ed would have been in a position to sell the car for \$20,000 to Gil (he had agreed). Ed would have spent \$15,000 on the car in buying it from Frank, and he would have spent another \$500 in readying the car for sale. Thus, he would have made a \$4,500 profit on the car (\$20,000 - \$15,000 - costs to ready it for resale). Further, Ed suffered consequential damages of \$200 in trying to find a suitable replacement car, but was unsuccessful, and he is entitled to this amount, as well, in his attempt to mitigate. Additionally, Frank will be liable for the consequential damages if Gil sues Ed for breach of their contract.
4. Ira should recover \$10,000 as reliance/incidental damages sustained by his reliance on the contract. Here, Ira purchased \$40,000 worth of inventory in reliance on the contract, but after the breach, he was only able to sell it for \$30,000 on the open market. Hal will unsuccessfully contend that Ira did not reasonably mitigate his loss by selling the inventory at a higher price, but selling the inventory on the open market without a store to sell from is reasonable under the circumstances.
5. Ken will not prevail on the liquidated-damages provision. Courts will not generally enforce a liquidated-damages provision, unless damages are difficult to estimate at the time of contract formation, the damages provided in the liquidated-damages provision are a good-faith and reasonable estimate of the damages at the time of the formation of the agreement, and are not punitive. Here, the damages appear to be punitive because the liquidated damages appear to be the amount of the whole contract value. Additionally, Ken sustained no other losses. Julia may be required to pay Ken for the difference in the contract prices between her and her replacement.
6. Lori will recover the land. Specific performance is a remedy available for unique items. Land is deemed unique, and thus specific performance is available.



QUESTION 7

Four best friends, Alan, Bob, Carl, and Dave agreed to go on a camping/drinking trip together in the woods in Ohio. Alan agreed to drive his car and buy all of the gas. Bob agreed to supply all of the food and beer for everyone on the trip. Carl agreed to bring his tent and four sleeping bags, and Dave agreed to bring his gun and protect everyone.

Alan picked up Bob, Carl, and Dave and drove for several hours before arriving at the mountain campgrounds. Bob unloaded the car and set up the bar and coolers for the food and beer. Carl set up the tent and prepared the sleeping bags, while Dave cleaned and loaded his .44 magnum handgun (the most powerful handgun in the world) and placed it in a holster strapped to his hip.

After dinner and a lot of drinking by all of them, Alan and Bob called it a night and retired to their sleeping bags in the tent. Carl passed out next to the campfire while Dave was telling him stories about his glory days as a high school small-arms marksman. Shortly after Carl fell asleep, a young female hiker (Hiker) walked into camp and told Dave that she was lost in the dark of the woods. Dave took Hiker by the hand and led her over to Alan's vehicle where Dave asked her "to take her clothes off." Noting the holstered handgun on Dave's hip, Hiker took her clothes off and silently submitted to sexual intercourse with Dave.

Alan and Bob were awakened by the sounds of the forest and, upon leaving the tent, they discovered Hiker and Dave engaged in sexual conduct. Alan immediately went over to Dave and Hiker and began fondling Hiker.

Shocked by all of this and, in an effort to stop Alan and Dave, Bob screamed at them, threatening to kill them, and grabbed Dave to pull him away from Hiker. In response, Dave pulled his gun, pointed it toward Bob, and pulled the trigger. The bullet missed Bob and struck Carl instead, killing him as he lay passed out at the campfire. Realizing that Carl was dead, Alan, Bob, and Dave quickly and unceremoniously dumped Carl's body into the trunk of the car. Alan, Bob, and Dave all jumped into the car, and Bob pulled Hiker into the back seat with him. Alan, still groggy from the large amount of alcohol he had consumed earlier, immediately took off at a high rate of speed, driving aimlessly while they argued about what to do with Carl's body. They were quickly apprehended speeding down the highway, still in possession of Dave's .44 and Carl's dead body in the trunk. Hiker told the police she had been sexually molested by Dave and Alan.

An investigation followed and all of the foregoing facts were presented to the prosecuting attorney.

1. What charges can the prosecutor bring against:

- a) Alan?
- b) Bob?
- c) Dave?

2. What defenses suggested by the facts might Alan, Bob, and Dave each raise, and which of the defenses, if any, are likely to be successful?

Explain your answers fully.

A Alan: Alan can be charged with sexual battery. Sexual battery is the offensive touching, sexual in nature, not involving penetration. Alan groped Hiker's breasts. Alan committed sexual battery. Alan can be charged as an accessory to rape. Rape is the sexual penetration by any means, without consent by means of force or threat of force of a woman other than one's spouse. An accessory provides assistance or encouragement to one performing a criminal act. Alan assisted and did not prevent Dave from raping Hiker. Alan can be charged with felony murder. Felony murder is proper when a killing occurs during the commission of burglary, arson, rape, kidnapping, escape, terrorism. Carl was killed during the rape of Hiker. Alan is guilty of felony murder. Alan can be charged with destruction of a corpse. Destruction of a corpse is the outrageous treatment of a human corpse. Alan threw a dead body in a trunk with intent to dump it somewhere. Alan can be charged with kidnapping. Kidnapping is the movement, concealment of another against their will by force or threat of force. Alan kidnapped Hiker when he drove off with her in the car.

Bob: Bob can be charged with desecration of a corpse. See law above. Bob dumped Carl's body in a trunk. Bob can be charged with kidnapping. See law above. Bob grabbed Hiker and placed her in the car before it drove off.

Dave: Dave can be charged with rape. See law above. Dave raped Hiker when he demanded she take off her clothes while possessing a firearm and proceeded to engage in sexual conduct. Dave can be charged with murder. Murder is the killing of a human with premeditation or malice aforethought. Dave intended to shoot Bob, but instead killed Carl. Carl's death was a result of Dave's malice aforethought. Dave can be charged with attempted murder. Attempted murder is the act of taking substantial steps toward committing murder. Dave shot at Bob and missed. This was an attempt at murder.

Dave may raise the defense of consent-to-rape charges. This will fail.

All three may bring the defense of lack of specific intent due to intoxication. All three were voluntarily intoxicated. Voluntary intoxication is not a defense. This defense will fail.

Alan could also be charged with an OVI. An OVI is the operation of a vehicle while having a blood alcohol level of .08. Alan was groggy from the alcohol and driving recklessly. Alan could be charged with OVI or reckless operation of a motor vehicle.



QUESTION 8

Gus and his adult son, Frank, attended the State University football game in October 2012. Gus was a fan of a rival university in an adjacent state while Frank was an alumnus of State University. After the game was won by State University, Gus and Frank engaged in a heated conversation on the way to their car, which resulted in a struggle. Frank stabbed Gus in the abdomen and Gus died several minutes later.

Frank was subsequently charged with voluntary manslaughter under Ohio law. Feeling a tremendous amount of remorse, Frank pleaded guilty to the charge and was incarcerated. During the first week of incarceration in June 2013, Frank committed suicide.

Gus had executed a valid Ohio Will in 2005 (Gus' Will), which provided as follows:

I give my 10 acres of land in Jackson County to my brother, Cleve. I give \$10,000 to my sister, Sarah. I give all of the rest of my property to my son, Frank.

Subsequent to the making of his will, Gus split the parcel of land in Jackson County and sold 5 acres. Gus used some of the sale proceeds to purchase a 2-acre lakefront property in Vinton County. Gus had also given \$5,000 to his sister Sarah in 2009 after Sarah had temporarily lost her job. There was no written documentation accompanying the \$5,000 transfer. At the time of Gus' death, he still owned 5 acres in Jackson County, the 2-acre Vinton County lakefront property, and \$50,000 in a bank account.

Frank had executed a valid Ohio Will in 2010 (Frank's Will), which provided as follows:

I give one-half of my property to my wife, Mary. I give the other one-half of my property to my child, Brent.

Brent was 21 years old at the time of Frank's death. Prior to Frank's incarceration, Frank and Mary became aware that Mary was pregnant and expecting a child in late 2013. Subsequent to Frank's death, Mary delivered a child, Gina, who was born in November 2013.

At the time of Frank's death, Frank owned a bank account worth \$100,000.

Gus is survived by his brother, Cleve, and his sister, Sarah. Frank is survived by his wife Mary, his son Brent, and Gina, born posthumously.

1. Who is entitled to receive the following property in Gus' estate:

- a. Gus' 5-acre tract of land in Jackson County?
- b. Gus' 2-acre lakefront property in Vinton County?
- c. The \$50,000 in his bank account?

2. Who is entitled to take from Frank's estate and in what proportions?

Explain your answers fully.

1) (a) Who is entitled to receive Gus' 5-acre tract of land in Jackson County?

Cleve is entitled to receive Gus' 5-acre tract of land in Jackson County. Ademption by extinction occurs where a will specifically devises property, and that property is not in the testator's estate at death. Partial ademption by extinction is possible. Here, Gus specifically devised the "10 acres of land in Jackson County" to his brother, Cleve. At the time of Gus' death, his estate only contained 5 acres of land in Jackson County. Accordingly, the other 5 acres of the specific devise were adeemed by extinction. But, Cleve should still receive the remaining property that was specifically devised to him.

(b) Who is entitled to receive Gus' 2-acre lakefront property in Vinton County?

Brent, Frank's son, is entitled to the 2-acre lakefront property in Vinton County. Gus' will did not specifically devise the lakefront property in Vinton County, but it did leave a residuary gift to Frank. However, pursuant to Ohio's Slayer Statute, Frank is deemed to have predeceased Gus. Under the Ohio's Slayer Statute, a beneficiary who is responsible for bringing about the death of the decedent is barred from taking any interest under the testator's will. A conviction of murder or voluntary manslaughter in criminal court is sufficient to find the beneficiary responsible. Here, Frank was convicted of the voluntary manslaughter of Gus in criminal Court. Thus, the residuary gift passes as if Frank predeceased Gus. Even though the lakefront property was purchased, in part, with money from the sale of the 5-acres in Jackson County, Cleve is not entitled to take the lakefront property. Frank's daughter, Gina, is not eligible to take any money under Gus' will because she was not in gestation at the time of Gus' death.

(c) Who is entitled to receive the \$50,000 in Gus' bank account?

Sarah is entitled to \$10,000 of the money in Gus' bank account. Gus' will contained a general legacy to his sister, Sarah, in the amount of \$10,000. It should be noted that Gus gave \$5,000 to Sarah in 2009. It is possible that this inter vivos transfer was in satisfaction of the general legacy in Gus' will. At common law, a gift to a child or relative was presumed to be in satisfaction of a general legacy in a testator's will. However, today, an inter vivos transfer will not be deemed a satisfaction unless (1) the testator states such intent in a signed writing, or (2) the donee acknowledges the gift to be in satisfaction in writing. Here, there is nothing to suggest that Gus intended the inter vivos transfer to be in satisfaction of the general legacy to Sarah. Thus, Sarah is entitled to the full \$10,000 general legacy.

Brent, Frank's son, is entitled to the remaining \$40,000 in Gus' bank account. As previously discussed, Frank is deemed to have predeceased Gus. Therefore, Frank's descendant, Brent, would be entitled to the remaining \$40,000. Again, Gina is not eligible to take as she was not in gestation at Gus' death.

2) Who is entitled to take from Frank's estate and in what proportion?

Mary, Frank's wife, is entitled to one-half of Frank's estate. Gina, Frank's daughter, who was in gestation at the time of Frank's death, is a pretermitted child as she was born after the execution of the will and there was no provision in the will for her. Also, there is nothing to suggest intent to disinherit Gina. A pretermitted heir is entitled to a share of the decedent's estate, after taking out the surviving spouse's share, equal to that which she would have taken if the decedent died intestate with no surviving spouse. Here, Gina would be entitled to a one-half share if Frank died with no surviving spouse (two children, split equally). Thus, both Brent and Gina would each be entitled to a one-fourth share of Frank's estate.



QUESTION 9

Creativity, Inc. is an Ohio corporation. Its Articles of Incorporation (Articles) only provide that it may conduct any lawful business and is authorized to issue 1,002 shares of without-par-value voting common stock, all of which have been issued. Inventor and Friend each own 250 shares, and Banker and Accountant each own 251 shares. The shareholders are all of the directors.

On February 1, 2013, the duly elected President personally delivered to all of the shareholders a written notice of a shareholders' meeting to be held on February 3, 2013, and stated that the purpose was to amend Creativity's Articles. All shareholders attended the meeting.

Amendment One provided that any sale, merger, or dissolution of the company would require the approval of 25% of the company's voting shares. All of the shareholders voted in favor of Amendment One.

Amendment Two authorized the issuance of an additional 200 shares of without-par-value voting common stock. Banker, Accountant, and Friend voted 752 shares (75%) in favor, and Inventor voted 250 shares (25%) in opposition. The Amendments were properly filed with the Ohio Secretary of State as required by law and all fees were paid. Banker offered to purchase the entire 200 new shares, which was accepted by Creativity, and the sale was completed.

Newco is an Ohio corporation, and its Articles authorize it to conduct any lawful business and authorize the issuance of 10,000 shares of without-par-value, voting common stock, of which 1,000 shares are issued and outstanding. Capitalist owns 900 shares, and Manufacturer owns 100 shares. The Board of Directors consists of Capitalist, Manufacturer, and Lawyer.

Without consulting Manufacturer or Lawyer or having a Board meeting or shareholders' meeting, Capitalist, as duly elected President of Newco, proposed that Newco acquire Creativity through a merger under which the shareholders of Creativity would receive 1 share of Newco stock for each share of Creativity stock they owned.

Creativity's President contacted all of the shareholders and asked that they meet both as shareholders and directors to consider the merger. Banker, Accountant, and Friend attended the Creativity shareholders' meeting and voted 952 shares (79%) in favor of the merger. Inventor did not attend the meeting and thus, did not vote his 250 shares (21%). Following the Creativity shareholders' meeting, they convened a meeting as directors to consider the merger, and the Board approved the merger with Inventor not attending. Before the meetings, Banker, Accountant, and Friend signed a letter waiving all notices required for the meetings. After the meetings, Inventor sent an email waiving all required notices.

The Merger Agreement was properly signed by duly authorized officers of both corporations and provided that the merger was effective immediately, but no further filings were made with the Ohio Secretary of State.

Seven days after the date of the Merger Agreement, Inventor delivered a written demand for the payment of his Creativity shares. The demand listed the number of shares, his address, and a demand for \$10,000, the fair-market value for his shares. Newco did not respond to the demand and refused to make payment. Thirty days after the date that Inventor delivered the demand to Newco, he commenced a suit against Newco for \$10,000.

One year after the date of the Merger Agreement, Manufacturer filed suit to have the merger set aside.

The following issues must be resolved:

1. Were the actions of the Creativity shareholders at the February 3, 2013 meeting valid?
2. Was the merger between Creativity and Newco valid?
3. Will Inventor be successful in his suit against Newco, and what amount, if any, will he receive?
4. Will Manufacturer be successful in his suit to set aside the merger?

Explain your answers fully.

- A
1. The amendments created on February 3 are invalid. The first issue is that any fundamental corporate change, including a substantive amendment to the Articles of Incorporation, must be voted on by the Board of Directors, and a majority vote must be received in favor of the action. President cannot unilaterally propose a change to the shareholders unless the Board of Directors approves it first, even though the Board of Directors is all of the shareholders. After the Board recommends action, the shareholders must vote 2/3 in favor of the action, or the amount required in the Articles of Incorporation, but not less than a majority.

In addition, in order to call a shareholders' meeting, notice must be given within 7-60 days of the meeting. Here there were just two days. Two-day notice is required for Board of Directors meetings, not shareholder meetings. It is likely that this was intended to be a shareholder meeting to get approval and because the notice stated the purpose of the meeting. However, everyone attended and waived the notice requirement.

Amendment One to the Articles of Incorporation is invalid because it impermissibly limits the amount of shareholder approval required to pass an amendment or approve a fundamental corporate change. As stated above, the default is that a 2/3 vote is required for an action to pass by the shareholders, unless otherwise specified in the Articles of Incorporation. However, this amount cannot be less than a majority. Therefore, the 25% approval is invalid.

Amendment Two is potentially valid looking past all of the issues with the President calling the meeting without the approval of the Board. Normally, a company cannot issue more shares than are authorized in their Articles of Incorporation. The extra 200 shares would be in direct contravention to the Articles of Incorporation. However, because the members are voting to amend the Articles, it is possible that their action to add 200 authorized shares will be valid.

2. In order for a merger to be valid, the Board of Directors for both corporations must approve and recommend, and the shareholders of both corporations must approve, the merger. Capitalist did not call a Board meeting or get approval from the shareholders. Although Capitalist would likely get approval of the shareholders since he has 90% ownership in the company, it is possible that the majority vote would have succeeded in the Board of Directors stage. Because the Board consists of Capitalist, Manufacturer, and Lawyer, two directors could have voted against the merger.

Creativity's President properly contacted the shareholders and directors to discuss and vote on the merger. Inventor was not present at the meeting, but it is possible that he waived notice like the other parties. However, a waiver of notice requires at least a signature. It depends on whether the email communication would be considered adequate.

If Inventor did properly waive notice, the vote by the other shareholders is valid. A quorum in Ohio is comprised of the shareholders present. The shareholders must vote in favor by 2/3 or what is contained in the Articles of Incorporation, but not less than 50 percent. It is likely that his vote is valid even without Inventor.

Additionally, the parties did not file a merger notice with the Secretary of State, which is improper to omit.

3. Inventor is exercising his rights as a dissenter. A person who does not agree with a fundamental corporate change can give written notice to a corporation within 10 days of the vote and is entitled to an appraisal of his shares and fair value. A shareholder can bring suit three months after the demand if he has not received payment.

Inventor properly dissented within 10 days; however, he did not wait the full three months in order to receive his shares. Therefore, he must wait another two months before he can file suit.

4. It is likely that Manufacturer waited too long to challenge the merger and will not succeed.



QUESTION 10

Seller and Buyer are both adult residents of Anytown, Ohio. Seller owned a printing press, which he advertised for sale. Buyer, responding to the ad, approached Seller and stated that he wished to purchase the press for a newspaper business he intended to start. Seller sensed that Buyer was unsophisticated in matters of business, but what Seller did not know was that Buyer was in the process of being declared incompetent by a court in guardianship proceedings commenced by members of his family.

Seller undertook to draft a contract, which contained the following terms:

- The agreed-upon price of \$10,000;
- Seller's representation that the press had all its parts, was in working order, and was suitable for use in printing a newspaper;
- Buyer's promise to give Seller delivery instructions as soon as Buyer was able to lease a building for his newspaper business;
- Seller's promise to store the press until delivery and to deliver it within 90 days of receipt of the delivery instructions;
- Buyer's promise to pay Seller in full within six months of the date of the contract or upon delivery of the press, whichever came first.

Buyer signed the contract as written by Seller with no changes. Three months after the contract was signed and before delivery of the press and any payment by Buyer, Seller died. At about the same time, it was determined in the guardianship proceedings that Buyer had recently become incompetent, and his father (Guardian) was appointed as Buyer's guardian for all purposes.

More than six months after the contract had been signed, the executor of Seller's estate (Executor) contacted Buyer to demand payment and learned for the first time that Buyer was under guardianship. In fact, Buyer had never taken steps to establish a newspaper and lease a building. Executor then contacted Guardian tendering delivery, requesting payment on the contract, and stating that, although Seller always stood ready to deliver the press, Buyer had never given delivery instructions. Guardian learned that, just after Seller died, vandals had broken into the place where Seller was storing the press and damaged it beyond repair. Guardian refused to pay and accept delivery.

Executor sued Guardian, as Buyer's representative, for breach of contract. Guardian asserted the following affirmative defenses:

- (i) the contract terminated upon Seller's death; (ii) Buyer lacked the capacity to contract; (iii) breach of express warranty as to the condition of the press; (iv) the risk of loss rested with Seller; and (v) failure of the implied condition that Buyer's obligation depended on his actually starting a newspaper business.

How should the court rule on each of Guardian's affirmative defenses? Explain your answers fully.

You may assume that Executor and Guardian are proper representatives of the contracting parties and that the UCC applies to this transaction.

Termination Upon Seller's Death

The court should deny Guardian's affirmative defense that the contract terminated upon Seller's death. An offer may be revoked through the offeror's death, but once a contract is made, death does not terminate the contract. The obligations and benefits of the contract pass to Seller's estate. In this case, there was a valid contract between Seller and Buyer at the time of Seller's death, so his death did not terminate the contract. Therefore, the court should deny Guardian's affirmative defense that the contract terminated upon Seller's death.

Buyer Lacked Capacity to Contract

The court should deny Guardian's affirmative defense that Buyer lacked the capacity to contract. A person lacks the capacity to contract if the person is incompetent until after the contract was made. At the time Buyer and Seller negotiated and signed the contract, Buyer had not been declared incompetent, nor did he have a guardian ad litem. Additionally, Seller did not have actual knowledge or reason to know that Buyer was in the process of being declared incompetent. Therefore, Buyer did not lack the capacity to contract at the time the contract was made, so the court should deny Guardian's affirmative defense.

Breach of Express Warranty as to the Condition of the Press

The court should deny Guardian's affirmative defense of breach of express warranty as to the condition of the press. Representations made in a contract apply to the facts as they are at the time the contract is made. Warranties apply to conditions after the making of the contract. The contract contained a representation that the press had all of its parts, was in working order, and was suitable for use in printing a newspaper. However, this was merely a representation and was not a warranty, so it only applied to the condition of the press at the time the contract was made. Therefore, the court should deny Guardian's affirmative defense of breach of express warranty as to the condition of the press.

Risk of Loss Rested with Seller

The court should allow Guardian's affirmative defense that the risk of loss rested with Seller. Parties to a contract have the right to create the terms for which delivery of the contracted good(s) will occur. The risk of loss impliedly remains with Seller when Seller agrees to store the good(s) until delivery is made to Buyer. In this case, the contract contained terms that Seller would store the press until delivery and deliver it within 90 days of receipt of delivery instructions from Buyer. Seller's obligation to deliver the press within 90 days of receipt of delivery instructions was contingent upon receiving Buyer's instructions. Since Buyer never issued delivery instructions and the press was still in Seller's possession when it was vandalized, the risk of loss remained with Seller and the court should allow Guardian's affirmative defense.

Failure of the Implied Condition that Buyer's Obligation Depended on his Actually Starting a Newspaper Business

The court should deny Guardian's affirmative defense that Buyer's obligation depended on his actually starting a newspaper business. Parties have the right to create the terms as they see fit. In this case, there was no implied condition that Buyer's obligation depended on his actually starting a newspaper business. Seller made an express representation that the press was suitable for use in printing a newspaper according to Buyer's stated wishes. It was not necessary that Buyer actually start a newspaper business in order to use the press to print a newspaper. Therefore, the court should deny Guardian's affirmative defense that Buyer's obligation depended on his actually starting a newspaper business.



QUESTION 11

Mother, a 92-year-old woman, owns Blackacre, her home, which is located in Anytown, Ohio. Concerned with her advanced years and failing health, Mother decided to deed Blackacre to her son, Son. In 2009, Mother executed and properly recorded a deed with the following granting language:

Mother, widow and not remarried, Grantor, of Anytown, Ohio, for valuable consideration paid, the receipt of which is acknowledged, grants and forever quitclaims to her son, Son, subject however to the hereinafter stated exception and reservation of a life estate in the Grantor hereof, the following real property situated in Anytown, Ohio and described as “Blackacre” (with proper legal description and address). Grantor hereof accepts and reserves unto Grantor exclusive use and control of the above-described real property during her lifetime.

In 2011, Mother fell and broke her hip requiring surgery and an extended nursing home stay. When Mother was released from the nursing home, Son decided that she could no longer live independently at Blackacre. Son moved Mother into his home, Whiteacre, located next door to Blackacre, so that he could care for her. Although Mother fully recovered physically, she began experiencing memory loss. By the end of 2012, Mother was diagnosed with dementia and Alzheimer’s disease. Her doctor determined that she was no longer mentally capable of making any decisions for herself and that she was in need of a guardian. A guardian was never appointed.

In March 2013, recognizing that Mother could never return to Blackacre, Son, with Mother’s consent, and Purchaser signed a written purchase contract (Contract) whereby Son agreed to sell Blackacre for \$50,000 with the closing on June 15, 2013. Contract provided that Son was to convey “marketable title” to Blackacre in its “present condition.”

Son also decided to sell Whiteacre to Purchaser because Mother’s doctor stated that she would do better in Anycountry, Ohio, a country town. Hence, Son and Purchaser orally agreed that Son would sell Whiteacre, also for \$50,000 with the closing scheduled for June 15, 2013. Son and Purchaser agreed that Purchaser would take Whiteacre “as is” and make all necessary repairs at his own expense.

In April 2013, anticipating acquiring title to Whiteacre, Purchaser, with Son’s consent, expended \$5,000 for repairs at Whiteacre.

Title Co., the title company examining the title records for Blackacre, discovered the reservation of a life estate in Mother, who was still living. The life estate was still valid. Title Co. requires the cancellation of Mother’s life estate before it will insure title on Blackacre.

Additionally, in May, through no fault of Son, a fire occurred in the Blackacre kitchen and resulted in damage to the ceiling and ornate wood cabinetry. The cost of repair is \$3,000. Son did not make the repairs.

At closing, Purchaser refused to close on Blackacre, asserting that Son had breached Contract by failing to produce marketable title. Also, Purchaser stated that even if marketable title is delivered, Son had to deduct \$3,000.00, the cost to repair the kitchen, from the purchase price.

Purchaser tendered the purchase price for Whiteacre, but Son refused to sell Whiteacre because he needed the proceeds from the sale of Whiteacre and Blackacre to move to Anycountry, Ohio.

Son sued Purchaser for specific performance for the sale of Blackacre, asserting in the complaint (i) that Mother’s life estate does not defeat marketable title and (ii) in any event, he does not bear the risk of the loss resulting from the kitchen fire.

Purchaser counterclaimed for specific performance for the sale of Whiteacre, asserting that he is entitled to specific performance notwithstanding that the purchase and sale contract was oral

1. How should the court rule on the assertions made by Son in his complaint regarding marketable title and risk of loss?
2. How should the court rule on the assertion made in Purchaser's counterclaim regarding the effect of the oral contract?

Explain your answers fully.

1. When a party contracts to sell a property interest, the seller must provide a marketable title. A marketable title is free from encumbrances and issues so that a reasonable person would purchase the property. Mortgages and easements usually do not make the property unmarketable; so long as the seller assures that the mortgage will be extinguished with the sale proceeds. Here, there are no such issues to deal with, except Mother's life estate in the property.

The deed conveying the interest to Son reserved a life estate, which allows Mother exclusive use and control of Blackacre during her lifetime. Son has a vested remainder in fee simple absolute after the death of his mother. A vested remainder is an interest where the devisees are ascertainable and there is no condition precedent. Mother's death does not constitute a condition precedent; therefore the remainder is vested. A remainder holder can transfer his property interest free from restriction on alienation, but he can only deliver what interest he has in the property. Son has a vested remainder, but cannot transfer the fee simple as he was attempting to, because his mother still has the life estate.

An interesting issue arises with Mother's incapacity subsequent to the deeding of the property to Son. Because Mother is incompetent and does not have a guardian, she cannot remove her life estate from the deed, even though it would be beneficial to her and Son, who is taking care of her. Unfortunately, it seems likely that a court would consider the failure to deliver a marketable title, free of the future interest, to constitute a material breach of the contract, and the buyer would not have to perform.

With regard to the risk of loss, normally due to the doctrine of equitable conversion, the buyer would have equitable title and, therefore, the risk of loss upon signing the contract. Buyer would receive legal title upon closing. However, equitable conversion applies to contracts that are valid. If it is found that the contract was not valid, buyer would not have taken equitable title at signing because of the breach of warranty. Further, Son warranted in the contract that Blackacre would be provided in its "present condition." It is possible that a court would consider the seller's language to constitute a waiver of the default equitable conversion rules, therefore, accepting risk.

2. The statute of frauds requires that any contract for the purchase of a property interest must be in writing, signed by the party to be charged, with the essential aspects of the contract included. In a buy- and-sell contract for land, the essential aspects are the names and addresses of the parties, a statement of intent to convey an interest, and an adequate description of the land. However, the contract for the purchase of Whiteacre was oral. On the face of these facts, the contract would then be unenforceable as contrary to the statute of frauds.

There is one exception to the writing requirement with regard to the purchase of property interests. If a buyer can show that he paid in full or in part of the purchase price, he made substantial improvements on the land, or he openly possesses the property. The buyer must show two of these three requirements. Here, Purchaser made \$5,000 improvements on the land, which may be considered substantial considering the purchase price of the property was \$50,000. However, it does not appear that Purchaser satisfied the other requirements. Although Son was prepared to tender the purchase price of the sale and was prepared to possess the property, he was not given the opportunity. This rule operates to protect a buyer who has gone through execution of the contract, not just formation of the contract. Therefore, it is likely that the oral contract will be unenforceable due to the statute of frauds.



QUESTION 12

Sarah, an Ohio lawyer and sole practitioner, shares offices with other sole practitioners. She has recently agreed to represent several clients and is preparing engagement letters setting forth her fee arrangements in the following matters.

1. To defend Ace, a long-time client whom she has defended in a variety of similar matters, in a lawsuit filed against him by a dissatisfied customer;
2. To defend Betty, a college student charged in municipal court with petty theft for shoplifting merchandise from a local store. Betty's parents accompanied her to the meeting in Sarah's office and promised to advance, within thirty days, a non-refundable lump sum flat fee to cover the legal fees for the representation of their daughter;
3. To pursue a recovery for Cal, a new client, who suffered bodily injuries when the motor vehicle he was driving was struck from behind by another vehicle. Sarah agreed to represent Cal on a contingent fee basis;
4. To associate as co-counsel with Mentor, who shares offices with Sarah. The attorneys have agreed that Mentor and Sarah will divide the legal fees paid by Donna equally to represent Donna in a domestic relations matter;
5. To associate as co-counsel with Veteran, a member of a boutique medical malpractice law firm, to represent Ed and Fay. Ed and Fay had previously consulted Sarah about filing a lawsuit against a local hospital and several physicians on behalf of them and their minor child who was severely injured at birth by alleged medical negligence. Veteran and Sarah have agreed to an even split of whatever contingent fee is approved by the probate court.

Sarah wants to be sure she is in compliance with both the requirements and the recommendations contained in the Ohio Rules of Professional Conduct relating to fee arrangements.

Discussing each of Sarah's proposed letters separately, what statements and disclosures relating to fee arrangements should she include in each? Explain your answers fully.

You may assume that none of the proposed fee arrangements are illegal or excessive.

Letter to Ace:

Sarah must disclose the basis of her fee to Ace. Attorneys are only permitted to charge reasonable fees to clients. Reasonableness is a case-specific inquiry, which considers the nature and complexity of the legal issue, the opportunity cost of the lawyer's time, the amount of time the lawyer will dedicate to the case, whether the fee is contingent, the customary fee charged for a similar case in the locality and the experience of the lawyer. Although it is not necessary for Sarah to address all of these factors, she should specifically state her hourly rate as a baseline indication of Ace's monetary obligation.

Letter to Betty:

Sarah must inform Betty that Betty is the Client and that her parent's payment will have no effect or influence on the scope of Sarah's representation in this matter. The Ohio Rules of Professional Conduct also require that Betty provide informed written consent allowing Sarah to accept payment from her parents. Informed consent entails a lawyer's explanation of the risks and advantages of a particular course of legal theory, options for the client, and explanation of the material facts and circumstances relevant to the case. Thus, Sarah must include a pre-typed document outlining these matters, which Betty is required to sign and return to Sarah prior to representation.

Letter to Cal:

Sarah must obtain Cal's written informed consent in order to accept the contingency arrangement. Further, Sarah must also detail how the fee is calculated (what percentage she will take if a successful verdict is rendered) and specify what expenses (if any) Cal is responsible for and whether these expenses will be subtracted from a settlement prior to computation of Sarah's percentage. Although the Rules provide for some flexibility, 33% is customary among lawyers. Sarah should include an informed consent letter for Cal to sign.

Letter to Associate and Mentor:

The general rule is that fee-splitting is prohibited among lawyers. There is an exception for lawyers in separate practice who provide joint representation for the client, as long as the division of the fee is proportionate to the amount of representation each lawyer provides. Such arrangements also require that the jointly represented client provide written informed consent to the fee-splitting arrangement. Sarah must articulate her hourly rate and indicate that Mentor and Sarah are separate entities, rather than members of the same firm. Therefore, Sarah must provide a separate engagement letter to Donna composed on her own office letterhead. She must also express that the Rules prohibit her from engaging in a contingency fee arrangement because Donna's legal issue involves a domestic relations matter, unless it is simply collection of arrears in child support payments.

Letter to Associate and Veteran:

Sarah must inform Veteran that she is a separate entity from the Boutique firm and that she will provide joint representation. A lawyer is required to provide competent representation. Competence requires the legal skill, knowledge, thoroughness, and preparation required for zealous advocacy. Given the complexity of the matter, it appears that Sarah has contracted with the Boutique firm in order to ensure that she provides Ed and Fay with competent representation. However, prior to engaging in the proposed fee-splitting arrangement, Sarah must gain both clients' informed consent. Since this case involves a contingency fee, Sarah must inform all parties of the applicable percentage the attorneys are entitled to upon achieving a beneficial verdict, whether that percentage applies before or after the split between the attorneys, whether the expenses of the care are attributable to clients. Further, Sarah must also explain whether the percentage is computed before or after expenses are accounted for. Informed consent is required.



MPT 1

IN RE ROWAN

In this performance test item, examinees are associates at a law firm representing William Rowan, a British citizen, in an immigration matter. Rowan moved to the United States with his wife, a U.S. citizen, and became a conditional permanent resident of the United States. The couple recently divorced, and Rowan's ex-wife, Sarah Cole, actively opposes his continued residency in the United States. Acting pro se, Rowan filed a Petition to Remove Conditions on Residence; the immigration officer denied the petition, and Rowan seeks the law firm's assistance. Examinees' task is to draft a brief for the upcoming hearing before an immigration judge, arguing that Rowan married Cole in good faith and not solely to obtain residency, that the denial of Rowan's petition was not supported by substantial evidence, and that in fact, the totality of the evidence supports granting the petition. The file contains the instructional memorandum, guidelines for drafting persuasive briefs, a memorandum summarizing the client interview, an affidavit by Sarah Cole, and a memorandum describing evidence to be submitted at the immigration hearing. The Library contains selected federal statutes and regulations on the requirements for conditional residency and two federal Court of Appeals cases addressing the basic process and standards for seeking a waiver of the joint filing requirement, as well as the substantial evidence standard of review.

I. Caption

[omitted]

II. Statement of Facts

[omitted]

III. Legal Argument

An alien spouse shall be considered, at the time of obtaining the status of an alien lawfully admitted for permanent residence, “to have obtained such status on a conditional basis” 8 USC 1186a(a)(1). In order to remove the petition, the alien spouse, along with the petitioning spouse (non-alien spouse) must submit a petition requesting the removal of such conditional basis. 8 USC 1186a(c)(1). If an alien no longer is married to the petitioning spouse, then the alien spouse must petition for a hardship waiver. 8 USC 1186(c)(4). A hardship waiver will be granted if the alien demonstrates that the qualifying marriage was entered into in good faith by the alien spouse and the qualifying marriage has been terminated, if the alien was not at fault for the failure to file a joint petition. 8 USC 1186a(c)(4)(B).

A conditional resident alien seeking a hardship waiver may file a Petition to Remove Conditions on Residence. 8 CFR 216.5(a)

(1). The alien must request a waiver, be not at fault for failing to meet the filing requirement, and be able to establish that the marriage was entered into in good faith by the conditional resident alien, although the marriage was ended by an event other than death. 8CFR 216.5(a)(1)(ii). In considering whether good faith existed, the director/ adjudicator may consider evidence relating to the amount of commitment by both parties to the marital relationship. 8CFR 216.5(e). Evidence of “amount of commitment” may include documentation regarding financial assets and liabilities of the two individuals that were combined, documentation regarding the length of cohabitation after marriage and after the alien obtained permanent residence, birth certificates of any children and other evidence deemed pertinent. 8 CFR 216.5(e)(2).

a. THE IMMIGRATION OFFICER’S DETERMINATION THAT ROWAN DID NOT MARRY COLE IN GOOD FAITH IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND OUGHT TO BE REVERSED.

The immigration officer’s rejection of Rowan’s claim is not support by substantial evidence. The substantial evidence standard governs review of hardship waivers and in order to affirm the lower court’s decision, there must be such relevant evidence as reasonable minds might accept as adequate to support it. Connor v. Chertoff. In the 15th Circuit, the alien spouse must prove he/she entered into a good faith marriage with the resident spouse, intending to establish a life with the spouse at the time of marriage. Hua v. Napolitano. Here, the evidence clearly shows that Rowan entered into the marriage in good faith under 15th Circuit law.

i. Documentary evidence demonstrates Rowan and Cole’s marriage was in good faith.

Documentation and other evidence, as required by 8CFR 216.5, demonstrate Rowan entered into the marriage in good faith and out of love for his wife. Documentation evidencing a joint life, as well as behavior in the marriage, provides evidence of good faith. Hua. Connor. For example, when the court in Hua addressed documentary evidence, it held joint enrollment in health insurance policy, tax returns, bank accounts, automobile financing agreements, and credit cards as evidence of a joint life and good-faith marriage. Conversely, in Connor, the court took issue with the lack of documentary evidence. The court

A held Connor provided only limited documentary evidence of the short marriage, as unexplained inconsistencies existed in the documents provided, there were no signed leases, nor any indication of any filed applications for life insurance or automobile title. Based on such lack of reliable documentary evidence, the court dismissed Connor’s claim.

Here, Rowan’s claim is much closer to a Hua claim than a Connor claim and, therefore, the court ought to hold the marriage as entered into in good faith. Whereas Connor did not provide any leases, Rowan can provide a two-year lease on a home in Franklin City – signed by both Rowan and Cole. Investigation results memo. Further, although Connor could not provide indications of filed applications for loans for an automobile title, Rowan can provide a promissory note for \$20,000 to purchase a new car. The note designates Cole as the debtor and Rowan as the co-signor. Investigation results memo. On the other hand, similar to Hua, Rowan can show the existence of joint bank accounts in both his and Cole’s name. Moreover, like Hua, Rowan can also produce joint income tax returns filed in both years of the Rowan/ Cole marriage. Further, Rowan and Cole named one another as next of kin, had health insurance together, and shared living expenses. Interview with Rowan. Based on the forgoing evidence, Rowan’s claims, from a documentary evidence standpoint, are considerably more like Hua than Connor. The court ought to follow the 15th Circuit’s ruling in Hua and hold the Rowan marriage as entered into in good faith.

ii. Other evidence, such as behavioral evidence, indicates the Rowan and Cole marriage was in good faith.

Additionally, Rowan’s argument is strengthened by other evidence of a strong commitment, such as behavioral evidence and evidence provided by others. In Hua, the court held the marriage was in good faith because of several actions bearing indicia of a married, committed couple. Rowan has similar evidence regarding commitment and intent to establish a life together. For example, Rowan fell in love with Cole at first sight and had to be persistent before Cole would even date him. They lived for about 6 months together in Britain. Interview with Rowan. They had extensive conversations about professional careers and especially about Cole moving to Olympia. Cole interview. Further, George Miller, a friend of Rowan, had observed them together, can testify they self-identified as husband and wife, and that he heard them discussing leases, purchases, borrowing, and buying real estate. Investigation memo. Such evidence contrasts with that presented in Connor, in which no friends or family could attest to the marital relationship. Moreover, Anna Sperling, a friend and coworker of Rowan, spent time with Rowan and Cole separately and as a couple and indicated Cole felt gratitude toward Rowan for moving to the United States without a job and that Cole was convinced Rowan “did it for love.” Investigation memo.

Once again, Rowan’s case is much more like Hua than Connor and his petition ought to be granted. While Rowan did not have extensive courtship like that in Hua, Rowan had a significantly longer cohabitation period after marriage than Hua. Moreover, Rowan has significantly more testimony from friends and family concerning the marital relationship than present in either Hua or Connor. The good-faith analysis is based on the entire record, Hua, and in examining the entire record, Rowan’s documentary and behavioral evidence of good faith is strong enough to prevail on the good-faith claim.

iii. There was not substantial evidence, based on the Cole affidavit, to deny the petition because the affidavit is self-serving and contradicted by other evidence.

When considering the evidence as a whole, the Cole affidavit is in contradiction with other available evidence and suggests the affidavit was primarily self-serving. As a result, the court’s using the Cole affidavit as the basis of its ruling likely fails the substantial-evidence test outlined in Connor. For example, Cole asserts in her affidavit that Rowan made contacts with the Franklin library long before he proposed.

A First, a marriage can be legitimate even if securing an immigration benefit is a factor in the decision to marry. Hua. However, more importantly, Rowan asserts he did not do so until after they were married and after Cole had suggested they move to the United States. Rowan interview. Cole also cites in her affidavit that he has carefully avoided any long-term commitments, including children, property ownership, and similar obligations as support for her claim that the marriage was fraudulent. However, documentary evidence indicates the existence of a lease, promissory note (for a car), joint bank account, etc. Moreover, the testimony of George Miller indicates he overheard Rowan and Cole speaking about such long-term commitments as purchasing real estate and cars as part of the marriage. Investigation memo. Finally, Cole indicates she believes the marriage was a sham, but back when the marriage was going well, Cole told Anna Sperling that she was grateful for Rowan moving to the states and believes he did it out of love. Investigation memo. Cole's tune changed after

Rowan would not leave his job to follow her to Olympia. Cole's own affidavit bears out that she was "shocked and angered" because she "fully expected him to follow" within a few weeks. Rowan's testimony indicates he wanted to follow her, but he believed he was always going to have to subordinate his career to hers. Rowan testimony. Rowan wanted her to take a local position so he could continue. Rowan testimony. Not wanting to leave his position and always follow her around is a legitimate reason for separation – not because he already had his citizenship so he didn't need her anymore. Rowan also had to deal with the frequent absences of his wife, which only stood to get worse as she took on prestigious jobs.

Rowan's case for a good-faith marriage is also validated by the fact Cole filed for divorce and was the one who threatened to divorce Rowan if he did not follow her to Olympia – a fact validated by both Rowan and Cole's testimony. In Hua, the court discussed how Hua's ex-husband had been the one to file for divorce, not Hua, and strongly considered such evidence as evidence of a good-faith intention by Hua. Here, Rowan did not want the divorce. Cole brought it up. Cole filed for divorce. While Rowan did not contest it, he did not actively take any steps to encourage it. Rowan, like Hua, did not want to break up the marriage because he was committed to it as a lasting and true marriage, not as the fraudulent marriage Cole attempts to depict in her affidavit.

In light of the forgoing evidence, it is clear the findings by the lower court failed to meet the substantial evidence burden because there is enough uncontroverted evidence in Rowan's favor so that reasonable minds could find that there was a good-faith marriage. The ruling of the lower court should be overturned and the petition ought to be granted.

MPT 2

IN RE PETERSON ENGINEERING CONSULTANTS

Examinees' law firm represents Peterson Engineering Consultants (PEC), a privately held engineering consulting firm. The president of PEC has some concerns about the company's potential liability arising from employees' use of the Internet and other technology. The task for examinees is to draft a memorandum to the supervising attorney to be used in advising PEC's president regarding the company's policies on employee use of technology, which have not been updated since 2003. Specifically, examinees are asked to address what revisions should be made to PEC's employee manual to clarify ownership and monitoring of technology, to ensure that the company's technology is used only for business purposes, and to make the policies reflected in the manual effective and enforceable. The File contains the instructional memorandum from the supervising attorney, excerpts from the current employee manual, and a summary of a survey about technology in the workplace. The Library contains three cases from the Franklin Court of Appeal.

TO: Brenda Brown
FROM: Applicant
DATE: Feb. 25, 2014
RE: Peterson Engineering Consultants

In response to our client's concerns relating to its employees use of technology, I have reviewed their employee manual, results of the 2013 survey concerning computer use at work, the three relevant cases, and the president's stated goals. I find especially problematic PEC's permissive use of their equipment for limited personal purposes. Below I will explain the legal bases under which PEC could be held liable for its employees use or misuse of computer technology and I will recommend changes to the employee manual to minimize liability exposure.

I. Theories of Liability

An employer can be held vicariously liable for an employee's action by ratification and by respondeat superior. The Franklin Court of Appeals discussed in *Fines v. Heartland* the elements necessary for vicarious liability. Additionally, an employer can be held directly liable in tort to their employee for invasion of privacy or wrongful termination if the company's policy regarding computer use is unclear and the employee has an expectation of privacy in equipment. *Hogan v. East Shore School* and *Lucas v. Sumner Group*.

A. Ratification

An employer may be liable for an employee's willful and malicious actions under principle of ratification. An employee's actions may be ratified after the fact by the employer's voluntary election to adopt the employee's conduct as its own. This ratification can be evidenced by the company's failure to discharge an employee after knowledge of his or her wrongful acts. In *Fines*, an employee had sent defamatory and sexually harassing emails to a coworker and later sent a defamatory email regarding this employee to other coworkers. The employer immediately began an investigation after learning of the complaint and, within four days, discharged the offending employee. The court held that the employer did not ratify the employee's behavior by this response; however, the court noted that any delay in discipline or discharge can also be seen as ratification. *Fines*.

B. Respondeat Superior

An employer may be vicariously liable for the acts of its employee under the traditional theory of respondeat superior. This liability may extend to willful and malicious torts if the tortious act comes within the scope of the employment – even if it contravenes an express company rule. *Fines*. Again, in *Fines*, the employer was not found vicariously liable. However, the employer relied on its statement in its employee handbook that office computers were to be used for business only and any use of office equipment for personal purposes constituted misconduct for which the employee would be disciplined. This provision put employees on notice that certain behavior was not only outside of the scope of their employment, but also an offense that could be disciplined.

C. Invasion of Privacy

The Franklin Court of Appeals addressed an employee's tort claim of invasion of privacy against his employer in *Hogan v. East Shore School*. In this case, the court found the employee had no reasonable expectation of privacy in his employer-owned computer. The court referred to the clearly worded policy in the school's employee manual stating that the employees may not use the computer for personal purposes at any time and that the school reserves

A the right to monitor use of such equipment at any time. If the employer permits personal use of company equipment, the courts may find an expectation of privacy by an employee in this equipment. Thus, limiting the employer's ability to monitor use and make it more difficult to discipline employees for misuse.

D. Wrongful Termination

When an employee is terminated for misuse of computer technology, the employer must be as unambiguous as possible in stating what behavior is prohibited. In *Lucas v. Sumner Group*, the Franklin Court of Appeals reversed and remanded a grant of summary judgment in favor of the employer on the employee's wrongful termination claim. At issue were both the language of the policy and the enforcement of that policy. The court referred to their prior decision in *Catt v. Unemployment* where they held an employee manual's language was unclear. The court further recommended use of the words "must" and "must not" as opposed to "should" and "shall" when drafting documents. The employee also claimed her employer abandoned its policy regarding computer use since it was common practice for the employees to engage in personal use of email and the Internet. The court held that these issues were a matter of fact to be determined at trial and remanded the case for proceedings consistent with their opinion.

II. Recommendations to Minimize Liability Exposure

After reviewing the holdings in the above cases and advice of the Franklin Court of Appeals, I recommend the following changes in the employee manual.

A. Clarify the Ownership of the Equipment

PEC should state clearly in its manual that they will provide Internet-enabled equipment, such as phones, tablets, and computers to employees for PEC business-related use only. The equipment is the property of PEC, to be used for PEC business only, and must be returned if the employee leaves the employ of PEC, whether voluntarily or involuntarily.

B. Clarify the Use of the Equipment

PEC should have a clear and unambiguous use policy stating any personal use of company equipment is strictly prohibited. It should specifically state that while emails and texts are effective means for communication with colleagues and clients, they are to be utilized for PEC-related business communications only. I also recommend language indicating that any personal use of equipment is prohibited, considered outside the scope of their employment, and subjects the employees to discipline and possible discharge. PEC may reiterate its Internet prohibitions listed under Computer Use, but must state that this list is not exhaustive and all non PEC-business use is prohibited. I recommend taking the court's advice and using the words "must" and "must not" to eliminate any confusion of meaning. The manual may suggest an employee carry a personal phone in addition to the company phone for any necessary personal use.

C. Monitoring and Enforcement

I recommend PEC include a separate section under their technology policy specifically addressing monitoring since this is critical to enforcement. The language should again reiterate that all equipment issued to the employee is owned by PEC, to be used for PEC business purposes only. Specifically state PEC reserves the right to monitor use of this equipment either by PEC employees or an outside agency contracted by PEC to provide monitoring. Monitoring will also include deleted computer files and searches under the employee's confidential password. Monitoring should be done on a regular basis to avoid lost productivity and the exposure to liability. Any violations of this policy must be immediately addressed and the employee disciplined. It would also be helpful to avoid liability by reissuing the policy annually.

I make these recommendations with the president's goals in mind, along with liability exposure. Considering the PEC's current policy, the new policy prohibiting all personal use of company equipment may seem harsh and be met with some resistance from the employees. However, the president must keep in mind that PEC's exposure to liability from the current policy is very high and detrimental to the company. These revisions provide the greatest possible protection for the company while still allowing for the use of current technology in conducting PEC business.

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