

THE SUPREME COURT *of* OHIO

July 2011 Ohio Bar Examination Essay Questions & Selected Answers Multistate Performance Test Summaries & Selected Answers



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

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JULY 2011 OHIO BAR EXAMINATION

Essay Questions & Selected Answers

Multistate Performance Test Summaries & Selected Answers



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OHIO BAR EXAMINATION

July 2011

Essay Questions and Selected Answers

MPT Summaries and Selected Answers

This booklet is a compilation of the 12 essay questions from the July 2011 Ohio Bar Examination, along with National Conference of Bar Examiners (NCBE's) summaries of the two Multistate Performance Test (MPT) items given on the exam. This booklet also contains actual applicant answers to the essay and MPT questions.

The essay and MPT answers published in this booklet merely illustrate above-average performance by their authors and, therefore, are not necessarily complete or correct in every respect.

They were written by applicants who passed the exam and consented to the publication of their answers. See Gov. Bar R. I(5)(C). The answers selected for publication were transcribed as written by the applicants. To facilitate review of the answers, the bar examiners may have made minor changes in spelling, punctuation and grammar to some of the answers.

The 12 essay questions on the July 2011 exam were 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 two MPT items included on the exam were prepared by the NCBE. Applicants were given 90 minutes to answer each MPT item.

Copies of the complete July 2011 MPTs and their corresponding point sheets are available from NCBE. Check NCBE's website at www.ncbex.org for information about ordering.



QUESTION 1

Danielle had been interviewing for a position as a kindergarten teacher in Ruraltown, Ohio, and recently learned that the school board has narrowed the field of applicants to Danielle and Paige, one of Danielle's classmates from State University. Danielle remembered Paige from their freshman year because Paige, who commuted from home, would often study late in the library and spend the night in the dorm room of one of her classmates. After searching her computer, Danielle was able to find the photo she took when Paige once slept in a beanbag cushion on the floor of Danielle's dorm room. The photo showed Paige scantily clad and appearing to be drunk and passed out on the floor. Danielle knew that Paige never drank alcohol, but believing the photo could be used to her advantage, Danielle decided to post the photo on her SocialNet homepage. SocialNet is an Internet social networking site.

Danielle posted the photo so it could be seen by her 842 SocialNet "buddies," acquaintances to whom she had granted access to all of the information she posted on the site. Danielle added the following caption to the photo:

"Most of you remember Paige and her reputation in college. She never knew I took this photo. Can you believe she's a finalist for a kindergarten teaching position at Ruraltown Elementary School? Share this with everyone you know who cares about young children."

When Buddy, one of Danielle's 842 SocialNet "buddies," saw Danielle's post, he immediately became outraged that an apparent drunk might be teaching his nieces and nephews at Ruraltown Elementary School. Buddy re-posted the picture of Paige and Danielle's caption about Paige for all 550 of his SocialNet "buddies" to see, many of whom were not "buddies" of Danielle. He added the comment, "Share this with everyone you know. This woman should not teach Ruraltown's kids. She's a DRUNK!"

Danielle's original post and Buddy's later post were eventually seen by most of the residents of Ruraltown, including the members of the school board. As a result, the school board selected Danielle for the teaching position, even though Paige was the more qualified candidate.

Paige is planning to file a civil tort action against Danielle and Buddy. What causes of action can Paige state against each of them? Explain fully.

Do not discuss defenses.

Paige v. Danielle — Paige would have a claim for invasion of privacy false light and defamation against Danielle.

The tort of invasion of privacy by portraying someone in a false light involves the intentional portrayal of facts that would be highly offensive to a reasonable person, as they portray the person in a false light. Here, because Paige was not drunk in the picture and in fact never drank alcohol, the image portrayed her in a false light. It was also posted by Danielle with the intent to portray Paige in a false light as a drunk, as evidenced by the statement regarding Paige's "reputation" in college.

Paige could also sue for invasion of privacy by public disclosure of private facts or intrusion. These offenses involve the portrayal of private facts or intrusion in a private area that would be highly offensive to a reasonable person. The publication of the photo portrayed Paige while she was asleep, scantily clad, in her dorm room. Thus, this would be an intrusion and publication of highly private facts that would be highly offensive to a reasonable person.

Defamation consists of a defamatory statement impugning the plaintiff's reputation, reasonably regarding the plaintiff, published to a third party, and resulting in damages. In Ohio, the defamatory statement must at least be made with negligence regarding the falsity of the statement. Libel is a printed defamatory statement. Under the 1st Amendment, defamation involving a public figure or official, however, requires actual malice or the knowing or reckless disregard involving the falsity of the statement.

Here, Paige would have a claim against Danielle for defamation by publishing libel and she would likely prevail. Danielle posted a picture along with the statement about Paige's reputation in college with the intent to ruin her chances of receiving the position of kindergarten teacher by negatively portraying her as a drunk. She wrote the statement directly alluding to Paige's bad reputation as a drunk in college. She published it to 842 of her "buddies" on SocialNet. Although Paige does not appear to be a public figure, Danielle's actions amount to actual malice because she published the photo knowing that Paige did not have a bad reputation in college and with the purpose of damaging her chances for receiving the kindergarten position. Thus, Paige has a claim for defamation and the actual malice would allow damages to be presumed and possible for Paige to receive punitive damages. Because Danielle knew these claims to be false, she would receive no qualified immunity for acting with actual malice.

Finally, Paige could sue for the intentional interference with a business relationship. This is the tortious interference with an economic expectancy. Although there was no contract entered into yet between Paige and the school, she had an expectancy to be considered one of the finalists, and could attempt to claim that Danielle interfered with her interest as a finalist for the kindergarten position.

Paige v. Buddy — Buddy would also be liable for defamation. Here, Buddy rebroadcasted the post to additional third parties with his SocialNet friends regarding Paige's reputation. Although he did not know it was false, he acted negligently regarding the truth, as he did not investigate further. With such a serious allegation regarding a teacher, an ordinary, prudent person would ask Danielle where she got her information. He failed to do this and breached a duty of ordinary care, negligently broadcasting the post and picture on SocialNet. Thus, he would be liable for defamation in Ohio, if Paige can prove actual damages. He could claim qualified immunity because he was acting in the public interest out of his concern regarding Paige, whom he thought was a drunk, becoming a kindergarten teacher. This may be successful for him.



QUESTION 2

The following events occurred in Anytown, Ohio:

- 1. Owen v. Carl:** Carl entered into a valid written contract with Owen to build a house for Owen. The contract specified that the house must be internally wired (i.e., hidden behind the walls) with fiber optic cable for Owen's phone, Internet and video needs. Upon completing work on the house, Carl realized he had unwittingly substituted coaxial cable for fiber optic cable. For Owen's needs, coaxial cable is substantially the same quality as fiber optic cable and performs substantially the same as fiber optic cable. When Carl informed Owen of this error, Owen objected. They were unable to resolve the issue to Owen's satisfaction, so Owen sued Carl for specific performance to require him to remove the coaxial cable and replace it with fiber optic cable or, in the alternative, for money damages for the cost of replacement.
- 2. Betty v. Sam:** Betty, who was moving to Ohio from a distant state, entered into a valid written contract with Sam for the purchase of Sam's home. The closing date of the deal was April 15. However, under the terms of the contract, Betty had the right to move her household goods onto the property and store them in the basement on March 31. The contract also contained a liquidated damages clause that required a payment of \$100 to Betty for each day after March 31 that the basement was not available to accommodate Betty's goods. On March 31, the basement was not available to Betty, so she was required to rent a storage locker to store her household goods at a cost of \$150 per day. On April 15, Sam informed Betty that he had decided not to go through with the contract to sell the house. Betty sued Sam for specific performance, for liquidated damages, and for the difference between the liquidated damages and the daily cost of the storage locker.
- 3. Fan v. Broker:** Before the pro football season began, Sports Fan (Fan) entered into a valid written contract with Ticket Broker Inc. (Broker) to purchase four tickets to the Super Bowl for \$1,000 each. The contract required that the tickets be located in the Premium Reserved Seating section and delivered to and paid for by Fan one week before the date of the Super Bowl game. Fan, in turn, contracted to sell three of the tickets to other individuals for \$1,100 each. Fan booked a non-refundable flight to Super Bowl City and a non-refundable hotel room deposit for the two days he intended to be in Super Bowl City for the game.

Two teams, the Protons and the Neutrons, made it through the regular season and playoffs undefeated and were to play each other in the Super Bowl. The match-up was universally proclaimed as the greatest sports match-up in history. Ticket prices for the game skyrocketed. Broker repudiated the contract with Fan and sold the four Premium Reserved Seating tickets to a third party for \$2,500 each. Fan had an opportunity to purchase four tickets in the General Admission section for \$1,000 each but declined to do so and, instead, stayed home to watch the game on TV. Fan sued Broker for breach of contract.

1. How would the Court be likely to rule on Owen's claims against Carl for specific performance and damages?
2. How would the Court be likely to rule on Betty's claims against Sam for specific performance and damages?
3. What is the measure of damages, if any, that Fan can recover against Broker?

Explain your answers fully.

1. Owen v. Carl

The Court is likely to rule for damages for Owen, but only nominal damages. Carl breached a valid contract with Owen. A valid contract is made of offer, acceptance and consideration. Since this was a construction contract, the remedy is usually specific performance, rather than money damages to repair the breach. If the breach is minor, or not material to the contract, specific performance is not an available remedy, but damages may be awarded. The question is if the coaxial cable for the fiber optic cable constitutes a material breach of the contract. For Owen's needs, the coaxial cable is substantially the same quality, and performs substantially the same. Here, there was a breach, but not a material breach. Carl made a mistake which caused a breach, but the performance of the two cables would be the same. The court is likely to enforce some measure of monetary damages for the breach, but the amount will be nominal, or the cost difference between the cables.

The Court is likely to rule for Carl on specific performance. Specific performance is required for a breach of contract as a remedy when there is a real estate contract, or something that can easily be fixed. Specific performance is not required when the breach has been immaterial, or would cause an unjust enrichment to the aggrieved party, or a substantial burden to the party who breached. The breach was not a material breach because the performance of the cables was substantially the same. Further, Carl would be substantially burdened by a remedy of specific performance. The wires were all to be hidden behind walls. Assuming that Carl noticed the difference after the walls were in place, the cost of tearing down the walls, uninstalling all of the wires, installing the proper cable, and rebuilding the walls would be a substantial and inappropriate measure of damage against Carl. The court is likely to rule specific performance is not required.

2. Betty v. Sam

The Court is likely to rule for Betty for specific performance for the sale of the house. Specific performance is required on the valid contract to buy and sell a piece of property, as each piece of property is unique. Betty and Sam had a valid contract to buy the land and the house. When Sam decided not to go through with the sale of the house, he breached the contract and is subject to damages. The damage available to Betty for the breach is specific performance. Therefore, the Court is likely to rule for Betty.

The Court is likely to rule for Sam on the liquidated damages clause. Liquidated damages are damages agreed to in a contract so that if a breach of the contract occurs the aggrieved party may have a remedy. Liquidated damages clause are used when the actual measure of damages is hard to calculate or impossible to calculate. Here, the cost of damages could have been reasonably discovered by finding the cost of a storage unit in the area. The Court is likely to rule that, because the amount of damages could be reasonably discovered, the liquidated damages clause was unenforceable.

The Court is likely to rule for Betty for the specific damages of the daily cost of storage. Instead of being charged the difference between the liquidated damage price and the cost of the storage locker, the Court is likely to find that Sam is liable for the entire cost of the storage locker.

3. Fan v. Broker

Fan is not entitled to recover any damages from Broker. When a breach of contract occurs, the aggrieved party must mitigate the damages. The aggrieved party must take reasonable steps to recoup the loss incurred by the breach. To mitigate the damages, Fan could have bought General Admission tickets to the Super Bowl game and sold them for \$1,100, and Fan, therefore, cannot recover damages against Broker.



QUESTION 3

Investor, Accountant, and Promoter formed two Ohio corporations: Acme, Co. (Acme) and Zero, Inc. (Zero).

Acme's Articles of Incorporation permit it to conduct any business which is lawful anywhere to the extent permitted by the laws of the state of Ohio. Its articles of incorporation also authorize the issuance of 1,000 shares of voting common stock. The articles contain no other provisions. The shareholders are Investor, who owns 600 shares; Accountant, who owns 300 shares; and Promoter, who owns 100 shares. All three shareholders are members of Acme's board of directors.

Zero's articles contain the same provisions as those of Acme, except that the name of the corporation is Zero, Inc. and Zero is authorized to issue 2,000 voting shares. The shareholders of Zero are Investor, who owns 700 shares, and Accountant, who owns 300 shares. Its board of directors consists of Investor, Accountant and Promoter.

For valid business reasons, Investor determined that Acme should merge into Zero, and Zero should be the surviving corporation. Investor issued a notice of a special meeting of the shareholders of Acme, and a notice of a special meeting of the Board of Directors of Zero. Each notice was properly given and stated that the purpose of the meetings was to authorize the merger of Acme into Zero.

At Acme's special meeting, Investor and Accountant, acting as shareholders, voted their shares in favor of the merger, and Promoter voted against the merger. After Acme's meeting, the members of the board of directors of Zero met. Investor and Accountant, as directors, voted in favor of the merger, and Promoter voted against the merger.

A merger agreement containing all of the statutory requirements was signed by Investor as president and Accountant as secretary of each of the corporations, and the required documents were properly filed with the secretary of state. The merger agreement provided that the shareholders of Acme would receive the following number of shares of stock of Zero in exchange for their shares in Acme, to-wit: Investor - 600 shares; Accountant - 300 shares; and Promoter - 100 shares. Investor and Accountant delivered their stock certificates for their shares of Acme to Zero and received new stock certificates from Zero pursuant to the terms of the merger agreement. Promoter did not deliver his certificate for his shares of stock of Acme, and Zero has not delivered its stock certificate for Promoter's shares.

Ninety days after the effective date of the merger, Promoter demanded the fair market value for his shares of Acme. After the merger, Investor properly called a special meeting of the shareholders of Zero to reduce the board of directors to one person and to elect himself as a sole director. Investor and Accountant voted their shares in favor of the reduction in the number of directors, and Promoter did not vote. Thereafter, Investor, as the sole director, elected himself as president, and authorized that Zero pay him \$1,000,000 for past services, which was a reasonable amount.

Fifteen months after the effective date of the merger, Investor called a special meeting of the shareholders of Zero. The purpose of the meeting was to sell substantially all of the assets of Zero and to liquidate it and pay all of its debts, including the \$1,000,000 owed to Investor. Investor voted his 1,300 shares in favor, Accountant voted his 600 shares in opposition, and Promoter did not vote. Acting as director of Zero, Investor authorized payment of the \$1,000,000 owed to him.

Now, 16 months after the merger, Accountant challenges the validity of the merger, the election of Investor as the sole director, and the authorization of the director to pay Investor the \$1,000,000.

Promoter challenges the validity of the merger and demands either that the merger be set aside or, in the event that the merger is found valid, he receive the fair market value for his stock in Acme or a stock certificate for 100 shares of stock of Zero.

The following issues must be resolved.

1. Were the actions of Acme and Zero in authorizing the merger valid?
2. Does Promoter have the right to receive the fair market value in cash for his shares of Acme's stock?
3. Was the reduction of the board of directors of Zero to one member valid?
4. Was the election of Investor as president of Zero valid?
5. Was the act of Investor as sole director of Zero authorizing the \$1,000,000 payment to himself valid?
6. Was the authorization of the sale of substantially all of the assets and the liquidation of Zero valid?
7. Will Accountant be able to require the rescission of the merger?

1. The actions of Acme and Zero were not valid in authorizing the merger. For a merger, the corporation that remains must have approval by the board of directors (majority). Here Zero properly called a special meeting, and Investor and Accountant voted in favor, thus majority. Acme, the disappearing corporation, requires majority board approval and the two-thirds approval by the shareholders because the merger is a fundamental change. Here, 9/10 of the shares were voted at a proper special meeting in favor of the merger, but no meeting for Acme's board of directors was called, which was needed. At the shareholder meeting, they were only acting as shareholders.
2. Promoter had no right to receive fair market value of his Acme stock because he didn't comply with the appraisal process. A shareholder who is harmed by a fundamental change or shares disappearing into the other corporation may seek appraisal rights only if he notifies the board of his intention within 10 days of the board approving the changes votes no, and if they cannot agree on a fair market value by three months, court determines it. Here, three months passed, and Promoter did vote no but failed to give timely notice to the board.
3. The reduction of the board of Zero to one director was invalid because it generally must have three directors. Here, even if Zero is considered to only have two shareholders, they must have two directors. Only if there is only one shareholder may there be one director. Here, they at least have two (Investor and Accountant) and maybe three (Promoter).

4. The election of Investor as president is invalid because of the duty of loyalty concerns. The officers are elected solely by the directors, but directors cannot engage in self dealing and loyalty concerns. The duty of loyalty is to act honestly, morally and conscientiously with the corporation. Here, Investor was the sole director and elected himself as president. This is self dealing.
5. The authorization of the \$1,000,000 payment to himself was invalid because it violates the duty of loyalty. An officer or director cannot authorize his own payment. He must deal at arm's length with other officers/directors of equal power. (Here, assuming authorizing \$1,000,000 payment as a director.) Other disinterested directors had to authorize the payment. Investor can argue that even if it breached loyalty, it was fair and thus that is sufficient to be held valid. Thus, because it is a fair amount, it saves the loyalty breach issue.
6. The authorization of the sale of substantially all assets and liquidation was a fundamental change which requires board approval and two-thirds shareholder approval. Here, only 1,300 shares voted for and 700 against (or not to OK). Since $1,300/2,000$ is not two-thirds of the shares, it fails. Investor voted his 1,300 shares in favor of the sale/liquidation. Accountant voted his 600 shares in opposition, and Investor did not vote his 100 shares. Two-thirds of all shares are needed, and 1,300 shares is not two-thirds of 2,000 shares. Note also the board approval needed, and because Investor stands to gain personally from the sale/liquidation (\$1,000,000 payment), he alone on the board cannot recommend the sale. Note shareholders may have an interest when voting because of no fiduciary duties.
7. Accountant will not be able to rescind the merger because rescission can only occur within a reasonable amount of time. Sixteen months after a merger is not a reasonable amount of time.
8. The merger is not outside of ultra vires.

QUESTION 4

In April 2008, Patty and Dan collided in their automobiles at an intersection in Anytown, Ohio. Dan's negligence was the sole cause of the accident. Patty suffered injuries to her neck and back for which she sought medical treatment. She missed several weeks of work. Patty has filed a lawsuit against Dan seeking compensation for her injuries. She also seeks damages for lost income and claims to suffer from ongoing anxiety and depression since the date of the accident.

Dan's attorney timely filed an answer to the complaint admitting Dan's negligence and served the following discovery requests with the answer:

INTERROGATORIES

1. Have plaintiff's driving privileges ever been suspended or restricted?
2. State the name of each and every expert consulted or retained by plaintiff regardless of whether such expert will testify at the trial of this matter.

REQUEST FOR PRODUCTION OF DOCUMENTS

1. Provide copies of notes from any and all interviews with eyewitnesses to the accident in issue, which were conducted by counsel or a private investigator retained by counsel.
2. Provide a complete copy of plaintiff's employment file from her present employer.
3. Provide copies of any and all medical records for the treatment of the injuries plaintiff sustained in the accident in issue.

NOTICE AND MOTION OF APPOINTMENT FOR MENTAL EXAMINATION

Counsel for defendant has made an appointment for a mental examination of plaintiff to be conducted by Dr. Ignatz Platz, a licensed psychiatrist, at 10:00 a.m. on June 8, 2010. Plaintiff is required to appear at the offices of Dr. Platz at 101 Main Street, Anytown, Ohio, at that time and date for said examination.

What objections might Patty's attorney reasonably make to the notice of appointment and to each interrogatory and request for production? How would the Court likely rule on each objection? Discuss your answers fully.

1. NOTICE

Patty's attorney can object to the notice of appointment for mental examination because it was not a motion made for approval by the court. A mental exam may only be of a party by an impartial physician, and only upon order by the court after the requesting party shows that the exam is necessary and the plaintiff put the medical condition at issue in the case. The notice simply states that plaintiff is required to appear for an appointment set up by defendant's counsel, not that there was any showing or order by the court to do so. Patty need not comply with the notice of appointment. However, the court may order Patty to go to an impartial psychiatrist upon a showing by the defendant that it is necessary since she placed her mental condition at issue by seeking damages for ongoing anxiety and depression since the date of the accident.

2. INTERROGATORIES

- a. Patty's attorney can object to the first interrogatory as irrelevant. Evidence is relevant if it makes any material fact more or less probable. Since Dan admitted his negligence, Patty's driving privileges are not at issue. The court will overrule this objection, though, because interrogatories are permitted for anything relevant to the subject matter of the litigation, including anything reasonably calculated to lead to admissible evidence. Since Patty's driving privileges could show that she may have been comparatively negligent, which would reduce her recovery, the court will overrule this objection.
- b. Patty's attorney can object on the grounds that only experts who are expected to testify at trial are discoverable. Experts who are consulted or retained but who are not going to testify at trial are not required to be disclosed. Since the interrogatory asks for disclosure of each and every expert regardless of whether the expert will testify, it is not proper. The court will sustain the objection to the extent that non-testifying experts need not be disclosed, but those experts who are expected to testify must be disclosed.

3. REQUESTS FOR PRODUCTION OF DOCUMENTS

- a. Patty's attorney can object since this is protected work product. Work product includes documents and tangible things prepared in anticipation of litigation by or for a party, and is subject to a qualified privilege. It is not subject to discovery unless the moving party shows that there is a substantial need for the materials and the party cannot obtain similar information without undue hardship. Even if the moving party meets this burden, notes by an attorney, especially regarding opinions or theories, are still protected as privileged. The court will sustain this objection since Dan has not shown substantial need for these materials nor undue hardship in doing his own interviews or investigations.
- b. Patty's attorney can object to this request as irrelevant and overly broad. Patty's employment has nothing to do with the lawsuit, other than her lost income. To require her to provide a complete copy of her employment file would require disclosure of irrelevant information not reasonably calculated to lead to any admissible evidence. The court will sustain the objection regarding disclosure of the complete employment file, but may require Patty to provide other evidence of her lost income since that is relevant to the damages issue in this case.
- c. Patty's attorney can object to this request based on physician-patient privilege. This applies when a patient seeks medical treatment or diagnosis from a doctor. However, if a patient places her medical condition at issue, this privilege does not apply. Since Patty seeks compensation for her injuries from the accident, she has placed her condition at issue and the medical records are discoverable. The court will overrule this objection.



QUESTION 5

Frank used to work for PumpCo, a manufacturer of high-pressure pumps for use in the oil and gas industry. Last year, Frank left PumpCo and went to work for Valvolink, a competitor of PumpCo. Shortly after Frank changed jobs, Valvolink started to manufacture a pump very similar to PumpCo's best-selling pump. PumpCo thereafter sued Frank and Valvolink in Anytown, Ohio, for misappropriation of trade secrets. Three weeks prior to the beginning of the jury trial, PumpCo filed a motion for an order requiring that the witnesses be separated during the trial. The Court granted the motion.

The following issues involving witnesses arose at trial:

1. At the trial, PumpCo called Frank as its first witness and started to ask him leading questions about his work at Valvolink. Valvolink's counsel objected.
2. During the examination of Frank, PumpCo's counsel discovered that two days before the trial, Frank and Valvolink's CEO discussed their anticipated trial testimony together. PumpCo's counsel subsequently objected to any testimony by Valvolink's CEO.
3. Spectator, who was in the courtroom when Frank testified, heard Frank testify that Ernie, an engineer employed by Valvolink, was going to testify at the trial as a witness for Valvolink. Spectator, who was acquainted with Ernie, called Ernie and related to him what Frank's testimony had been. When PumpCo's counsel eventually cross-examined Ernie at trial, he discovered the conversation with Spectator, objected, and moved that all of Ernie's testimony be stricken.
4. At the trial, the outside expert retained by Valvolink came into the courtroom to listen to the testimony of PumpCo's outside pump expert. PumpCo's counsel saw him enter and objected to Valvolink's expert being in the courtroom.
5. At the trial, Valvolink's outside pump expert testified extensively about the features of Valvolink's pump. On cross-examination, PumpCo's lawyer tried to ask the expert about a defective seat belt assembly that expert had designed many years ago when he worked in the automotive industry. Valvolink's counsel objected to cross-examination about the seat belt assembly.
6. The Court limited the direct and cross-examination of Valvolink's outside pump expert to 30 minutes each. Counsel for both parties objected to the limitation.
7. After the direct and cross-examination of Valvolink's outside pump expert, the Court stated that there appeared to be certain similarities between the Valvolink pump and the PumpCo pump and questioned the expert extensively about those similarities. Out of the presence of the jury, Valvolink's counsel objected to the Court's examination of the expert.

With regard to matters 1 through 5 above, how should each objection be resolved? With regard to matters 6 and 7 above, was the Court's ruling correct? Explain your answers fully.

1. The court should overrule Valvolink's objection. Leading questions are permitted when a witness is hostile, or "adverse," even when the witness is called by the party doing the questioning, rather than during cross-examination. Here, Frank is a defendant himself and an employee of Valvolink, the other defendant, so he is adverse to PumpCo and the court should let PumpCo's attorney lead him.
2. The court should overrule PumpCo's objection. The court previously granted a motion to separate witnesses "during the trial." There can be good cause for this in order to avoid witnesses adjusting their testimony based on other witnesses' trial testimony, but Valvolink and Frank should not be prejudiced in their joint defense by forbidding them to talk to each other pre-trial, and the court's previous order does not prohibit the communication here, two days before trial began.
3. The motion to strike Ernie's testimony should be denied, and the objection overruled, though it is a close case. A party cannot evade a court order by use of intermediaries, and arguably here, Ernie and Frank violated the court's order that witnesses be separated during trial. Ernie is an employee of Valvolink and was a party to the allegedly violative conversation with Spectator, apparently in furtherance of Ernie's loyalty to Valvolink and desire for Valvolink to prevail. However, it is not clear whether Ernie had notice of the court's order or whether the order specified that it should be conveyed to likely witnesses. Valvolink and Frank should not be denied. Ernie's evidence if they bore no fault for the conversation, particularly when it was initiated by Spectator, who appears to have no connection to either defendant. The rules of evidence should be construed in the interest of just administration, and relevant evidence should be admitted absent a reason for exclusion. Here, where no order violation is clear by either defendant, the court should (a) instruct the jury about what happened and how it is related to the prior order, to allow the jury any appropriate adverse inference, if any; and/or (b) allow PumpCo to cross-examine Ernie about the conversation, his motivations, and any notice he may have had that the conversation with Spectator was inappropriate.
4. The objection should be overruled. The court's prior order appears geared to prevent collusion and unfair anticipation of cross-examination points. Here, the witnesses are adverse, and Valvolink's expert may be needed to rebut or use the evidence of PumpCo's expert. He should be permitted to stay.
5. The court should overrule the objection. The expert's qualifications and the reliability of his methods are relevant. A prior defective design is relevant to making it more or less likely that this expert is qualified and his methods reliable. Then again, the relevance is marginal, and there is a risk of unfair prejudice due to the inference that the expert may have caused injury to persons via a defective design of a safety-belt. However relevant evidence should only be excluded in cases like this where its probative value is substantially outweighed by the danger of unfair prejudice. On cross, with an opportunity to explain available to the expert, the court should allow the questioning. The prejudicial effect is too speculative to substantially outweigh probative value.
6. The limitation is valid and the court's ruling is correct. Courts have significant power to structure trial and limit time to administer justice in the cases before them efficiently. The limitation here is even-handed. If the matters were extremely complex, the limitation might violate due process, but the issue here appears limited to a single trade secret dispute about a single product. Without more showing of the need for more time, no due process violation is apparent.
7. The court acted appropriately in questioning Valvolink's expert. Courts may comment on evidence and question witnesses during trial so long as they show no bias and do not usurp the role of the jury as a fact finder.



QUESTION 6

The police obtained a search warrant for House on Main Street in Any County, Ohio, in connection with sales of illegal drugs. House, a known drug house, had previously been searched pursuant to a warrant. During the previous search, gunfire was exchanged. The present search warrant authorized the search of House, the curtilage, outbuildings, any persons present, and vehicles on or near the property. The affidavit for the search warrant recited several controlled purchases of narcotics made by police officers and undercover agents shortly before the warrant was issued.

Officer (Cop) was in charge of the front perimeter of the scene. As he approached House in his vehicle, he observed Defendant sitting on the front steps of House and then getting up and running toward a van parked across the street from House. Cop observed Defendant enter the van but could not see inside because of the darkly tinted windows on the vehicle. Cop pulled his vehicle in front of the van to prevent its departure pending execution of the search warrant. Cop's reasons for doing so were that he had the duty to secure the front perimeter of the search area, to protect the other officers' safety, and to secure any contraband that Defendant might have taken from the area covered by the search warrant and hidden in the van.

After the search of House was completed by the other officers, Cop extracted Defendant from one of the rear seats of the van, relying on the search warrant's authorization to search persons who were present at or near House. Cop frisked Defendant with negative results. There were two other occupants of the van, a male and a female, seated in the front of the van. Cop believed that, under the circumstances of this case, the authority provided to the police in the search warrant included the right to search the van. Therefore, he asked the other occupants to exit the van. Cop established that the female occupant was the owner of the van and Defendant was neither the owner nor co-owner.

After Defendant was removed from the vicinity of the van and handed off to other officers, Cop checked the area where Defendant had been seated and found a loaded firearm. Defendant was arrested and charged with carrying a concealed weapon. The male and female front seat occupants of the van claimed to have no knowledge of the firearm.

Defendant's lawyer filed a motion to suppress any evidence obtained by the police, claiming that they violated Defendant's rights under the Fourth Amendment to the U.S. Constitution and Article 1, Section 14, of the Ohio Constitution.

What arguments should Defendant's lawyer make in support of the motion? What arguments should the State make in opposition? How should the Court rule on Defendant's motion to suppress? Explain fully.

Defendant will argue that the warrant was improper and too broad. Under the rules of Criminal Procedure and the Constitution, the Fourth Amendment protects citizens from unlawful searches and seizures. In order to conduct a lawful search, police need a valid search warrant absent exigent circumstances. Here, Defendant will argue that the search warrant was overbroad and too generic. Under the general rules, a search warrant must be based on probable cause and must dictate with particularity the places and parties to be searched. Here, the warrant allowed for search of not only House, but curtilage, outbuildings, and vehicles near the property. Although the warrant had probable cause, it was hardly made with particularity.

The State in rebuttal will argue that warrant was proper, and even if it was not proper, Cop reasonably believed that it was. Under the general rules, fruits of an invalid search will be suppressed from trial under the exclusionary rule if they were seized improperly. An exception exists however when a law enforcement officer searches an area under the reasonable mistake that the search warrant is valid. Here, Cop believed that the search warrant was valid. Here, the state will first argue that the warrant does state with particularity the areas to be searched. They then will argue that even if the warrant was improper, the evidence will not be excluded because Cop reasonably believed that his search was authorized.

Defendant will argue that he was improperly seized, and the State will argue that there were exigent circumstances. Under the general rule, a warrant is not necessary for a search and seizure if there exists exigent circumstances and probable cause. Here, the state will argue that the Defendant fleeing from the scene created an exigent circumstance that allowed the police to properly detain him. Further, the general rule allows for a valid Terry Stop if an officer has a reasonable suspicion that crime is afoot. This allows the officer to temporarily detain a vehicle or person if they articulate facts that an officer's safety might be in jeopardy. Here, Cop felt that crime was afoot, and the safety of his officers was at issue, so his detainment and subsequent frisk were valid.

Defendant will argue that Cop's search of the van was improper. Under the general rule, a cop may search the grabbing area of a detainee without a warrant under the search incident to an arrest exception. This search however is limited to the grabbing area where the defendant is currently being detained. Here, the Defendant will argue that he was already out of the vehicle when Cop found the gun under the car.

The State will argue that even without a valid warrant, the search of the van was proper under the automobile exception. Under the general rules, an officer may search a vehicle with a warrant if they have probable cause that contraband is located within it. Here, Cop felt that given the exigent circumstances of Defendant's escape attempt, some fruit of a crime may be located in the van. As a result, he has the right to search every compartment of the van, including under the seat.

The State will argue that Defendant has no standing to suppress the evidences seized, as he did not own the Van. Under the general rules, an individual can only make a motion to suppress if they have a stake in the area that was seized. Here, Defendant has no standing to make this motion because he did not own the Van. As a result, he cannot argue that the found gun was improperly seized.

The Court will rule in favor of the State. Even though the warrant may have been overbroad, Cop's stopping of the Van was within the Terry Stop exception. His search of the vehicle was proper under the automobile exception. Defendant also has no standing to suppress the gun. The Defendant's motion will be denied.



QUESTION 7

Candidate is a member of the bar in the state of Franklin. He meets all of the requirements of that state to become a candidate for the judiciary, and he has filed to run for a seat on the Common Pleas Court. The Supreme Court of Franklin has promulgated several ethical canons regulating the conduct of judges and candidates for the judiciary, including the following:

CANON A. To preserve the impartiality and non-partisanship of judicial elections, no candidate for judicial office shall disclose his or her affiliation with a political party, and no candidate for judicial office shall directly solicit funds for his or her campaign committee.

The Supreme Court also has in place the following rule for the governance of the bar:

RULE 1. All lawyers in Franklin must register with the Supreme Court and will be issued an identification card. When making an appearance in any court in this state, lawyers must present their identification card to the clerk of the court in order to facilitate confirmation that the lawyer is in good standing and eligible to practice.

Immediately after filing for election, Candidate sent the following letter to his friends and professional acquaintances:

Dear Friend:

I am running for the Common Pleas Court because I am a member of the Republicrat Party and am concerned that Republicrats are underrepresented on the bench. I need your support and would ask that you contribute \$100 to my campaign committee.

/s/ Candidate

Shortly thereafter, Disciplinary Counsel of the Supreme Court informed Candidate that he was under investigation for a violation of the Ethical Canons. Enraged, Candidate went to the Supreme Court building. Standing in front of the doorway to the Supreme Court at midday, he yelled, "This ridiculous canon is an infringement on my constitutional rights!" He then took his Franklin Lawyers Identification Card from his wallet and tore it to shreds.

The police immediately arrested Candidate for violating a Franklin statute, which provides:

Citizens may conduct peaceful protests in front of any government building in Franklin, except within 30 feet of any entrance/exit to the building at any time the building is open for business.

Subsequently, Disciplinary Counsel charged Candidate with a violation of Canon A based on the fundraising letter he sent, and with a violation of Rule 1 for destroying his identification card.

Candidate has filed a lawsuit challenging the constitutionality of Ethical Canon A, Rule 1, of the Supreme Court, and Franklin statute, on the basis that they each infringe on his right to free speech under the First and Fourteenth Amendments to the United States Constitution. You may assume that the lawsuit is proper in all procedural respects, and that state action is present in every situation.

1. Is Candidate likely to succeed in his challenge to Canon A?
2. Is Candidate likely to succeed in his challenge to Rule 1?
3. Is Candidate likely to succeed in his challenge to the Franklin statute?

Explain your answers fully.

1. Candidate is likely to succeed on his constitutional challenge to Canon A. Regulation of the First Amendment right to freedom of association and speech is generally subject to strict scrutiny, which requires that the regulation be narrowly tailored to serve a compelling governmental interest; very few laws survive this analysis. Exceptions to strict scrutiny analysis include expressive conduct, time/place/manner restrictions, and the categories of obscenity, subversive activity, fighting words, defamation, and commercial speech. Canon A regulates the right of a judicial candidate to associate with political parties and raise funds for electoral bids. Raising funds is considered a free speech activity. As Canon A does not fit under any of the exceptions to strict scrutiny analysis, it will only be valid if it is narrowly tailored to meet a compelling governmental interest. As stated previously, most laws do not survive this standard, and it is unlikely that Canon A will either. Although the governmental interest in an impartial judiciary might be compelling, it is difficult to believe that the law is narrowly tailored to achieve that goal; if judicial candidates are not permitted to raise funds, the candidates will be severely hampered in their efforts to run for office and to inform voters of why they are qualified. Thus, Canon A will likely be struck down as unconstitutional.
2. Candidate is unlikely to succeed on his constitutional challenge to Rule 1. Expressive conduct is subject to a lesser scrutiny than is traditional speech. Generally, regulation of expressive conduct will be permissive if:
 1. the law is within the government’s power to enact,
 2. the law furthers an important governmental interest,
 3. the law is unrelated to the suppression of ideas, and
 4. the burden on speech is no greater than necessary.

In this instance, charging Candidate with violating Rule 1 by ripping up his bar membership card is a regulation of expressive conduct. However, the Supreme Court generally has the right to regulate admission to and practice before the bar, requiring attorneys to carry cards serves the important governmental interest of ensuring that attorneys are properly licensed, the law in no way relates to suppressing particular viewpoints, and there is an incidental version on the burden of speech—surely there are many other methods of expressing dissatisfaction with judicial candidacy requirements than ripping up one’s membership card. Thus, the regulation of Candidate’s expressive conduct in this instance does not rise to the level of a constitutional violation, and Rule 1 will probably survive Candidate’s challenge.

3. Candidate is also unlikely to succeed on his constitutional challenge to the Franklin statute. Government regulation of the time, place, and manner of free speech falls under two different categories. If the regulation concerns a nonpublic forum, the law must simply be viewpoint-neutral and rationally related to a legitimate governmental interest. If the regulation concerns a public forum, the law must be viewpoint neutral, narrowly tailored to further a significant governmental interest, and leave open alternative means of communication. In this instance, the Franklin Statute regulates the time and manner of conduct before a government building, and so will probably be considered a public forum regulation. However, the statute itself simply prohibits protests within 30 feet of the entrance of a building during business hours. Thus, the law is unrelated to the suppression of ideas and hence viewpoint-neutral, furthers the significant governmental interest of safely allowing egress and ingress of a public building during working hours, and leaves open the opportunity to simply conduct one’s speech before other parts of the building not adjacent to entrances. Thus, the Franklin statute is constitutional.



QUESTION 8

Doctor, in Anytown, Ohio, advised Ann that she needed gallbladder surgery. Before surgery, Doctor spoke with Ann and Husband about the risks associated with a gallbladder procedure, including bleeding and injury to adjacent organs. Doctor never warned Ann that death was a known risk of gallbladder surgery, and the consent form signed by Ann did not mention the possibility of death. During the operation, Doctor severed one of Ann's major blood vessels causing massive blood loss. Ann died during surgery. Husband requested an autopsy, which produced 18 gruesome photographs documenting Ann's loss of blood and 2 photographs of a blood vessel that had been severed by a surgical instrument used in the surgery.

Husband met with Doctor demanding to know how this could happen. Doctor told him that death from this procedure rarely happens and stated, "I've never had a patient die from a gallbladder surgery before." Doctor repeatedly apologized to Husband and offered to pay Ann's medical expenses.

Weeks later, Husband learned that blood loss and death are inherent risks of the procedure, and that the possibility of death is typically explained in gallbladder surgery consent forms. Husband sued Doctor for Ann's wrongful death, alleging that Doctor had neglected to obtain Ann's informed consent by failing to disclose the known risk of death.

During pretrial discovery, it was disclosed that two years previously Wilma, a former patient of Doctor, had died from excessive bleeding during gallbladder surgery. Doctor admitted to John, Wilma's husband, that Wilma had died from blood loss. Discovery also revealed that seven years ago, the Medical Board temporarily suspended Doctor's medical license for drug abuse. However, for the past five years, Doctor remained drug-free and was a model physician. His medical license has been reinstated, and he is currently in good standing.

At the final pretrial conference, the parties stipulated that the cause of Ann's death was massive blood loss.

At trial, Husband's lawyer sought to introduce the following evidence and Doctor's lawyer made timely objections.

1. John's testimony regarding Doctor's statement that John's wife, Wilma, had died from blood loss during gallbladder surgery.
2. Evidence of Doctor's temporary license suspension.
3. The 20 autopsy photos.
4. Doctor's offer to pay Ann's medical expenses.

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

- 1.** The Court will sustain Doctor’s (D) objection because the probative value of this testimony is substantially outweighed by the danger of unfair prejudice. John’s testimony regarding D’s statement would typically be admissible under Rule 801(d) (2) of the Federal Rules of Evidence (FRE) as a Statement by a Party Opponent. Under this rule, a statement by a party that is against his current interest is admissible. Here, D’s statement that Wilma died of blood loss was made by D; a party. This may be against his current interest because it suggests a history of performing negligent surgeries. Further, the statement would not be protected by the Physician/Patient privilege. Ohio recognizes this privilege as protecting communications made by patients to physicians for the purposes of medical treatment. The patient holds the privilege. Here, D’s statement did not concern forthcoming medical treatment. Furthermore, Wilma controls the privilege. The privilege would be inapplicable to Husband’s case against D. Thus, the statement is not privileged.

D’s statement is however barred by Rule 403. Rule 403 bars otherwise admissible evidence when the probative value is substantially outweighed by the danger of unfair prejudice. In Ohio, such evidence must be excluded. D’s statement that he operated on a previous patient who died from gallbladder surgery is in no way probative of whether D obtained Ann’s informed consent. The parties have stipulated that the cause of death was massive blood loss. The danger of unfair prejudice is high because it suggests that D is a negligent person. The statement also may not be used as character evidence to show a propensity for negligence because character is not an element in this case. Because the probative value is low and the danger of unfair prejudice is substantially higher, this statement is inadmissible under Rule 403.

- 2.** The Court will sustain D’s objection under Rule 403 as impermissible character evidence. Rule 403 precludes evidence when the probative value substantially outweighs the danger of unfair prejudice. The probative value of D’s license suspension is very low because it is unrelated to the issue of whether he obtained Ann’s informed consent. The danger of unfair prejudice is high, as it paints D as a drug abuser. Thus, 403 precludes this evidence. Further, the FRE prevents character evidence of a defendant’s prior bad acts in civil cases to show propensity, unless character is an element of the case. This character evidence, suggesting D is a drug abuser, is inadmissible and D’s character is not an element of the case.
- 3.** The Court will sustain D’s objection under Rule 403. The 20 autopsy photos, showing Ann’s blood loss and the severance of her blood vessel, are highly prejudicial. A jury seeing these photos would likely be so scarred from this jarring evidence that it would interfere with its impartial judgment. Furthermore, the parties have stipulated that Ann died of blood loss. Thus, the probative value of this evidence is very low because the issue in the case is whether D had obtained Ann’s informed consent. While anyone with familiarity with the scene could authenticate the photos, they would be impermissible under Rule 403.
- 4.** The Court will sustain D’s objection based on public policy grounds. Under the FRE, offers to pay medical expenses are inadmissible in civil cases to show negligence. The public policy rationale favors settlement of disputes. FRE facilitates offers to pay medical expenses to encourage efficient dispute resolution and discourage litigation. D’s offer is thus inadmissible. However, D’s statement made in conjunction with the offer that he never had a patient die from gallbladder surgery before, is not an offer to pay medical expenses. Thus, if relevant, it is admissible.



QUESTION 9

1. Mary Jones, a resident of Anywhere, Ohio, borrowed \$20,000 from Bank A to purchase new furniture for her bridal boutique, which she operated as a sole proprietor under the name of “Mary Jones’s Boutique.” On May 1, 2010, Bank filed a financing statement with the Ohio Secretary of State to perfect its security interest in the furniture. The financing statement listed the debtor as “Mary Jones’s Boutique.” Mary married Todd Smith on August 1 of the same year and changed her name and the name of her business to “Mary Smith’s Boutique.” No fictitious name filings were made for either business name. On August 10, 2010, Mary borrowed money from Bank B and gave Bank B a security interest in “all equipment, furniture, inventory and supplies of ‘Mary Smith’s Boutique’” and Bank B filed a financing statement listing the debtor as “Mary Smith’s Boutique.” On December 20 of the same year, Mary defaulted on both loans. Bank B claims the rights to the furniture over Bank A.
2. On May 1, 2010, Bill, a licensed dentist in Anywhere, Ohio, purchased a new television set on credit from Appliance Store for \$2,000. He placed the set in his waiting room for his patients to use but did not tell the salesman that he was a dentist or that he intended to use the set in his waiting room. Appliance Store did not file a financing statement. On July 1, 2010, Bill borrowed \$100,000 from Bank to refinance his dental practice and Bank filed a financing statement with the Ohio Secretary of State covering “all equipment, supplies, inventory and receivables” of Bill’s business. On November 1, 2010, Bill defaulted on both loans. Bank claims the television and Appliance Store objects.
3. Bank A loaned \$10,000 to Appliance Mart to purchase a new computer system. On February 4, 2010, Bank A filed a financing statement with the Ohio Secretary of State perfecting its security interest in the computer system. On May 1, 2010, Appliance Mart sold the computer system to Eileen for \$5,000 cash and put the money into a special account at Bank B identified as “Proceeds from Equipment Sales.” On August 1, 2010, Bank B loaned \$10,000 to Appliance Mart and filed a security interest with the Ohio Secretary of State for “all equipment, inventory, receipts, cash and receivables.” On September 1, 2010, Appliance Mart defaulted on both loans. Bank B claims the proceeds from the sale of the computer system and Bank A objects.
4. Bank A loaned \$10,000 to Acme (a company located in Anywhere, Ohio) to purchase inventory. Bank A filed a security interest on the inventory with the Ohio Secretary of State. Several months later, and unbeknownst to Bank A, Acme moved its business to another state (New State) where Bank B loaned money to Acme. One year after Acme had moved, Bank B filed a security interest in all equipment, inventory, and accounts receivable with the New State Secretary of State’s Office and subsequently Acme defaulted on both loans. The New State law regarding perfection of a security interest is identical to Ohio law. Bank B claims priority over the inventory because Bank A did not refile its security interest in New State when the company moved.

Explain who should prevail in each case and why.

1. Bank B prevails. Article 9 of the Uniform Commercial Code (UCC) governs secured transactions. To perfect a security interest against third parties, a secured party may file a financing statement with the Ohio Secretary of State. Priority of perfection is determined by which party's security interest is first filed or perfected, unless a special rule applies. The financing statement must include the debtor's correct name. If the debtor's name is a corporation or partnership, the debtor's name must be the corporate or partnership name. Indexing of financing statements is performed according to debtor name. The debtor's name must not be seriously misleading. A name is seriously misleading if the financing statement could not be found in a filing search under the debtor's correct name. If a debtor changes his name, the secured party's interest remains perfected for 4 months. If the debtor name on the financing statement is still seriously misleading after 4 months and the secured party has not filed a new financing statement, the secured party loses perfection. Here, Bank A filed under Mary Jones. When Mary married Todd, she changed the business name to Mary Smith. This change is seriously misleading. Bank A failed to file a new financing statement under Mary Smith within 4 months. Bank B's interest prevails.
2. Bank B prevails. Priority of perfection among competing creditors is determined by which party is first to file or perfect a security interest. A purchase money security interest (PMSI) in consumer goods perfects automatically. A PMSI in equipment (goods used for business) takes priority of perfection only if the secured party files a financing statement within 20 days of the debtor's receipt of the goods. Here, Appliance store sold Bill a TV on credit. Appliance would have a PMSI in consumer goods if the TV was used for personal or family purposes, but the TV is used as equipment for Bill's dentist office. To perfect, Appliance would have had to have filed a financing statement within 20 days from Bill's receipt of the TV, which Appliance failed to do. Bank filed before Appliance store, and the first to file or perfect rule controls. Bank's security interest prevails.
3. Bank A prevails. Proceeds include cash or other collateral that the secured party received upon sale or other disposition over the collateral to which the secured party has sought attachment (through an authenticated security agreement) and perfection. When a secured party perfects its security interest in collateral or the goods used to secure the debtor's payment obligation, the secured party's interest in proceeds may also be perfected. If the debtor receives proceeds in exchange for collateral, the secured party's interest in proceeds is perfected automatically for 20 days. Further action, such as filing a financing statement, is required for perfection unless the proceeds are identifiable cash. No further action is needed to perfect. Here, Bank A filed a financing statement for the computer as collateral. When Appliance Mart sold the computer for cash, the \$5,000 served as proceeds. Because the proceeds were cash, Bank A's security interest automatically remained perfected in the cash. The first to file or perfect rule applies. Appliance Mart's security interest prevails over Banks.
4. Bank B prevails. A financing statement must be filed where the debtor is located. If the debtor moves, a secured party's security interest remains perfected for 4 months. After 4 months, the secured party must file a new financing statement in the place where the debtor has moved. By failing to do so, a secured party loses its priority of perfection over other secured claims. Here, Bank A filed its financing statement in Ohio, Acme's original location. Acme moved to New State. Bank A filed a new financing statement 1 year after (beyond the 4 month limit). Bank B's filing wins.



QUESTION 10

Heath and Wendi married in Franklin, Ohio, in 1995. Both were previously married. Heath's first marriage ended in divorce while Wendi's first husband is deceased. Heath had two children from his first marriage, Brian and Gail. Wendi had one child, Adam, who was seven years old at the time of Heath and Wendi's marriage. Heath subsequently adopted Adam in 1998.

In 2005, Heath decided he would give Brian \$20,000 to pursue a graduate degree in college. Heath also decided that he should prepare a will to provide for disposition of his estate and to explain how he wanted the payment to Brian to be handled. Heath, a very thrifty individual, located a legal form website and used one of the forms to create the following instrument:

I intend this instrument to be my Last Will and Testament. Contemporaneous with the execution of this instrument, I am giving \$20,000 to my son, Brian, as part of his inheritance to complete his graduate degree. Upon my death, I wish to give an additional \$20,000 to my son, Brian. I give \$40,000 to my daughter, Gail, so as to even out the distribution between Brian and Gail. I give all of the rest of my property to my spouse, Wendi. I give nothing to my adopted son Adam since I expect Wendi will utilize her own assets to make provisions for him.

The legal form website suggested that Ohio law requires two witnesses. As a result, Heath took the instrument to his next-door neighbor's house. In the presence of his neighbor Jim, and Jim's 16-year-old son, Paul, Heath signed the instrument at the bottom of the document and had Jim and Paul sign the document as witnesses. Satisfied with what he had done, Heath gave Brian a copy of the 2005 Instrument and made the \$20,000 payment to Brian.

While returning from a business trip on February 2, 2011, Heath was involved in an automobile accident. Heath died at the scene of the accident. Upon hearing of Heath's accident, Wendi was extremely distraught. On February 4, 2011, Wendi took her own life. Heath and Wendi were survived by Brian, Gail, and Adam.

At the time of his death, Heath's property consisted of \$200,000 in a brokerage account and \$20,000 in a bank account titled solely in Heath's name, with a payable on death designation to Wendi. Brian, Gail, Adam, and the executor of Wendi's estate ("Executor") have all asserted claims to Heath's estate.

To whom and in what amounts should Heath's property be distributed? Explain your answer fully.

Under Ohio law, a will must be witnessed by two competent witnesses to be effective. Witnesses must be at least 18 years of age to be competent. Here, one of the witnesses to Heath's will was only 16 years old, so the will did not comply with the two competent witness requirement. Heath's will is therefore invalid. When a will is invalid, the decedent's estate will pass by intestate succession. Under Ohio's intestate succession laws, where there is no surviving spouse, the estate passes in equal shares to the decedent's children on a per capita with representation basis. Here, for the reasons discussed below, Heath has no surviving spouse. He has three children who will share in his estate, because adopted children like Adam are treated the same as biological children under Ohio law.

1. Executor/Wendi's estate: Executor will take nothing. For the reasons stated above, any devise in Heath's will to Wendi fails because the will itself is invalid for lack of a competent witness. Further, Ohio law requires a devisee to have survived by 120 hours to take under the will, which Wendi did not. She is therefore treated as predeceased, and any gift under the will would lapse. Wendi also would not take under intestate succession as a surviving spouse, because as stated, she did not survive by 120 hours. Wendi's estate also will not take the \$20,000 bank account because she is deemed to have predeceased Heath. Any gift to a pre-deceased beneficiary lapses, unless the antilapse statute applies. The antilapse statute only applies if the devisee or beneficiary is a blood relative of the decedent. Here, the antilapse statute does not apply because Wendi is not a blood relative of Heath. The bank account proceeds therefore lapse and are paid into Heath's estate to be distributed under the intestacy rules. Heath's estate therefore consists of \$220,000 total (200,000 brokerage account + 20,000 bank account).
2. Brian: as one of Heath's three children, Brian will take 1/3 of Heath's estate under Ohio's intestacy rules. However, Heath made an advancement to Brian during his life that will be counted against Brian's share. An advancement is valid if a contemporaneous writing evidencing the advancement was made by the decedent, as was done here when Heath wrote his will. (Although the will is not effective as a will, it may be effective to demonstrate the advancement). The advancement is therefore effective. Any advancement is added into "hotchpot," which is the total of the decedent's estate. The hotchpot is then divided among the decedent's heirs, with the amount of the advancement subtracted from the share of the heir receiving it. Here, adding the \$2,000 advancement to the \$22,000 estate creates a hotchpot of \$240K. Divided by 3 creates a share of \$80K per child. Brian therefore takes 80K, minus his 20K advancement, for a total of 60K.
3. Gail: Based on the calculation above, Gail takes a share of \$80K from the estate. This comports with Heath's testamentary intent that his children should inherit from him equally.
4. Adam: Based on the calculation above, Adam also takes a share of \$80K from the estate. Although Adam is adopted, adopted children are treated like biological children under Ohio law. Further, the provision in Heath's will does not divest Adam of his ability to take under the intestacy laws, because it does not amount to a negative will. It does not expressly state Heath's intent that Adam not inherit at all from him, only that Wendi. Further, Heath only did not provide for Adam in his will because he assumed Wendi would care for Adam. However, Wendi is deceased, so Heath's testamentary intent can only be carried about by allowing Adam to inherit under intestacy.



QUESTION 11

Chef, employed as a cook at Employer's restaurant in Anywhere, Ohio, owned two properties in Anywhere: Blackacre and his home (Home). Bank was the holder of a promissory note and a properly recorded mortgage on Blackacre. Chef owned Home free and clear.

In March 2008, Chef was arrested and jailed for theft. Chef telephoned Employer from jail and asked Employer to lend him \$3,000 to post his bond and another \$3,000 to pay his attorney to defend him. Employer agreed to lend Chef the money, but only on the condition that Chef give Employer a deed to Chef's Home as collateral.

Employer loaned Chef the \$6,000, and Chef signed the following agreement:

I, Chef, hereby agree with Employer that on or before April 1, 2009, I will pay out of my wages the sum of \$6,000 to repay Employer the bond money and attorney fees necessary to obtain my release from jail and defend me against the charge of theft. If I default, Employer may sue me for the balance due.

At the same time, Chef delivered to Employer a general warranty deed on Home. Employer accepted the deed but never filed it with the County Recorder.

Eventually, Chef was found not guilty on the theft charge, and the case against him was dismissed. He returned to work and resumed living in Home. By October 2008, Chef had fully repaid the \$6,000 recited in the agreement. Despite repeated requests by Chef, Employer refused to return the deed to Home.

Chef continued to periodically borrow additional money from Employer to pay other debts. Employer continued to deduct money from Chef's paychecks to recover those additional loans. Chef continued working and paying Employer through May 2010, when he quit out of frustration with Employer's refusal to return his deed. At the time he quit, Chef owed Employer about \$4,000 on the additional loans.

Employer, claiming that he owned Home, ordered Chef to vacate and, when Chef refused, Employer filed an action to evict Chef.

Unfortunately, Chef could not find other work and he got further behind on his debts. In fact, Chef defaulted on his note and mortgage with Bank on Blackacre.

Bank filed an action in the proper Court of Common Pleas against Chef to foreclose on the mortgage of Blackacre. On January 11, 2011, judgment was rendered against Chef and by decree of foreclosure, Chef was granted three days to pay the judgment or Blackacre would be sold at Sheriff's sale on January 24, 2011. Chef was unable to pay the money due within the 3-day period. On January 24, Bank purchased Blackacre at Sheriff's sale.

On January 28, Chef was able to obtain enough money so that he deposited the full amount of the judgment and court costs with the appropriate Clerk of the Court. On January 31, the Court, nevertheless, entered final judgment confirming the sale to Bank.

Chef appealed, assigning the following as errors:

- i. the lower court's January 11 decree of foreclosure that allowed him only three days to pay the judgment and
- ii. the lower court's January 31 entry confirming the sale to Bank.

1. What defenses, if any, might Chef assert against Employer's claim of ownership of Home in the eviction action, and what is the likely outcome?
2. How should the appellate court rule on each of Chef's assignments of error in the Blackacre action?

Explain your answers fully. Do not discuss any employment law issues.

1. Chef may defend against Employer's claim of ownership in Home by arguing that Employer had an equitable mortgage in the Home, and because Chef paid off the debts that constituted this mortgage Employer must return the deed. An equitable mortgage will be found where, even though the agreement between the parties does not explicitly provide a mortgage relationship, one party gives a deed to his real property while simultaneously making and giving a promissory note. Here, Employer orally agreed to give Chef money if Chef would provide his deed to Home as collateral for the loan. Although the promissory note that Chef wrote Employer only described the promise to pay back money, and that upon default Employer may sue for the balance, Chef should argue that the situation as a whole is substantially similar to a mortgage on real property. The court in Employer's eviction action will likely rule in favor of Chef. Under a typical mortgage agreement, the mortgagee is contractually obligated to return a deed upon repayment of loan proceeds. Here, Chef properly and timely repaid the loan (it was due April 1, 2009, and he paid it back by October 2008). Because the doctrine of equitable mortgage applies here (Chef gave his deed to Employer while simultaneously also giving him a promissory note to repay a loan), the court will likely not permit Employer to evict Chef.
2. The appellate court should rule in favor of Chef on each of his assignments of error in the Blackacre action. While a foreclosure sale is permitted upon default of a debtor, the equitable rule of redemption permits a debtor to satisfy his debts at any time prior to the sale. If the debtor does this, he can re-take the property. Here, Chef owed money to Bank pursuant to the mortgage agreement existing between them. Chef defaulted on these payments, and the trial court properly ruled in favor of Bank's foreclosure request. The foreclosure sale was set for January 24, but the trial court declared that Chef must make good on his debt before January 14 in order to get back the property. Such ruling improperly conflicts with Chef's equitable right of redemption, and thus for Chef's first assignment of error the appellate court should rule for him.

The appellate court should also rule for Chef on his second assignment of error. Ohio has a statutory right of redemption, which permits a debtor to make good on his mortgage debt within 6 months of a foreclosure sale. If the debtor is able to do this, he can retake possession of the property. Here, the foreclosure sale of Blackacre occurred on January 24. On January 28 (only 4 days later), Chef was able to satisfy his mortgage debt. However, he was not prohibited to do so by the clerk of court. This denial conflicted with Chef's statutory right of redemption, and the appellate court should rule in favor of Chef on his assignment of error for this.



QUESTION 12

Attorney, a lawyer licensed and practicing in Ohio, received the following items in the ordinary course of his practice:

- 1. Check #1:** This check, received from an insurance company, was in full settlement of a personal injury claim of Injured, one of Attorney's clients. The check was payable jointly to Attorney and Injured. With Injured's approval, Attorney had previously sent letters to Injured's medical providers promising to pay Injured's outstanding medical bills if and when a settlement was obtained. The amount of the check was sufficient to pay the medical providers, Attorney's contingent fee, and a reasonable amount to Injured. Although not contemplated by the written fee agreement, Attorney believes that he can persuade the medical providers to accept a fraction of what they are owed and wants to split the "savings" with Injured, thereby increasing both Injured's share and Attorney's fee.
- 2. Check #2:** Attorney had agreed to represent Divorcee but, in the engagement letter, required her to pay a retainer before he would enter an appearance in her case. Check #2, payable to Attorney, was from Divorcee to cover the full amount of the retainer. Under the terms of the engagement letter, the check was in an amount equal to the first 10 hours of Attorney's time at his standard domestic relations hourly rate.
- 3. Check #3:** One of Attorney's clients is Creditor, for whom Attorney regularly collects debts owed to Creditor by delinquent debtors. Check #3, payable to Creditor, was for partial payment of a debt Attorney had been engaged to collect. Attorney had established a special trust account at the bank into which, pursuant to instructions from Creditor, Attorney deposits funds collected.
- 4. Check #4:** This check is payable to Elderly, a client who entrusts all of her financial matters to Attorney. The check is the net proceeds from the sale of Elderly's automobile.
- 5. Check #5:** This check, payable jointly to Attorney and his client, Hurt, is from another insurance company for payment in full of a settlement of Hurt's personal injury claim. Because Hurt did not have the cash to pay uninsured medical expenses, Attorney had promised the medical providers, with Hurt's authorization, that they would be paid from the settlement. However, Hurt called Attorney and told him not to pay the medical providers when the settlement check arrived. He told Attorney instead to deduct the contingent fee and send the entire balance to Hurt, and that Hurt would deal with the medical providers.
- 6. A gold watch:** Attorney's client, Vanity, has an uncle (Uncle) who owns a valuable gold watch. Uncle sent the watch to Attorney for safekeeping, stating that he wanted to give Vanity the watch as a gift.

What obligations does Attorney have under the Ohio Rules of Professional Conduct upon receipt of each of these items? Explain your answers fully. You are not required to cite the rules by number.

1. **Check #1.** When a lawyer receives a settlement check payable to both the attorney and client he must deposit this money in a separate interest-bearing account. Lawyer must immediately notify the client that money has been received. Prior to paying out any proceeds a settlement letter must be issued. This must detail the amount of money received, who is entitled to any part of the money, and how it is to be paid out. In negotiating any expenses claimed by parties to a matter a lawyer must act in good faith with third-parties. A lawyer cannot circumvent any prior fee agreements, nor can he or she claim a right to any amount of money above what he or she has earned. A contingent fee agreement must be in writing, set forth how fees will be calculated, state what expenses and cost a client will be responsible for, and it must be signed by the lawyer and the client. Contingent fees are not allowed in criminal matters or most domestic relations matters. Here, Attorney must put the settlement check, that is payable jointly, in a trust account. Prior to making any disbursements of this money, Attorney must draft a settlement letter addressing how the money will be disbursed. Attorney had previously made a written promise to Injured's medical provider promising to pay expenses. These costs need to be satisfied first. Further, Attorney should not attempt to reduce any medical provider's obligations in bad faith. Finally, Attorney will only be able to recover his percentage of the fees as set forth in the contingent fee agreement.
2. **Check #2.** Any money provided as a retainer from client must be deposited in client's trust account. A lawyer cannot withdraw any money until earned. There must be a writing evidencing how fees will be calculated. If a portion of the money is not earned then it must be returned to the client. Also, the lawyer must not commingle his funds with the client's funds. The only exception is that a lawyer may put some of his or her money in to a client's account in order to pay bank costs or fees. In this matter, Divorcee paid Attorney a retainer that was meant to cover the first 10 hours of Attorney's time that may occur. Attorney has no right to any of this money until any portion of it has been earned.
3. **Check #3.** Please incorporate the discussion of client funds and fees from above. Here, Attorney established a special trust account and deposited the funds. He never commingled the funds or took possession of any portion. Attorney acted properly.
4. **Check #4.** Please incorporate the discussion of client funds and fees. In this matter, Attorney must immediately notify Elderly that the check has been received. Also, Attorney must deposit it into a trust account.
5. **Check #5.** Incorporate the discussion of client funds and fees. When there is a dispute as to money received, the lawyer may pay out any portion of the money that is not in dispute. The lawyer must then retain any portion of the fees that are in dispute until the matter is resolved. A lawyer cannot engage in misconduct or assist another in doing so. Here, Attorney had promised to pay the medical provider from the settlement. Attorney must inform the providers that a settlement has been received. Attorney should then satisfy any obligations from this settlement. Attorney must not pay out any money because there is a dispute with Hurt. Further, Attorney must not comply with Hurt's request to only pay the two of them and not the providers because this would be misconduct. Attorney would have to keep the settlement in a trust account until the matter is resolved.
6. **A gold watch.** When a lawyer receives client fees or property he has a duty to safekeep such items and keep them separate from his or her own property. Lawyer must notify client of receipt.



MPT 1

In re Field Hogs, Inc.

In this performance test, examinees are employed by the law firm that represents Field Hogs, Inc., a manufacturer of heavy lawn and field equipment for consumer use. The company has been sued four times on various products liability and tort theories; the firm successfully defended two of these cases, but two others resulted in substantial jury awards for the plaintiffs. Field Hogs wants to limit its costs and any unwanted publicity in future litigation. To address these concerns, Field Hogs has asked the law firm to draft an arbitration clause to be added to its sales contracts. Examinees' task is to draft an objective memorandum analyzing whether the proposed arbitration clause would cover tort claims against Field Hogs and whether the allocation of arbitration costs would affect the clause's enforceability. In addition, examinees are asked to draft an arbitration clause that is likely to be enforceable in court and that addresses the client's priorities. The File contains the instructional memorandum from the supervising attorney, a summary of the client interview, a memorandum summarizing Field Hogs's litigation history, a copy of the law firm's standard commercial arbitration clause, and the Consumer Procedures of the National Arbitration Organization. The Library contains two cases discussing the standards for enforceable arbitration clauses.

Delmore, DeFranco, and Whitfield, LLC
Attorneys at Law
1800 Hinman Avenue
Windsor, Franklin 33732

To: Carlotta DeFranco
From: Examinee
Date: July 26, 2011
Re: Arbitration Clause for Field Hogs, Inc.

Questions: The questions this memo answers are as follows.

- (1)(a) Would Field Hogs, Inc.’s (FH’s) commercial arbitration clause cover arbitration of all potential claims by consumers against FH under Franklin law? Why or why not?
- (1)(b) Would the commercial arbitration clause’s allocation of arbitration costs be enforceable against consumers under Franklin law? Why or why not?
- (2) What would an ideal arbitration clause look like, explaining how the draft language addresses FH’s needs and priorities.

This memo takes each question in turn.

Question (1)(a). FH’s commercial arbitration clause does not cover arbitration of all potential claims by consumers against FH under Franklin law. The arbitration clause reads as follows: “Any claim or controversy arising out of or relating to this contract or the breach thereof shall be settled by arbitration. Arbitration shall occur in accordance with the rules and procedures for arbitration promulgated by the National Arbitration Organization [NAO].” It is clear from your discussions with FH that it is seriously concerned with tort based claims—i.e. claims which arise from physical injuries caused by or related to the operation of FH equipment. Given how important quietly and cheaply dealing with torts claims is for FH, it will need to draft an arbitration agreement which specifically addresses tort claims. This is important because as drafted, the arbitration clause does not govern tort claims which arise from the use or operation of FH equipment.

In Franklin, arbitration clauses are generally favored. *LeBlanc* (Fr. Ct. App. 2003) and *Howard* (Fr. 2004). Thus, “all disputes between contracting parties should be arbitrated according to the arbitration clause in the contract unless it can be said with positive assurance that the arbitration clause does not cover the dispute.” *LeBlanc*. This means that “only the most forceful evidence of purpose to exclude a claim from arbitration can prevail over a broad contractual arbitration clause.” *Id.* The *LeBlanc* court went on to say that when an arbitration clause applies to claims which “arise out of or relate to” a contract, any tort claims which arise under the contract are not governed by the arbitration clause because the arbitration clause’s language clearly only applies to contract related claims like breach, and not to claims which arise out a general duty either party owes the public at large. All in all then, *LeBlanc* stands for the proposition that unless an arbitration clause specifically lists causes arising in tort as causes of action to which it applies, courts should not order the arbitration of tort claims. While the court did not explicitly rule on the interpretation of an arbitration clause specifically mentioning torts, it did state that “[w]e note that parties should clearly and explicitly express and intent to require the arbitration of claims sounding in tort” and that “courts should strictly construe any clause that purports to compel arbitration of tort claims.”

This law makes it clear that FH’s commercial arbitration clause is insufficient. If FH wants to arbitrate tort claims, which makes sense given that arbitration can be confidential and thus reducing the publicity FH would receive, it

must clearly and explicitly express that intent in its arbitration clause. Therefore, it is recommended that FH include the following statement in its arbitration clause, which is reproduced below in its full, edited form: “Any claim or controversy arising out of or relating to this contract, or any claims for physical or emotional injury which may result from the purchase, use, or operation of FH equipment, shall be settled by confidential arbitration.” In order to decrease publicity, FH should then define “confidential arbitration” as arbitration whose proceedings and results are sealed from public or private disclosure.

Question 1(b). FH’s commercial arbitration clause’s distribution of costs is unacceptable in Franklin, at least potentially unacceptable enough under the case law to merit massive litigation surrounding it, something which FH wants to avoid. Currently, the clause apportions costs per NAO rules. These rules state that (1) if claims and counterclaims are less than \$75,000, the consumer must pay 1/2 of the arbitrator’s fees, up to \$750; and (2) if claims and counterclaims exceed \$75,000, the consumer may pay half of the arbitrator’s costs, with a 1/2 estimate of costs deposited up front. In Franklin, in order for such fees to be proper, they and the arbitration clause supporting them must be conscionable.

To be conscionable, an agreement must be procedurally conscionable and its fees must be substantively conscionable. To be procedurally conscionable, the proponent of the arbitration clause must prove that (1) the consumer, the less powerful party, had a reasonable opportunity to negotiate the terms of the agreement and (2) that the consumer had a fair opportunity to be informed of the clause’s terms. To be substantively conscionable, the proponent must prove that the terms of the agreement were neither oppressive nor one-sided. Procedural unconscionability has not been heavily litigated per the materials provided. Thus, an estimated guess believes that FH’s arbitration clause is procedurally conscionable—as long as FH has given consumers a reasonable chance to read, understand, and speak to FH about it.

Turning to substantive unconscionability, four court of appeals cases provided help. In *Georges*, the court held that asking the consumer to pay a small initial fee with the seller paying the rest of the arbitration’s fees was substantively conscionable. In *Ready Cash*, the court held that an agreement forcing the consumer to pay 25% of the arbitrations fees was too much—it chilled a consumer’s willingness to go to arbitration because it would be impossible for the consumer to know how high that 25% could get. The court held as much in *Athens* where it held that an agreement substantively unconscionable when it allowed the arbitrators to assign fees as they saw fit, fees accumulated by a \$3,500 filing fee, a \$1,500 service fee, and a \$1,200 per day per arbitrator fee. Finally, in *Scotburg*, the court held an arbitration agreement that was completely silent about fees substantively unconscionable because given how fees can spiral, it was unfair to ask a consumer to enter into a type of dispute resolution about which it knew little and could not reasonably anticipate costs. The Franklin Supreme Court took all of these cases and in *Howard* ordered that where a court reasonably believes arbitration fees will exceed litigation fees, a court should hold the arbitration agreement authorizing the fees unconscionable where it is up to the arbitrator to determine who pays the fees.

With this case law digested, we know the following about FH’s current fee structure. First, it is likely problematic because it asks the consumer to pay, in every case, at least half of the fees. While for claims under \$75,000 those costs only go to \$750, for any claims over \$75,000, which as FH history has proven will be all of its torts claims, the consumer will have to pay half the costs, no matter what they are. Second, because in the later case those costs must be anticipated up front, under the current clause that may work a substantial hardship on consumers who might not be able to afford the fee. Courts in Franklin will likely look down upon this fact, especially when confronted by a plaintiff whose entire fortune is going to pay medical expenses. Third, under NAO rules, the consumer will have to pay a one-time \$2,000 administrative fee and split arbitrator costs of \$1,000 per day plus \$200 per hour for pre- and post-hearing matters. This seems to buck the *Athens* case.

To be safe, FH should draft an arbitration cost in which the consumer pays, at most, a small filing fee and where FH pays the rest of the cost of arbitration. While this seems daunting, it accomplishes two things. First, it will guarantee that FH's arbitration clause as it related to fee is conscionable (assuming that it allows consumers to review, understand, and negotiate the arbitration clause to some extent). Second, given the bad press that FH has received, particularly thanks to three piece "Costs of Justice" article, this step will give FH a lot of community credibility. Plus, given that it has been successful in its claims in the past, paying for the arbitration might be a small cost compared to potential payouts it might have to make in court.

Question (2). Below is an arbitration clause which meets FH's needs.

- 1. Any claim or controversy arising out of or relating to this contract, including breach, or any claims for physical or emotional injury or any other torts which may result from the purchase, use, or operation of FH equipment, shall be settled by confidential arbitration. "Confidential arbitration" is an arbitration whose discovery, facts and circumstances, causes of actions, proceedings, and results are sealed from public or private disclosure and will remain confidential upon settlement of a final claim.*
- 2. All fees relating to this arbitration shall be paid, except for a SMALL filing fee of \$___ [to be determined by FH], by FH, including arbitrator costs, hearing costs, and expenses.*
- 3. Three arbitrators shall hear and decide all claims and controversies. Each party shall select one expert and the two selected experts shall choose the third expert. The third expert shall be President and control the proceedings. Each party shall select its experts from the list provided by the NAO.*
- 4. The NAO's Procedures for Consumer Related Disputes shall govern all other elements and procedures of the arbitration.*

This arbitration clause addresses a number of FH's needs and priorities. For example, paragraph 1 assures that tort claims are addressed and that arbitration proceedings and the cases which lead to them remain confidential, something important to a company that has experienced bad press. Paragraph 2 assures, at a minimum, substantive conscionability because it makes the terms of the fee apportionment perfectly fair for the consumer in a manner that would not chill consumer use of arbitration. Paragraph 3 addresses FH's desire for professional arbitrators who are predictable by making sure that they have access to decision-makers with a professional background in arbitration. If FH would like, it might be possible to change the experts from NAO experts to experts in FH-like equipment. However, to do that, we would need the name of an organization which could provide those experts. Three arbitrators were suggested because it would give the consumer the opportunity to select an arbitrator for itself and have that arbitrator influence the proceedings through its own vote and by the selection of the third arbitrator. Finally, the last paragraph was added so that any arbitration proceeding has rules to govern it.

This clause does not address FH's concern about lower award yields and decreased costs because (1) arbitration naturally accomplishes both and (2) to place any restrictions on either, particularly the size of awards, might greatly chill a consumer's desire to enter arbitration, a key factor giving rise to substantive unconscionability.

Conclusion: As it is written, there are serious problems with FH's clause—it needs an explicit mention of torts and it must be reworked to assure conscionability. Assuming that FH meets its procedural conscionability requirements in the offering and negotiation of its contracts, if it adheres to the clause above, it should succeed. This suggests imputed into the draft clause above should reduce consumer actions litigating the appropriateness of the arbitration clause itself.

MPT 2

In re Social Networking Inquiry

Examinees' supervising partner is the chairman of the Franklin State Bar Association Professional Guidance Committee. The committee issues advisory opinions in response to inquiries from Franklin attorneys concerning the ethical propriety of contemplated actions under the Franklin Rules of Professional Conduct. The committee has received an inquiry from a Franklin attorney asking whether an investigation using the social networking pages (such as Facebook or MySpace) of a nonparty, unrepresented witness in a personal injury lawsuit would violate the Rules. The supervising partner has reviewed the matter and believes that the attorney's proposed course of conduct would be contrary to the Rules. Examinees' task is to prepare a memorandum analyzing the issue with the object of persuading the other committee members that the proposed course of conduct would violate the Rules. This is an issue of first impression in Franklin. Examinees must therefore discern the relevance of, and guidance to be derived from, the three differing applications of those Rules in other states and then apply those differing approaches to the proposed course of conduct. The File contains the instructional memorandum, the letter from the Franklin attorney making the inquiry to the committee, and notes of the committee meeting. The Library contains the applicable Rules of Professional Conduct (including commentary on the Rules) and two cases—one from Olympia and one from Columbia—bearing on the legal issues.

MEMORANDUM

To: Bert H. Ballentine
From: Examinee
Date: July 26, 2011
Re: Social Networking Inquiry

The issue brought by Melinda Nelson is a case of first impression in Franklin. Nelson seeks advice regarding whether it would be an ethical violation if she asks one of her assistants, who is not an attorney, to go onto a social networking site and seek to “friend” a witness to gain access to the information on her pages. Under any of the three approaches followed by Olympia, Columbia, and elsewhere, Nelson’s proposed conduct would indeed violate the Franklin Rules of Professional Conduct (FRPC) for the reasons stated below.

1. FRPC applies even if the proposed conduct will be carried out by a non-lawyer.

FRPC Rule 5.3(c)(1) state that with respect to a nonlawyer employed or retained by or associated with a lawyer: ... (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules if engaged in by a lawyer if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved.” In *In re Hartson Brant (Brant)*, the court said that the fact that non-attorneys actually carried out a sting involving misrepresentation and deceit did not exempt Brant, the attorney, from liability. Here, Nelson is proposing to have her assistant carry out a misrepresentation by engaging with an adverse witness for the purpose of providing Nelson with information to impeach the witness. Under FRPC 5.3(c)(1), Nelson will be liable for this misconduct even if her assistant is the one seeking the “friend” request.

2. Under any of the three approaches to resolving this issue, Nelson’s proposed conduct will violate the FRPC.

- (a) Strictly Applying the Rules

The Olympia Supreme Court applied its Rules of Professional Conduct in the case: *In the Matter of Devonia Rose (Rose)*. The court there approved sanctions of Rose because she violated Rule 8.4(c), even though it mitigated her punishment because her motive was in no way selfish or self-serving, and she sincerely believed she was protecting the public. In coming to this conclusion, the court applied its rules strictly because members of our profession must adhere to the highest moral and ethical standards, which apply regardless of motive. Rose, the chief deputy district attorney, offered to impersonate a public defender in order to get a criminal to surrender his hostages. Patrick, the criminal, made three demands to surrender, including that his lawyer would be present, and Rose agreed to all three while impersonating a public defender. Patrick believed Rose was his attorney and he asked for her, but Rose made no subsequent effort to correct the misrepresentation she created. In applying Olympia Rule of Professional Conduct 8.4(c), which states that “It is professional misconduct for a lawyer to ... (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation,” the court stated that there were no exceptions to this rule. Rose asked for an exception to the rules for cases involving the possibility of “imminent public harm,” but the court was not convinced that such was the case here. Rose had other options rather than acting deceptively, including telling Patrick that a public defender would be provided as soon as he surrendered.

Here, Nelson’s proposed conduct would violate the FRPC as strictly applied. The plain language of the rules deems any misrepresentation, no matter the motivation, improper. Nelson’s proposed action seeks for her to engage in dishonesty, fraud, deceit, and misrepresentation by using her assistant to gain access to the witness’s information. Nelson seeks to use her assistant to gain access to an

A adverse witness's social media site because Nelson believes the witness would not allow Nelson access herself. Furthermore, she intends to engage in this deceit to seek information to impeach this witness. The fact that Ms. Piel claims that misrepresenting Nelson's identity through her assistant would be harmless, or that Mr. Hamm believes it is worthwhile to expose a lying witness, are of no consequence under the method that strictly applies the rules. Even if the sites are open to the public, as Ms. Piel asserts, this witness would not allow Nelson access, so it's not open to her. Thus, strictly applying the rules to Nelson's conduct would result in a violation.

(b) Conduct-Based Analysis

This approach examines four factors in determining whether conduct is a violation of the rules. The factors are: (1) The directness of the lawyer's involvement in the deception, (2) the significance and depth of the deception, (3) the necessity of the deception and the existence of alternative means to discover the evidence, and (4) the relationship with any other of the rules, that is, whether the conduct is illegal or unethical. Goldring & Bass, *Brant*. Here, Nelson is directly involved in the proposed deception. She is the one who created this plan and its execution. Second, the significance and depth of the deception is high because it goes to the heart of the rules of discovery. In *Rose*, for example, Rose's conduct went to the heart of the attorney-client relationship and was significant. Third, Nelson's deception is not necessary and there are alternative means to discover this evidence. The *Brant* court stated that misrepresentation used to obtain information that could be obtained through standard discovery is more likely to constitute an ethical violation. Here, Nelson could seek this information through a subpoena, or could first attempt to "friend" the witness herself. Just because Nelson believes the witness would not allow her access does not mean she should not try. Finally, this conduct is unethical. Under FRPC 4.1(a) "in the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person." Nelson is making a false statement of identity through her assistant. In addition, as stated above, the conduct directly violates FRPC 8.4(c).

Ms. Piel, Mr. Hamm, and Mr. Haig may argue that there are no alternative means to discover this information, but Ms. Nelson has not even attempted any other less intrusive method at this point. Furthermore, they may assert that this deception is harmless and is not significant, but this matter involves a crucial misrepresentation and the witness's testimony may be critical to the case. Thus, based on the content-based approach, Nelson's conduct is unethical.

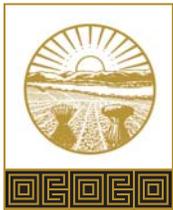
(c) Status-Based Analysis

The status-based approach focuses on the importance and nature of the role that the attorney plays in advancing the interests of justice. The spirit of the rules is to see that justice is done. Thus, the test is whether the conduct goes to the core of the integrity of the profession and adversely reflects on the fitness to practice law. *Brant* involved a sting operation in which Brant, an attorney for Columbia Fair Housing Association, instructed his minority assistants to engage in a sting operation of a discriminatory condo seller. Brant was accused of violating Rules 4.1(a) and 8.4(c). In *Brant*, the type of misrepresentation at issue was one common to cases which seek to root out violations of civil rights. The court found it was not one that goes to the core of the integrity of the profession and adversely reflects on the fitness to practice law. The court held that misrepresentations that do not go to the core of the integrity of the profession, and that are necessary to ensure justice in cases of civil rights violations, intellectual property infringement, or crime prevention, do not violate Columbia's Rules of Professional Conduct. The court examined the commentary to 8.4, which states that many

A kinds of illegal conduct reflect adversely on fitness to practice law ... and some offenses carry no such implication. A lawyer should be professionally answerable only for offenses that indicate a lack of those characteristics relevant to law practice.

Here, the conduct Nelson seeks to engage in goes to the core of the integrity of the profession and adversely reflects on her fitness to practice law. Her misrepresentation of identity is not one that seeks justice for civil rights, involves intellectual property infringement, or involves crime prevention. Instead, Nelson's case is a trip-and-fall case. Her conduct of misrepresenting her identity through her assistance to gain information to impeach the witness is in direct contravention to the characteristics of honesty and truthfulness, which are essential to the practice of law. Mr. Hamm may claim that this does not reflect adversely on Nelson's fitness because she is seeking to expose a liar, but the status-based approach does not account for motive of the attorney. Even if this is a misrepresentation in the pursuit of justice, as Ms. Piel claims, Nelson's conduct is still in contravention of the integrity and fitness to practice law.

Published by
THE SUPREME COURT *of* OHIO
Office of Bar Admissions
www.supremecourt.ohio.gov
December 2011



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OFFICE OF BAR ADMISSIONS
65 South Front Street
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