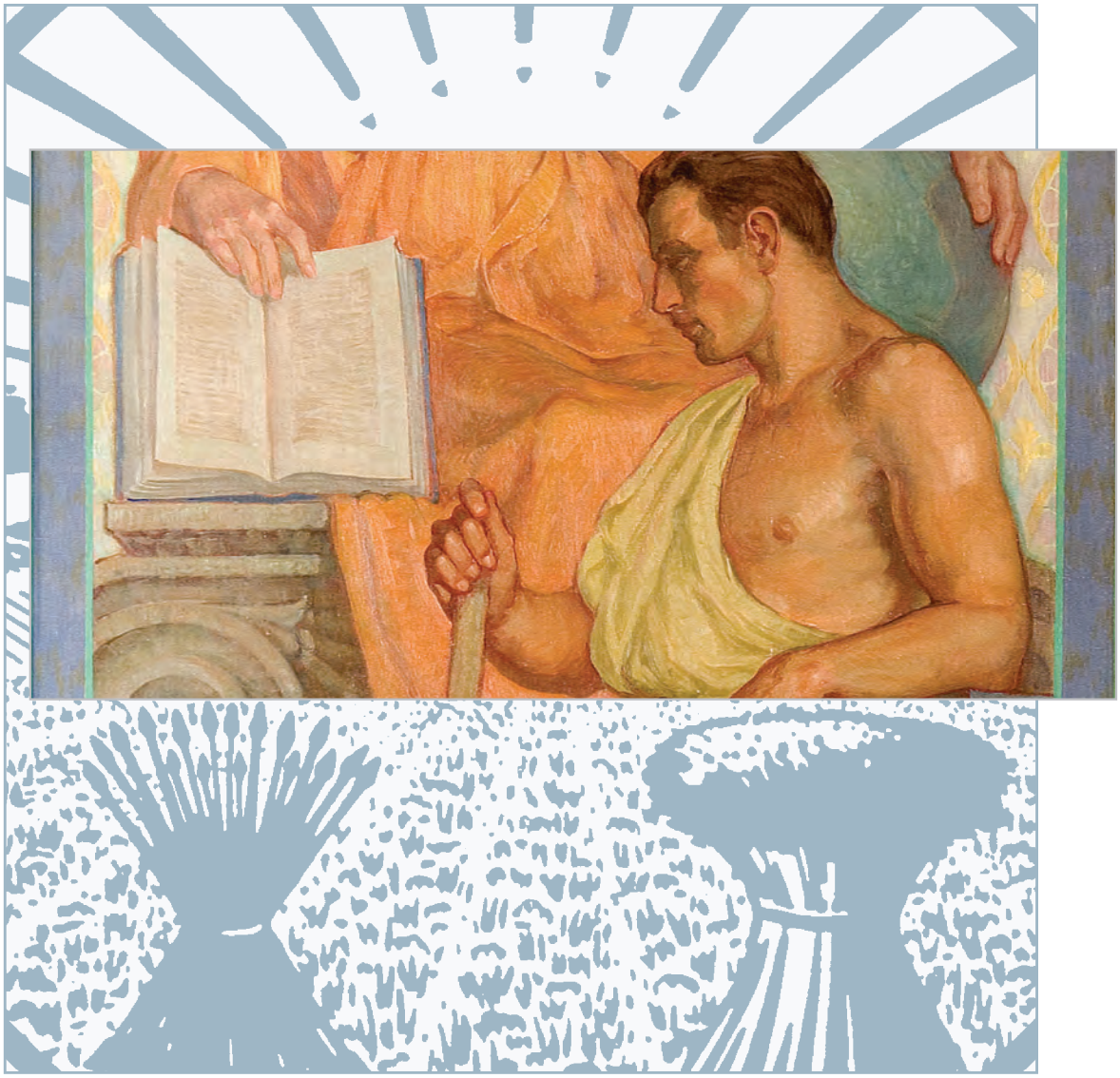
THE SUPREME COURT *of* OHIO

February 2015 Ohio Bar Examination

Essay Questions & Selected Answers

Multistate Performance Test Summaries & Selected Answers



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FEBRUARY 2015 OHIO BAR EXAMINATION

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OHIO BAR EXAMINATION

FEBRUARY 2015 OHIO BAR EXAMINATION

Essay Questions and Selected Answers

MPT Summaries and Selected Answers

The February 2015 Ohio Bar Examination contained 12 essay questions, presented to the applicants in sets of two. Applicants were given one hour to answer both questions in a set. The length of each answer was restricted to the front and back of an answer sheet.

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

The following pages contain the essay questions given during the February 2015 exam, along with the NCBE's summaries of the two MPT items given on the exam. This booklet also contains some actual applicant answers to the essay and MPT questions.

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

Copies of the complete February 2015 MPTs and their corresponding point sheets are available from the NCBE. Check the NCBE's website at www.ncbex.org for information about ordering.

QUESTION 1

Gizmo sells electronic devices on the wholesale market to businesses and also operates a retail store for consumers. He is a resident of and conducts business in Ohio.

Bank 1 Transaction: Recently, Gizmo needed some additional cash flow and received a loan from Bank 1. Gizmo and Bank 1 executed a security agreement identifying the collateral for the loan as Gizmo's existing inventory of electronic devices for the wholesale-business market. No further action was taken.

Bank 2 Transaction: Gizmo then approached Bank 2 to get a loan to purchase new inventory for his retail business. Bank 2 provided a loan for the purchase of 200 laptop computers for Gizmo's retail business and executed a security agreement with Gizmo identifying the laptops as collateral for the loan. No further action was taken.

Bank 3 Transaction: Gizmo sold 50 of the laptops to customers who financed the purchase through installment contracts with Gizmo. Gizmo borrowed money from Bank 3 and used the contracts as collateral. Gizmo retained the contracts for collection of payments. A security agreement was executed identifying the contracts as collateral, and Bank 3 filed the financing statement with the Ohio Secretary of State.

Friend 1 Transaction: Gizmo then approached Friend 1 and said, "I am desperate in the short term for cash. I have a deposit account at State Bank with $10,000 in it that I do not want to take out because of early-withdrawal penalties. If you loan me $10,000, I will give you a security interest in the account and you can have the balance, with interest, when it matures." Gizmo and Friend 1 executed a security agreement describing this arrangement, and Friend 1 filed the financing statement with the Ohio Secretary of State.

Friend 2 Transaction: Finally, Gizmo approached Friend 2 and said, "Can you loan me $1,000 until next week?" Friend 2 gave Gizmo $1,000 and no further action was taken.

For each of the following situations, discuss whether a security interest has attached and whether it has been perfected.

1. Bank 1's interest in Gizmo's existing business inventory.
2. Bank 2's interest in Gizmo's new retail inventory.
3. Bank 3's interest in the installment contracts.
4. Friend 1's interest in the deposit account.
5. Friend 2's interest in the $1,000 loan.

Explain your answers fully.

Do not discuss priority as among the creditors.

In order for a security interest to attach, the following are required: 1) the debtor has an interest in the collateral; 2) the secured party gives value; 3) there is a valid security agreement formed. A valid security agreement can be created by a record, authenticated by the debtor and containing a reasonably sufficient description of the collateral (this description cannot be super-generic). Alternatively, attachment can occur through an oral security agreement and possession by the secured party. Attachment is a prerequisite to perfect. Perfection can occur by 1) properly filing; 2) possession; 3) control; 4) alternative perfection systems; or 5) automatically.

1. Bank 1's interest in Gizmo's existing business inventory: Bank 1's interest has attached. Gizmo, the debtor, has an interest in their existing inventory of electronic devices. Bank 1 extended valued to Gizmo by loaning them money. Bank 1 and Gizmo signed a security agreement, which contained a sufficient description of the collateral as existing inventory of electronic devices. Bank's security interest has not been perfected.

2. Bank 2's interest in Gizmo's new retail inventory: Bank 2's interest has attached. Gizmo, the debtor, has an interest in their existing inventory of electronic devices. Bank 2 extended value by loaning Gizmo money to purchase new inventory. Bank 2 and Gizmo entered a valid security agreement by executing a security agreement describing the collateral as the existing inventory of laptops. Bank 2's security interest is temporarily, automatically perfected for 20 days. A purchase money security interest (PMSI) in non-consumer goods is temporarily, automatically perfected for 20 days. A PMSI exists where a debtor borrows funds in order to pay for goods, does in fact use the money to purchase those goods, and the secured party obtains a security interest in those goods. Here, Gizmo borrowed money to fund the inventory of laptops they purchase and Bank 2's security interest was in the inventory of laptops. Bank 2 will not be entitled to super-priority status for this PMSI, however, as they did not perfect by the time delivery occurred.

3. Bank 3's interest in the installment contract: Bank 3's interest in the installment contracts has attached. Here, Bank 3 gave value to Gizmo by lending money. Gizmo had an interest in the customer's installment contracts. A valid security agreement was formed when Gizmo and Bank 3 agreed that the money Gizmo borrowed would be secured by the installment contracts. The installment contracts would constitute chattel paper because there is both a loan to the customers and a written record (the written installment contract). Filing is an effective means of perfecting an interest in chattel paper. Here, Bank 3 filed a financing statement with the Secretary of State for the collateral. Therefore, Bank 3's security interest is perfected.

4. Friend 1's interest in the deposit account: Friend's interest in the deposit account has attached. Friend extended value to Gizmo by loaning Gizmo $10,000. Gizmo had an interest in its deposit account. Gizmo and Friend entered into a valid security agreement by executing an agreement describing this arrangement and the collateral. Friend's security interest is not perfected, however. A security interest in a deposit account can only be perfected by control. Here, Friend attempted to perfect their security interest by filing. However, because this method is not effective to perfect a security interest in a deposit account, Friend is unperfected.

5. Friend 2's interest in the $1,000 loan: Friend 2's security interest has neither attached nor been perfected. The security interest did not attach because there was no security agreement formed. Attachment is required for perfection. Therefore, no perfection has occurred.

QUESTION 2

1. Suspension of Peter – Facebook Profile: Peter, an 18-year-old high school senior at Lakeland High School in the State of Franklin, created a fake Facebook profile of his home economics teacher Curt Cook (Cook). He created the Facebook account during non-school hours at his girlfriend's house using her computer. He obtained pictures of Cook from the school's public website and cut and pasted those pictures into the account. Peter completed the profile by creating bogus answers to survey questions designed to help create a profile. Many of the responses Peter created were vulgar and offensive. For example, under "getting to know me" questions, Peter answered them as follows:

   - Daily Routine: Getting drunk to dull the pain of my pathetic career and miserable life.
   - Favorite Soup: Turd Soup.
   - My favorite evening: Putting on a dress and high heels and whipping up a gourmet meal.
   - Person I hate the most: Principal Don "Big Butt" Winter.

   News of the Facebook account spread quickly among the student body at Lakeland and most, if not all, students had seen the profile shortly after it was created. Some students viewed it on school campus during school hours. Cook was made aware of the profile when his daughter, a junior at Lakeland, told him about it. He immediately notified Principal Winter as he found the profile to be degrading, demoralizing, and shocking. He was also concerned about his reputation and his ability to command respect from his students who may have viewed the profile. The school's computer staff was able to ascertain that Peter created the profile. Peter was confronted by Principal Winter and Cook and admitted that he created the profile. An informal hearing before the school board was held and Peter was found to have violated the Lakeland School District Disciplinary Code, which prohibits:

   > Disruption of the normal school process; Disrespect; Harassment of a school administrator via computer/internet with remarks that have demeaning implications; Gross misbehavior; Obscene, vulgar and profane language; Computer Policy violations (use of school pictures without authorization).

   Peter was suspended for two weeks, banned from any extracurricular activities, and prohibited from participating in any graduation ceremonies with his classmates.

   Peter filed a lawsuit against the school district alleging that the punishment violates his First Amendment rights.

2. Brandy's Suspension – Arm Band Policy: As a way to protest Peter's punishment, several students devised a plan in which they would all begin wearing silver armbands to class to raise awareness of Peter's plight. The Lakeland School Board found out about the plan and quickly adopted a policy stating that any student wearing an armband would be asked to remove it, with refusal to do so resulting in suspension. The policy was disseminated to all Lakeland High School students. Two days after the policy was adopted, several students carried out their protest and wore the silver armbands to class. All students wearing the armbands were asked to remove them. One student, Brandy, refused to remove the armbands and was suspended. Through her parents, Brandy sued the school district for violating her First Amendment rights.

3. Clay's Suspension – Policy on Promoting Illegal Drugs: At a school assembly convened to discuss the recent suspensions, one student, Clay, unfurled a banner which read, "Pot Smokers for Peter." The banner was greeted with loud cheers from the student body, but did not lead to any disturbance. Principal Winter asked Clay to take down the banner as it violated school policy on promoting illegal drug use.

   After Clay refused to take down the banner, Principal Winter had the banner removed and later suspended Clay. Through his parents, Clay sued the school district for violating Clay's First Amendment rights.

4. Daryl's Suspension – Policy on Promoting Illegal Drug Use: Another student, Daryl, began displaying an identical banner across the street from school property. He did so after obtaining all of the appropriate city permits and only displayed the banner before and after school hours as students were entering and leaving school property. Principal Winter asked Daryl to take down the banner as it violated school policy on promoting illegal drug use. After Daryl refused to take down the banner, Principal Winter had the banner removed and later suspended Daryl. Through his parents, Daryl sued the school district for violating Daryl's First Amendment rights.

How should a court rule on the constitutional challenges asserted in each of the following cases?

1. Peter's challenge of his punishment.
2. Brandy's challenge of the school policy on wearing arm bands.
3. Clay's challenge of the school policy on messages promoting illegal drug use.
4. Daryl's challenge of the school policy on messages promoting illegal drug use.

Explain your answers fully. Please do not make any defamation arguments.

1. Peter likely will succeed on his claim that the Lakeland High School's punishment based on the Disciplinary Code violates his first amendment rights (this is assuming Lakeland is not a private school). The right to free speech under the 1st amendment is a fundamental right. Any government action which interferes with the right is subject to strict scrutiny and must be narrowly tailored to serve a compelling governmental interest, and be the least restrictive means. Furthermore, any statute that curtails this right cannot be vague or overbroad. A vague statute is one which doesn't put a citizen on sufficient notice as to specifically what kind of conduct is prohibited. An overbroad statute is one that burdens more speech than is constitutionally permissible to achieve the government's aim. Here, Peter's act of making the Facebook profile was a form of speech. Therefore, this triggers strict scrutiny. The school's policy in this case was enacted with the purpose of preventing disruption of the school process, disrespect and harassment of school administrators. The school would likely have a compelling interest in protecting their employees and in maintaining the smooth functioning of the school environment. However, the school's policy is not narrowly tailored to achieve this end because they have a blanket prohibition on any "remarks that have a demeaning implication" regarding an administrator. And further prohibit all vulgar and profane language and any use of school pictures without authorization. The school could achieve their goal by less restrictive means, such as by only prohibiting specific types of remarks or specific types of pictures. Furthermore, the "obscene, vulgar, and profane language" is overly vague and does not give real notice as to what is prohibited, nor does the prohibition against remarks with "demeaning implications." Furthermore, all the prohibitions are overly broad. Therefore, Peter will succeed on his 1st amendment claim.

2. Brandy will succeed in her claim that the school's action violated her first amendment rights. Symbolic speech, such as wearing an armband to support a certain cause is a form of speech and is entitled to 1st amendment protection. Generally, where the government places a restriction on symbolic speech such restriction will be upheld where it advances a significant government interest that is unrelated to the suppression of the underlying content. Here, Brandy began wearing a silver armband in order to raise awareness about Peter's plight. This was symbolic speech. Lakeland told Brandy to remove it and that if she failed to do so she would be suspended. This action was a restriction on symbolic speech. Lakeland did not have a significant interest in ordering this action apart from their desire to suppress the underlying speech. Therefore, Brandy will succeed in her argument that this violated her 1st amendment rights.

3. Clay will likely not succeed in his challenge that Lakeland's action violated his constitutional rights. Placing the banner was a form of speech subject to strict scrutiny (this requirement is laid out in answer 1 above). Here, however, the school has a compelling interest in preventing students from endorsing illegal activities on school premises. Clay's banner which read "Pot Smokers for Peter" could be viewed as endorsing illegal pot smoking. The schools requirement that Clay take down the banner at school was narrowly tailored to this purpose.

4. Daryl will succeed in his argument that the school's action violated his first amendment rights. Here, Daryl's banner was a form of speech. Thus the school's prohibition and suspension trigger strict scrutiny. Here Daryl was not on school property when he displayed the banner. The school does not have a compelling interest in preventing students from endorsing the use of illegal drugs when they are not on school premises.

QUESTION 3

Acme, Inc. (Acme) is an Ohio corporation, which has issued 100 shares of its without-par-value common stock. The shareholders are Tom - 20 shares; George - 35 shares; Carl - 35 shares; and James - 10 shares. The shareholders unanimously elected Tom, George, and Carl as the members of the Board of Directors. The board has elected Tom as president, George as treasurer, and Carl as secretary.

Tom is to be a full-time employee of Acme. George is an accountant and will be an advisor to Acme; and Carl, as Secretary, is an investor and will be an advisor to Acme. Carl and George will each receive $10,000 for every board meeting they attend. Tom will not receive any compensation for attending board meetings. The Board delegated to Tom all of the rights, powers, and authorities held by the Board of Directors. The Board reviewed and approved a proposal from George's accounting firm for accounting and tax services.

Without further action of the Board, Tom signed an employment agreement between him and Acme for 10 years whereunder Tom will receive a salary of $100,000 a year plus 10% of Acme's profits. Tom also obtained a loan for Acme from Bank, and he granted Bank a security interest in all of Acme's assets to secure the loan.

Tom, in performing his duties as President, became aware of the fact that Acme's major supplier (Supplier) was for sale. Tom informed George and Carl of the opportunity to buy Supplier. Anticipating that they could make a handsome profit, Tom, George, and Carl formed an equal partnership to purchase Supplier. After the purchase, Supplier continued to furnish materials to Acme at the same price and upon the same terms that were available to Acme before the sale.

When James was informed of all of the foregoing, he immediately demanded immediate access to Acme's books and records and demanded the annual financial statements for Acme, because he has not received one for the last three years. Tom declined the requests because James refused to say why he wanted the information.

James has filed suit against Acme, Tom, George, and Carl and asserted the following claims:

1. The delegation by the Board of all its power to Tom is unlawful.
2. The payment of fees to George and Carl for attendance at board meetings should be returned to Acme.
3. The engagement of George's accounting firm should be canceled.
4. Tom's employment contract with Acme should be canceled.
5. The loan by Bank to Acme should be canceled, and the security interest granted to Bank canceled.
6. Ownership of Supplier should be transferred to Acme, and all profits earned by Tom, George, and Carl as a result of the ownership of Supplier should be paid to Acme.
7. Acme should be required to deliver to James its annual financial statements.
8. Acme should be required to give James access to its books and records.

After Tom, George, and Carl were notified of the suit, they convened a meeting of the board. At this meeting, they discussed the lawsuit in detail, and they unanimously voted to require Acme to reimburse them for any expenses, including legal fees, they incur in defending the lawsuit filed by James, and to reimburse them for any amounts which they are required to pay as a result of a compromise or judgment of the lawsuit. Acme entered into an Indemnification Agreement with Tom, George, and Carl to pay their expenses in defending the lawsuit and reimburse them for any amount which they are required to pay.

When James learned that Acme was paying for the defense of the lawsuit for all of the defendants, James amended his complaint to add the following additional claim

9. Acme should be prohibited from paying any amounts to Tom, George, and Carl under the Indemnification Agreement.

Tom, George, and Carl assert the following defenses to the action brought by James: (i) that James has no right to maintain the lawsuit; and (ii) that none of the nine claims asserted by James has any merit.

How should the Court rule on each of the defenses? Explain your answers fully.

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

i. The court should hold that James has a right to maintain the lawsuit. James is a shareholder of Acme Corporation and in such position can file either a direct suit against individual members of the board or can file a derivative suit against the directors on behalf of the corporation to assert the corporation's rights. Under General Corporate Law (GCL) in Ohio, a corporation is a separate entity that can be sued. Here, since the suit is against the corporation, Acme, as well as the individual members of the board, it seems like James is filing a direct suit for the injury the corporation and the directors are inflicting upon James as a shareholder. A shareholder can file a direct suit against a corporation or the directors if they are acting outside the scope of their purpose (ultra vires acts, which the individual directors would be held liable) or if the corporation and its directors are not following proper requirements as stated by the General Corporate Law (GCL). It also doesn't matter if James is only a 10% shareholder. Therefore, James has right.

ii. 1. The delegation of power to one person on the Board is unlawful. Under GCL, the management of the corporation is vested in the board of directors, across all of the directors who are elected. The board of directors can then delegate day-to-day management to officers (such as President, Treasurer, and Secretary). However, a board of directors which consists of 3 members can't place all the power of the board of directors in one director. Therefore, the court will decide that this claim has merit.

2. The payment of fees to George and Carl for attendance at board meetings is ok. Board members can approve compensation for their services as long as it is reasonable, but there has to be majority approval from the board of directors. There seems to be approval here and thus as long as the $10,000 compensation is reasonable, this will be allowed. Therefore, this claim has no merit, unless the court says unreasonable.

3. The engagement of George's accounting firm is allowed. Directors owe a duty of loyalty to the corporation which means the corporation's interests are before the director's individual interest. If a director stands to benefit personally from a transaction, such as George here, then he must disclose material facts to the board and get the approval of the majority of disinterested directors or shareholders, or it must be fair to corporation. George has approval here, so it is ok.

4. Tom's compensation should be canceled. Directors are allowed to be compensated for services but it must be reasonable and must be approved by the board. Here, Tom is acting alone without approval from the rest of the board. Therefore, the compensation agreement should not be allowed.

5. The loan for Acme from Bank and the security interest in all of Acme's assets also should be canceled, for the same reasons as stated above. Tom was acting alone and without the approval of the rest of the board.

6. The ownership of Acme and its profits as well as its profits should be transferred to Acme. Here, there was a violation of the duty of loyalty. As stated, the directors must act with best interest of corporation and not engage in self-dealing. Here, Tom, George, and Carl wanted to keep the profits so they formed a partnership in order for the profits not to go to the corporation. This violates duty of loyalty and therefore James' claim has merit.

7. James' claim that Acme send him a financial statement is with merit. Since James is a shareholder and hasn't received a report in 3 years, he is entitled to one.

8. Acme is not required to give James access to books and records without the James giving a stated proper purpose. James has not given one, so claim is without merit.

9. James' claim is with merit. Directors can be indemnified if they win on merits, not if they lose.

QUESTION 4

On an early spring evening in Oldlaw Park (the Park) in downtown Franklin, Ohio, Victim was brutally stabbed multiple times resulting in his death during an apparently failed drug transaction. Defendant was arrested and charged with murder. Defendant entered a general plea of not guilty. At trial in Common Pleas Court, during the State's case-in-chief, Prosecutor called five (5) witnesses:

Witness One: Over Defense Counsel's timely objection, Witness One testified as follows: Thirty minutes before the alleged murder, Witness One observed Defendant and another person generally fitting the description of Victim, exchanging money for a small plastic zip-lock baggie. Witness One witnessed this activity two blocks from the Park.

Witnesses Two and Three: Witness Two and Witness Three were on a date on the evening of the alleged murder and were approaching the entrance of the Park. Witness Two testified that she observed two persons in the Park, generally fitting the descriptions of Defendant and Victim, engaged in a physical confrontation. The one that looked like Defendant overpowered the other and made repeated stabbing motions. Defense Counsel did not object to Witness Two's testimony. When Prosecutor called Witness Three to testify that he saw exactly what Witness Two had seen, Defense Counsel timely objected.

Witness Four: Witness Four, Coroner, testified that Victim died as a result of multiple stab wounds. During the autopsy, Coroner carefully photographed each of the nine wounds, both before and after he cleaned the dried blood from the surface of the skin. In some of the "before" photos, the blood obscured most of the wounds. Prosecutor moved to introduce all 18 photos. Defense Counsel timely objected.

Witness Five: Over Defense Counsel's timely objection, Witness Five, Defendant's former employer, was called to testify about Defendant's propensity for violent and brutal attacks. If allowed, Witness Five will testify that Defendant was fired because of physical attacks on his immediate supervisors. Defense Counsel had steadfastly maintained during pretrial negotiations with Prosecutor that Defendant is a peaceful person not capable of physical acts like murder with which he is now charged.

What are the grounds upon which Defense Counsel should have based each of his objections, and how should the Court have ruled on each? Explain your answers fully.

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

Witness 1

Defense counsel's grounds for the objection to Witness 1's testimony is that it is irrelevant. Evidence is relevant if it makes any fact of consequence any more or less probable. Defense counsel will argue that what happened 2 blocks away, 30 minutes before the crime in question is irrelevant to whether the Defendant committed murder.

However, Witness 1's testimony will be allowed because the occurrence of a drug transaction between the Defendant and Victim before the stabbing is relevant to motive and mens rea. The existence of a drug deal makes the theory of the case that the stabbing resulted from a drug deal gone wrong more likely. Therefore, the court will overrule defense counsel's objection.

Witnesses 2-3

Defense counsel will object to Witness 3's testimony because it is duplicative. Testimony is not allowed if it is duplicative, would cause confusion for the jury, or is a waste of time. Here, because Witness 3 is saying the exact same thing as Witness 2, and both are based on personal knowledge, only one is necessary. Because Witness 2 has already testified, Witness 3's statement should be excluded. Therefore, the court will sustain defense counsel's objection.

Witness 4

Defense counsel's grounds for objecting to the photos will be that they are prejudicial. Relevant evidence is admissible unless its probative value is substantially outweighed by unfair prejudice. The reason the photos are being introduced into evidence is to show the nature, size, and shape of the wounds. This relevant purpose can be achieved with the "after" photos, in which the blood was cleaned off, so the "after" photos will be admissible.

However, the "before" photos will likely be excluded. The only value of the "before" photos is to show the blood, which is unnecessarily gruesome and would likely inflame a juror. The jurors would be less able to see the nature and extent, size and shape of the wounds because they were obscured by blood, so they have no probative value. Because a juror would likely be inflamed by the bloody photos and no further understanding of the wounds would be gained, the "before" photos would be excluded as prejudicial.

Defense counsel also will raise the grounds of the best evidence rule, that testimony about the contents of a writing or photo is inadmissible when the writing or photo is available as evidence. As the photos are available, Coroner's testimony is not the best evidence of the wounds. Unless the whole purpose for him testifying is to verify he took the photos, his testimony will be excluded.

Witness 5

Defense counsel will object to Witness 5's testimony as inadmissible character evidence.

Extrinsic evidence of prior bad acts is not admissible to prove propensity to commit a crime. This is highly prejudicial because the jury is likely to assume that because a defendant did something bad in the past that he's a "bad guy" and will be more likely to render a guilty verdict regardless of the facts of the case. Defendant's former employer firing him because of physical attacks on his immediate supervisors is a prior bad act. Because prior bad acts are inadmissible to prove propensity, and that is the only reason Prosecutor would seek to admit it, defense counsel's objection will be sustained.

Evidence about a person's propensity for violence in the form of opinion and reputation testimony is admissible if the defendant first opens the door by introducing testimony about his propensity for peacefulness. However, Defendant has not opened the door because no testimony as to his peacefulness has been brought to trial. Just because defense counsel maintained during pretrial negotiations that Defendant is peaceful does not open the door. Therefore, the opinion and reputation testimony as to Defendant's propensity to violence is inadmissible. The court will sustain defense counsel's objection.

QUESTION 5

Doug is a widower who lives in Ross County, Ohio. After the death of his wife in 2004, Doug created a valid Will under Ohio law in May 2005 (2005 Will). The dispositive provisions of the 2005 Will provided as follows:

1. I give $20,000 to my sister, Ann.
2. I give the rest and residue of my estate in equal shares to my son, Scott, and my daughter, Emmy.

Doug also purchased a $60,000 life insurance policy in 2007. The policy included a provision that, if any beneficiary did not survive the insured, the share for the deceased beneficiary would pass to the estate of the insured. The beneficiaries of the policy were as follows:

1. $20,000 to my son, Scott, and his wife, Sandy.
2. $20,000 to my daughter, Emmy.
3. $20,000 to my business partner, Pete.

In February 2014, Doug and Scott were passengers in a vehicle driven by Doug's sister, Ann. Ann was traveling well above the posted speed limit. Doug repeatedly asked Ann to slow down; however, she continued to drive well above the speed limit. While rounding a curve, Ann lost control of the vehicle and rolled down an embankment. Scott died at the scene of the accident. Doug was seriously injured and hospitalized. Ann suffered only minor injuries.

Several days after the accident, Doug called his daughter, Emmy, and asked Emmy to bring his 2005 Will to the hospital. Doug was extremely angry with Ann and, in the presence of Emmy and a nurse, Doug crossed out the provision in his 2005 Will which provided a $20,000 payment for Ann. Doug did not make any other alterations, nor did he cross out any other provisions of the 2005 Will. Doug signed his name in the margin next to the crossed-out provision. No one else signed the document.

Doug had appeared to be recuperating nicely from the injuries he suffered in the accident. However, several weeks later, Doug suffered a heart attack at the hospital and passed away.

Ann was subsequently charged and convicted of negligent homicide under Ohio law for the death of Scott. No criminal charges were filed against Ann in regard to Doug's death.

Doug's 2005 Will has been admitted to probate in Ross County. Doug is survived by a) his sister, Ann; b) his daughter, Emmy; c) Scott's spouse, Sandy; and d) Scott's son, Jack. Doug's business partner, Pete, predeceased Doug in 2011, and was survived by his son Pete, Jr. Ann has no surviving issue.

At the time of Doug's death, Doug still owned the $60,000 life insurance policy, and he had $200,000 in a bank account that was titled in only Doug's name. Doug had never changed the beneficiary designations on his life insurance policy.

Emmy asserts that Ann should not share in any of the property.

Who is entitled to the following property?

1. The proceeds of Doug's life insurance policy.
2. Doug's $200,000 bank account.

Explain your answers fully.

Doug's $60,000 life insurance policy is a non-probate transfer and will be paid out to the named beneficiaries independent of any other assets or bequests. Scott having predeceased Doug in the car accident, he will not take his $20,000 but his wife Sandy would, not because she is an in-law (in-laws never take) but because she was a named joint beneficiary with Scott in the policy. Thus, Sandy will take the share that previously would have gone to her and Scott. Emmy will receive her $20,000 share. The remaining $20,000 will pass to Doug's estate per the express provision of the policy covering non-surviving beneficiaries, because Pete, who would have received it, predeceased Doug. Ohio's anti-lapse statute does not save the gift for Pete Jr., first because it could not override an express provision of the policy, and second because the Ohio anti-lapse statue operates only to descend gifts designated to children, stepchildren, and descendants of grandparents of the decedent, but Pete Jr. is unrelated to Doug.

As to the bank account, the 2005 Will, which was validly executed and unrevoked at the time of Doug's death, will control. Although Doug may have intended Ann not to take anything under the will, his crossing out of the gift to her was insufficient to revoke the will. Revocation can be done by physical act, including obliteration, but only as to a will in its entirety, not to individual gifts. Nor does Doug's "amendment" constitute a valid codicil to the will. A codicil must fulfill all of the ordinary wills formalities of writing, subscription by the testator, and attestation at the bottom by at least two disinterested witnesses who sign in the conscious presence of the testator, and who see the testator sign the will or adopt the signature on the will. Doug's margin signature is not subscription, which requires signing at the bottom, nor was there any signed attestation by witnesses. Finally, the requirements for an oral will have not been met. In Ohio, an oral will, effective as to personal property only (not realty) may be given to two disinterested witnesses upon the testator's last sickness, provided the witnesses within 10 days memorialize the bequests in writing. Although Emmy and the nurse saw Doug's "amendment," there is no indication that they later committed the "oral will" to writing; Emmy is an interest witness; and most significantly, an oral will cannot revoke an earlier will. For all these reasons, the 2005 will is still effective, despite Doug's apparent intention to revoke the gift to Ann.

Emmy's assertion that Ann should not take may be based on the "slayer rule," a statutory provision that in Ohio prevents one from benefiting from a death if the would-be beneficiary intentionally and feloniously caused the death. Because Ann was charged and convicted only with a negligent, rather than intentional homicide, the slayer rule does not apply and Ann may take.

Thus, Ann will get $20,000 of the estate under the 2005 Will, and the residue, totaling $200,000 after the inclusion of the lapsed life insurance gift, will be divided equally between Emmy and Jack, Scott's son, who will take the gift to Scott under the anti-lapse statute described above.

The only other argument Ann may have is that the will should be reformed by a court to the intention of the testator, which she will be able to testify to, under the "harmless error" doctrine, which states that a will may be reformed to conform with testator intent provided clear and convincing evidence of such intent. This is unlikely to be successful, however, as the error will not be found "harmless" as to Ann's share, and there is no other evidence of clear intent of Doug to disinherit Ann beyond the markings on the 2005 will itself. In the absence of such evidence, a court will be unlikely to reform the 2005 Will. Ann will get $20,000.

QUESTION 6

Southern Furniture Company (Southern) is a furniture manufacturer organized under the laws of the state of South Carolina with its principal place of business in South Carolina. Having established itself as a major furniture supplier solely in the southern states, Southern wants to expand its business operations farther north. Midwest Warehouses, Inc. (Midwest), is an Ohio corporation located in Anytown, Ohio, that owns warehouse facilities in a number of other states.

Southern and Midwest had a number of telephone conversations discussing acquisition of space by Southern, ultimately agreeing to terms for the lease of a warehouse located in Kentucky. The agreed terms include a one-year written lease for the payment of $2,000 per month. Midwest mailed the contract to Southern in South Carolina, where it was properly executed and then returned to the Midwest office in Ohio.

Southern used and paid for the Kentucky warehouse for four months in accordance with the lease terms. At that point, Southern decided that its expansion plan was not going to be profitable. Southern abandoned the space and did not pay the rent owed for the final eight months of the lease.

Midwest filed a lawsuit against Southern in the Municipal Court of Anytown, Ohio, to recover the balance owed under the lease agreement. Midwest directed the clerk of court's office to serve Southern with the summons and complaint via certified mail at one of Southern's warehouse facilities located in Georgia. The certified mail receipt was signed by a receptionist for that facility.

The attorney for Southern intends to file a motion to dismiss Midwest's lawsuit based on the following grounds: (i) lack of jurisdiction and (ii) improper service on Southern.

What arguments should Southern make in support of each ground of the motion, and how is the court likely to rule on each? Discuss your answer fully.

(1) Personal Jurisdiction and Subject Matter Jurisdiction

Southern can argue a lack of both personal jurisdiction and subject matter jurisdiction. Personal jurisdiction has to do with whether the defendant can be sued in the forum, while subject matter jurisdiction is whether the court is the proper court to hear the matter. Here, Midwest filed the lawsuit with the wrong court. In Ohio, the Municipal Court can only hear matters of civil litigation where the disputed amount is under $15,000. In this case, the remaining amount at issue on the contract is $16,000. Therefore, the Municipal Court cannot hear this case. It should be filed in the Common Pleas Court, which has original jurisdiction over claims in excess of $500, except those claims against the state, which is not an issue herein. The court will rule for Southern, finding there is no subject matter jurisdiction.

In addition, there needs to be personal jurisdiction. Southern is a company and is deemed to be "domiciled" where it is incorporated and has its principal place of business. Thus, Southern is domiciled in South Carolina since that is where Southern is incorporated and has its principal place of business. In order to have personal jurisdiction, Midwest will have to prove that Southern has enough contact with Ohio to allow for jurisdiction. Midwest can argue the ways in which Southern purposely availed itself in the forum or should have expected litigation in Ohio.

Ohio's long arm statute allows for personal jurisdiction if there are enough minimum contacts and if there is compliance with due process, meaning exercising jurisdiction comports with traditional notions of fair play and substantial justice. Here, Southern has limited contact with Ohio. The parties' conversations occurred mostly by telephone and the contract was executed in South Carolina, for property located in Kentucky. Southern never stepped foot in Ohio. The only contact was Southern mailing the contract to Ohio. The court will find that mailing a contract alone will not pass the minimum contacts requirement and will rule in favor of Southern. The court will state there was no personal jurisdiction here, as exercising jurisdiction does not comport with traditional motions of fair play and substantial justice.

(2) Service of Process

Southern will also allege there was improper service. The court will likely disagree. In Ohio, service of process can be conducted by certified mail within one year of the filing of the complaint. Midwest mailed the summons and complaint to one of Southern's businesses, thus service was proper. In addition, Southern waived its right to claim improper service when one of Southern's employees signed the receipt of service. Southern is deemed served and the court will rule in favor of Midwest.

QUESTION 7

On a cold night in January, Mom was running errands in Anytown, Ohio, with her infant child, Baby. Baby had fallen asleep in her car seat. When Mom pulled up to a self-service fuel pump to fill her gas tank, she kept the car running to keep Baby warm while she filled the gas tank at the rear of her car. She finished filling the gas tank and, while she was facing away from the car and hooking the nozzle of the fuel hose back on the pump, Mom did not notice Carjacker jump into the driver's seat of her car. She turned back toward her car just as Carjacker was driving away.

Mom frantically hopped into a nearby car to follow Carjacker. Unbeknownst to Mom, the car was owned by Bystander, who had left his unoccupied vehicle running while he went inside the gas station to buy coffee. Because Mom's phone was inside her purse in her car, she used Bystander's cell phone to call 911. She reported the carjacking incident and kept the dispatcher apprised of Carjacker's whereabouts as she pursued him. While trying to keep up with Carjacker as he sped along rural roads in the dark, Mom struck several road-side mailboxes, causing significant damage to the body of Bystander's car.

When Carjacker parked the car and went inside another convenience store, Mom advised the 911 dispatcher, who told Mom to stay in the car and wait for the police to arrive. However, Mom was not willing to sit and wait while Baby was in danger. She did not have another set of car keys with her, so she could not drive off in her car with Baby, but she discovered that Carjacker had not locked the car doors. First, she opened the front passenger door and grabbed the loaded handgun that she kept in her glove box. As she was climbing into the back seat to remove Baby, she saw Carjacker walking toward her car.

Mom jumped out of the car and pointed her handgun at Carjacker. She told him to stay away from her car and toss her the car keys or she would shoot him. Carjacker simply laughed at Mom and continued walking toward her car. As Carjacker got closer, Mom pleaded with him, "Okay, take my car, but let me get Baby out of the back seat." Carjacker again laughed and said, "Lady, that's the reason I took your car. I can get good money for that kid." Mom again warned Carjacker to stay away from the car, but he continued laughing and walking toward the car. As he reached for the driver's side door, Mom fired her handgun, striking Carjacker in the knee. Carjacker fell to the ground, screaming and writhing in pain.

To ensure Carjacker could not flee before the police arrived, Mom stood over him with her gun pointed at his head. "What kind of sicko would steal and sell a baby? I should shoot you a few more times and let you die in terrible pain." Mom continued to threaten to kill Carjacker until the police arrived 10 minutes later. Carjacker eventually fully recovered from his physical injuries.

Carjacker was convicted of crimes stemming from the carjacking incident. He began receiving mental health treatment in prison and was diagnosed with post traumatic stress disorder, which the doctors attributed to his encounter with Mom. Carjacker has filed an intentional tort action against Mom.

Bystander got his car and cell phone back, but was unable to recover from his or Mom's insurers for the damages to his car. He filed an intentional tort action against Mom.

1. What intentional torts can Carjacker prove a prima facie case of, and what defenses can Mom successfully assert against each?

2. What intentional torts can Bystander prove a prima facie case of, and what defenses can Mom successfully assert against each?

Explain your answers fully.

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

1. Carjacker's Claims

Carjacker can assert several tort claims against Mom: assault, battery, false imprisonment, and intentional infliction of emotional distress.

Assault is the intentional creation of a reasonable apprehension of imminent bodily harm. The victim need not be scared by the event; he merely must have an apprehension of bodily injury. Carjacker can assert an assault claim against Mom for pointing a gun at him as he exited the convenience store and also for the threats while holding him until police arrived. He could claim that he was reasonably apprehensive of imminent bodily harm, and that Mom intended such apprehension. Mom will assert the defense that Carjacker did not have an apprehension of imminent bodily harm as he exited the store, as evidenced by Carjacker laughing at her threats. Mom will also assert defense of others. She can claim that she reasonably believed that her actions were necessary to protect her baby and the actions were proportionate to the threat. A defendant can assert defense of others as an affirmative defense if the person defended would have been privileged to use the same force. Ohio requires a victim to retreat before threatening deadly force if the victim can do so in complete safety, and baby obviously does not have the ability to retreat. The threat was proportional. Thus, the defense of others claim should be successful.

Battery is the intentional harmful or offensive touching of another's person. Carjacker can assert a claim for battery because Mom shot him in the knee, and she intended to cause the resulting harm to his person. Again, Mom can assert the affirmative defense of defense of others.

False imprisonment is the intentional confinement of a person within a bounded area by force or the threat of force. To be successful, a victim must either know about the confinement or be harmed by it. Carjacker was held at gunpoint until police arrived. Although no additional injury was caused by the detainment, he was aware that he was being held at gunpoint. Again, Mom will assert a defense of others claim or that she privileged to conduct a citizen's arrest.

Intentional infliction of emotional distress requires the tortfeasor to intentionally engage in extreme and outrageous conduct that causes severe distress in the victim. Conduct is "extreme and outrageous" if it exceeds all bounds of decency in a civilized society. This claim will fail because a civilized society would support Mom's actions in this case. Furthermore, Carjacker assumed the risk that Mom would defend her baby.

2. Bystander's Claims

Bystander can assert claims of trespass to chattels and conversion. These torts require an intentional interference with the possessory rights of another in personal property. Here, Mom interfered with Bystander's possessory rights in Bystander's car and phone. The amount of interference determines if the tort is trespass to chattels or conversion. Here, Mom's interference with the car carried substantial risk of forfeiture of the property, and the damage was extensive. This likely qualifies as conversion and requires Mom to replace the car at the fair market value at the time of conversion. The interference with the possessory rights in the cell phone is not substantial, and Mom will only be liable for costs of repair, if any. Mom will claim a private necessity, which is a qualified privilege to interfere in property rights of another during an emergency for personal benefit or for the benefit of a small group. Because this is a qualified privilege, Mom must still compensate Bystander for the harm actually caused to Bystander's property. At common law, this defense only applied to naturally-caused emergencies; however, the defense is now generally recognized in any emergency.

QUESTION 8

The following transactions occurred between the parties in Ohio:

1. Concrete Supply v. Big Lumber: Mary, who is single, executed a promissory note to Big Lumber Home Builders (Big Lumber) on June 1, 2011, in the amount of $20,000 to pay for some remodeling work that Big Lumber performed on Mary's home. The note was fully executed by Mary and was negotiable. The terms of the note provided that the entire principal amount, plus interest, was due and payable on May 30, 2012.

   In January 2012, Big Lumber endorsed and transferred the note to Concrete Supply to pay for building materials purchased by Big Lumber from Concrete Supply. Mary decided to take a trip to California to visit her Grandmother. Mary left home on April 20 and never arrived at her Grandmother's home and no one knows where she is. The due date on the note came and went and all efforts by Concrete Supply to contact Mary went unanswered. Concrete Supply presented the note to Big Lumber and demanded payment. Big Lumber refused. In October 2014, Concrete Supply sued Big Lumber for the amount due on the note, alleging as the grounds of recovery that Big Lumber had breached its UCC transfer warranties. Big Lumber asserted the defenses that (i) as a prerequisite to demanding payment from Big Lumber, Concrete Supply was required to present the note to Mary for payment, and (ii) in any event, Big Lumber did not breach any of its UCC transfer warranties.

2. Sam v. Bill: Bill executed a promissory note payable to Sam. The note was due on January 1, 2007. Sam was on vacation in New York and did not actually demand payment on the note until October 1, 2008. By then, Bill had forgotten about the debt and ignored Sam's demand completely. In July 2014, Sam filed suit against Bill to collect the principal amount of the note.

3. Suzie v. Beth: Beth had a dispute over the alleged value of an antique painting that Beth agreed to purchase from her Aunt Suzie. The initial contract price was $10,000 for the painting. An art expert who inspected the painting opined tentatively that she was uncertain whether the painting was the artist's original, but that, if it was not, it was a very good copy.

   On May 1, 2014, Beth took delivery of the painting and gave Suzie a check for $8,000, explaining that it was a fair price in view of the uncertainty about authenticity of the painting. On the back of the check, Beth wrote in full capital letters "ACCEPTED IN FULL PAYMENT FOR THE ANTIQUE PAINTING."

   Suzie, unhappy about the amount and aware of the inscription on the back of the check, nevertheless indorsed and cashed the check. Subsequently, the expert who had originally inspected the painting communicated to both Beth and Suzie that further study proved that the painting was an original. On July 1, 2014, Suzie tendered her own check for $8,000 to Beth, along with certified proof of authenticity, and demanded payment of $10,000, the original full purchase price.

   1. How should the court rule on each of Big Lumber's defenses?
   2. What defense, if any, does Bill have to Sam's claim, and is it likely to succeed?
   3. Can Suzie prevail on her claim for $10,000 against Beth?

Explain your answers fully.

Do not discuss holders in due course.

1. Big Lumber's Defenses

a) Concrete Supply can present the note for payment to Big Lumber.

Big Lumber's argument that Concrete Supply must collect from Mary is erroneous. Under Article 3 of the UCC, the maker of the note has primary liability, and transferors have secondary liability. Nonetheless, because Mary cannot be found, presentment to her is excused and Concrete can sue up the chain to enforce the note against Big Lumber. Big Limber can sue Mary if he can find her. Accordingly, Big Lumber's argument that Concrete Supply must collect from Mary will fail.

b) Big Lumber did not breach transfer warranty

Big Lumber did not breach the transfer warranty. Under Article 3 of the UCC, a transferor transfers a note subject to a transfer warranty, under which the transferor warrants that he lacks notice of any claims of recoupment or other defects with respect to the note, that he was a proper holder of the note and had legal title to the note at the time of transfer, that the note is transferable, and that the note is properly payable. Here, Big Lumber was not aware that Mary would skip town at the time he transferred the note to Concrete Supply. He was likewise unaware of any defects with respect to the note. Moreover, the note was transferrable as it was properly negotiable and contained no restrictions. Finally, Mary never gave notice of dishonor to Big Lumber, and the note is still properly payable.

Furthermore, Concrete Supply does not have a claim for breach of presentment warranty, because Big Lumber did not present the note to Concrete Supply for payment. Accordingly, Big Lumber did not personally breach any warranties with respect to Concrete Supply, but is still liable to Concrete Supply as an endorser.

2. Bill's Defenses to Sam's Claims

Bill has a valid statute of limitations defense against Sam. Under the UCC, the statute of limitations for promissory notes is 6 years measured from the date payment was due (if due at a specified time) or from the date payment was demanded (if payable on demand). Here, the note was due on January 1, 2007, and the suit was not filed until July 2014 (1 year and 6 months after the expiration of the statute of limitations). Although Bill did not demand payment until October of 2008, the note was payable at a definite time, thus the statute began to run at the time it was due. Accordingly, Bill has a valid statute of limitations defense against Sam.

3. Suzie's claim for $10,000 against Beth

Suzie will not prevail on her claim against Beth for $10,000 because there was an accord and satisfaction. When there is a dispute over the amount to be paid, if a payor writes on a check (in a conspicuously worded endorsement) an amount less then what is allegedly owed, and writes that it represents payment in full, if the payee cashes the check she has accepted it and there has been an accord and satisfaction. Here, Beth wrote a check in the amount of $8,000, and expressly and conspicuously wrote "accepted as full payment for the antique painting." Suzie subsequently accepted the check by cashing it, hereby resulting in an accord and satisfaction. Suzie cannot revoke her acceptance after having cashed it, thus the check she wrote on her account to Beth for $8,000 will serve as no defense. Accordingly, Suzie will not prevail. Suzie's attempt to rescind the accord and satisfaction within 90 days fails because she was aware of her endorsement and acceptance of the lesser amount.

QUESTION 9

Defendant was arrested by Anytown, Ohio, municipal police officers as he was fleeing from the scene of a robbery. He was later charged with robbery.

At his initial appearance in the Municipal Court, the Court asked Defendant how he pleaded. Defendant refused to enter a plea of any kind. The case was set for a preliminary hearing, from which Defendant was bound over to the grand jury of the county and indicted for robbery, a felony of the second degree. At his arraignment in Common Pleas Court, Defendant entered a plea of "not guilty" to the charge of robbery, and counsel was thereafter appointed to represent him.

Newly appointed defense counsel (Counsel) reviewed the discovery in Defendant's case. Counsel and Defendant appeared at the pretrial in Common Pleas Court and Counsel orally informed the Judge that, in addition to Defendant's plea of not guilty, he was also pleading "not guilty by reason of insanity" on Defendant's behalf.

Counsel filed a motion to suppress evidence. The motion was set by the Court to be heard on the morning immediately before the trial. The motion to suppress was heard and overruled, and the case proceeded to trial.

Before trial, the Court informed the parties that it was rejecting Defendant's plea of "not guilty by reason of insanity" and that no evidence of insanity would be admissible. After discussing the Court's rulings on the motion to suppress and the insanity plea, and after the prosecutor offered to recommend the minimum sentence of 2 years if Defendant pled guilty, Defendant and Counsel told the Court that Defendant wished to enter a guilty plea to the robbery charge if he could maintain his innocence while doing so. When the Court refused to accept such a plea, Counsel said that Defendant would plead "no contest" to the charge of robbery. Without further discussion, the Court accepted Defendant's plea of no contest and set the case for sentencing in 60 days.

After entering the plea, Defendant maintained his innocence with Counsel to such an extent that Counsel moved to withdraw the plea of no contest prior to sentencing. The Court, without a hearing, overruled Defendant's motion to withdraw his plea, and then proceeded to sentence Defendant to the penitentiary for eight years.

On appeal, Defendant claimed the following errors:

1. The Municipal Court erred in failing to secure a plea from Defendant at his initial appearance before binding him over to the grand jury;
2. The Common Pleas Court erred by accepting Defendant's not-guilty plea before counsel was appointed to represent him;
3. The trial Court erred by conducting the hearing on the motion to suppress immediately before trial;
4. The trial Court erred by refusing to allow trial evidence of Defendant's insanity at the time of the criminal offense in support of his plea of not guilty by reason of insanity;
5. The trial Court erred by refusing to accept Defendant's guilty plea while maintaining his innocence;
6. The trial Court erred in overruling Defendant's motion to withdraw his no-contest plea before sentencing;
7. The trial Court erred by sentencing Defendant in the absence of a valid conviction.

How should the Court of Appeals rule on each of the assignments of error? Explain your answers fully.

1. The Municipal Court did not err in failing to secure a plea from Defendant as his initial appearance before binding him over to the grand jury. In Ohio, a criminal defendant is not required to make a plea until his arraignment, when he must enter a plea. Here, the Defendant refused to enter a plea. If Defendant had similarly refused to enter a plea at their arraignment the court would enter a plea of not guilty.

2. Defendant is correct that the court erred by accepting Defendant's not guilty plea before counsel was appointed to represent him. Under the 6th amendment, a criminal defendant is entitled to counsel at all critical stages in the case against him. Generally, the right to counsel attaches once a defendant has been indicted for a crime. The defendant has such a right to counsel at his arraignment. Here, Defendant was indicted for robbery, and subsequently arraigned. However, no counsel was appointed to him until after the arraignment. Thus, this was improper.

3. The trial Court did not err by conducting the hearing on the motion to suppress immediately before trial. A separate hearing must be held, outside of the presence of the jury and before trial, on a motion to suppress evidence. Here, the Trial Court had a suppression hearing outside the presence of the jury and before trial. However, conducting it immediately before trial may not have been entirely fair to the defendant, who would not have adequate time to change his trial tactics given the fact that the evidence would not be suppressed.

4. The trial Court did not err by refusing to allow trial evidence of Defendant's insanity at the time of the criminal offense in support of his plea of not guilty by reason of insanity. Under Ohio law, a plea of not guilty by reason of insanity must be written, and must be entered at the defendant's arraignment. A defendant may subsequently change their plea, but only for good cause shown. Here, the Defendant orally informed the Judge at the pretrial that he was going to plead not guilty by reason of insanity. Thus, the fact that the plea was not written was improper as was the fact that it was given after arraignment. Furthermore, Defendant did not present good cause for why he should be able to change the plea. Thus, the trial Court did not err in their refusal of evidence of insanity.

5. The trial Court did not err by refusing to accept Defendant's guilty plea while maintaining his innocence. Under Ohio law, the judge has the discretion to accept or reject a defendant's plea, they are not required to accept a plea. Here, the judge did not accept Defendant's guilty plea because it was inconsistent with the fact that Defendant simultaneously professed his innocence. It was in the judge's discretion to reject the plea. Thus, the Court did not err.

6. The trial Court erred by overruling Defendant's motion to withdraw his no contest plea before sentencing. Under Ohio law, a defendant is not entitled to withdraw a pre-sentencing plea unless preventing them to do so would be manifestly unjust. Manifest injustice may occur, for instance where a prosecutor has agreed to recommend a particular sentence in exchange for a plea, but subsequently reneges on the deal. Here, upon entering his plea of no contest, Defendant's plea was accepted by the judge without a proper plea allocution. Before accepting a plea from Defendant, the judge should have informed Defendant of the implications of the plea, including the maximum possible sentence imposed and the fact that he was waiving his right to jury trial. No plea allocution was given here. Thus to correct this manifest injustice the Defendant should have been permitted to withdraw his plea.

7. The trial Court erred by sentencing Defendant in the absence of a valid conviction. As discussed about in answer 6, a defendant was required to have a proper plea allocution to be sentenced.

QUESTION 10

The following transactions occurred in Anytown, Ohio.

1. Ashley and Bob: A lamp and a chair were the only remaining items at Ashley's garage sale. Bob asked Ashley how much she wanted for the lamp. Ashley pointed at the lamp and said, "I will take $100 for that chair." Bob was certain that Ashley intended to offer him the lamp for $100, not the chair, and that she had misspoken when she said "chair" instead of "lamp." Nevertheless, Bob said, "I accept," and tendered Ashley $100 for the chair, which she refused. Ashley claims formation of a contract with Bob to sell him the lamp for $100. Bob claims formation of a contract with Ashley to purchase the chair for $100.

2. Connie and Debby: Connie offered to sell Debby a donkey named Egor for $500 and, in exchange for $60 from Debby, Connie agreed to keep that offer open for five days. On the third day, Connie walked up to Debby and said, "Egor ain't for sale anymore and I will pay you back the $60." Debby replied, "that doesn't work for me!" The next day, Debby tendered $500 to Connie for Egor, which Connie refused, claiming that the offer to sell had been properly revoked.

3. Fannie and Graham: Fannie had valuable beads. Graham asked Fannie how much she wanted for the beads. Fannie replied, "Make me an offer." Graham said, "I accept, and the price is $1,000." Fannie said, "No, I will sell the beads for $1,800." Graham said, "I accept, but I thought we just had a deal for $1,000?" Fannie replied, "Never mind, the price is now $2,000." Graham claims formation of a contract to purchase the beads for either $1,000 or $1,800, while Fannie claims formation of a contract to sell the beads to Graham for $2,000.

4. Hawk, Ike, and Judd: Hawk, an auctioneer, conducted an auction at which every item was put up for bid to the highest bidder. The first item for auction was a Danish tea set. Ike and Judd got into a bidding war for the item through back-and-forth successive bids. Ike's final bid was $3,000, but Judd outbid him at $3,100. Before Hawk could bang the gavel to announce completion of the sale, Judd exclaimed, "I revoke my bids and I'm out." Ignoring Judd, Hawk banged the gavel and announced that the item had been sold to Judd based on his highest bid of $3,100. Hawk claims a contract with Judd for the sale of the tea set for $3,100. Alternatively, Hawk claims a contract with Ike for the sale of the item for $3,000, because Ike was the highest bidder aside from Judd when the gavel came down to complete the sale. Ike and Judd dispute the existence of any such contracts.

5. Kim and Executor: Kim offered to sell her classic car collection to Lori for $250,000. Lori had always wanted to buy the collection, and she was so excited about Kim's offer that, upon hearing it, she suffered a massive heart attack and died. Kim has since received notice from the Executor of Lori's estate stating, "the offer you made to Lori is accepted." Executor claims formation of a contract for the purchase of the car collection from Kim.

Based on ordinary principles of *contract formation*, was a contract formed in each of the foregoing scenarios? Explain your answers fully.

Do not discuss *contract enforcement/Statute of Frauds* issues.

Generally for a valid contract to be formed there must be an offer, an acceptance and mutual consideration.

1. A valid contract has been formed between Ashley and Bob for the lamp. A misunderstanding exists where two parties to a contract reasonably ascribe two different meanings to the same contractual term. Ordinarily mutual misunderstanding prevents the formation of a valid contract. However, where one party has knowledge that the other party ascribes a different meaning to the term, the other party's understanding will control. Here, Bob asked Ashley how much she would accept to purchase her lamp. She pointed to the lamp but mistakenly said, "I will take $100 for that chair." Bob had knowledge that she had misspoken and meant to say "lamp" rather than "chair" and he accepted her offer. Thus, because Bob had knowledge that Ashley intended to sell her lamp, a valid contract for the sale of the lamp was formed for $100.

2. Connie and Debby have formed a valid contract. Ordinarily an offer is revoked upon communication of the revocation by the offeror. However, an option contract, which is a promise not to revoke that is supported by consideration, cannot be revoked before the expiration of the option period. Here, Connie offered to sell Debby her donkey for $500. In exchange for Connie's promise not to revoke the offer for 5 days, Debby paid Connie $60. This created a separate option contract that was binding. Thus, Connie's attempt to revoke on day 3 was ineffective, and Debby validly accepted by tendering $500 for the donkey on day 4.

3. A valid contract between Fannie and Graham has been formed for the sale of the beads for a price of $1,800. Whether a valid offer has been made is determined by an objective standard. Furthermore, a mere invitation to deal is not an offer. Here, Graham indicated an interest in purchasing Fannie's beads and Fannie replied, "Make me an offer," to which Graham responded, "I accept, the price is $1,000." Fannie's statement was a mere invitation to deal. Thus, Graham's acceptance for $1,000 was ineffective because no offer had been made or accepted by Fannie. Rather, Graham's statement is actually an offer to purchase for $1,000. However, when Fannie responded to Graham's offer of $1,000 by saying she would not agree to that price, but would sell him the beads for $1,800, this was a valid counteroffer by Fannie and a rejection of Graham's offer. A reasonable person would understand this to be an offer to sell for $1,800. Graham's response that, "I accept, but I thought we just had a deal for $1,000," was a valid acceptance. A mere counter inquiry does not render an acceptance ineffective. Thus, a valid contract was formed for the price of $1,800. Although Fannie subsequently attempted to raise this to $2,000, this did not change the terms of the contract for the sale price of $1,800.

4. No contract has been formed between Hawk and Ike or between Hawk and Judd. Under the UCC an auction is an offer for sale, and a valid contract is formed between the auctioneer of the good and the highest bidder upon the fall of the gavel. Prior to the conclusion of the auction sale, any bidder is free to revoke their bid. Furthermore, a revocation does not revive any prior bids. Here, Judd submitted the highest bid for the Danish tea set at $3,100 dollars, outbidding Ike who had bid on the tea set for $3,000. However, before Hawk the auctioneer banged the gavel to complete the sale, Judd revoked his bid. Because no contract had yet been formed by the fall of the gavel, Judd was entitled to revoke. Ike's prior bids were not revived by the revocation. Thus, no contract has been formed between either party.

5. No valid contract has been formed between Lori's executor and Kim. The death of an offeree prior to acceptance revokes an offer. That is, the death of Lori terminated the power of acceptance. Here, Kim offered to sell her car collection to Lori for $250,000 which Lori intended to accept. However, before Lori could accept, she died of a heart attack. This death killed the offer and no contract was formed.

QUESTION 11

Tenant entered into a written lease for an apartment located in Anywhere, Ohio, with Landlord on December 1, 2013, with the lease expiring on November 30, 2014. The lease provided that Tenant would pay a $1,000 security deposit and rent of $1,000 per month commencing immediately. Tenant paid the first month's rent in advance and the $1,000 security deposit.

While moving in, Tenant scratched the woodwork and knocked several small holes in the walls of two rooms causing about $500 worth of damage. Tenant never reported the damage to Landlord.

After only three months of living in the apartment, Tenant noticed that some of the plumbing leaked under the kitchen sink and mold was growing on the wall near the leak. Also, the dishwasher stopped working. Tenant made several calls to Landlord complaining of the conditions and each time, Landlord promised to send someone to make the repairs, but never did.

Frustrated, Tenant reported Landlord to the housing code inspector (Inspector). Soon thereafter, Tenant was visited by Inspector, who stated that Landlord was a serial violator and had been cited for numerous housing code violations over the years. After viewing the conditions, Inspector issued a citation to Landlord and ordered him to repair the plumbing and dishwasher and remove the mold within 24 hours.

Landlord failed to make the repairs. The leak worsened and the water to the kitchen sink had to be turned off, rendering it unusable.

The mold was so bad that Tenant suffered an asthma attack resulting in a brief hospitalization. Tenant was told by his doctor that he could not enter the kitchen as the mold was a health threat.

Tenant called Landlord and explained that the mold made him sick. Within three days, on August 28, 2014, Landlord, using his key, entered the apartment unannounced. Tenant, who was sleeping on the couch, was startled. Landlord handed Tenant an envelope and left the apartment. The envelope contained a notice to Tenant to vacate the apartment by September 1, 2014, or Landlord would file an eviction action against Tenant. In a telephone conversation later that day, Landlord told Tenant that the notice was given because he was fed up with Tenant's demands for repairs and angry because Tenant complained to Inspector.

Tenant refused to move and, commencing with September rent, Tenant timely deposited the rent payments for September, October, and November, totaling $3,000, in escrow with the clerk (Clerk) of the appropriate municipal court.

When Tenant moved out of the apartment on November 30, 2014, he left his forwarding address with Landlord and instructed Landlord to forward his security deposit to him. Except for the scratches on the woodwork and the damaged walls, Tenant left the apartment in an excellent and clean condition.

Tenant timely received a letter from Landlord declining to return the $1,000 security deposit. In the letter, Landlord itemized deductions of $500 to repair the scratches on woodwork and holes in wall, and $500 to clean the apartment. While Tenant did not dispute the $500 charged to repair the woodwork and holes in walls, Tenant disputed the $500 cleaning charge.

The following issues are presented in subsequent litigation between Landlord and Tenant:

1. Did Landlord breach any duties owed to Tenant to replace and repair the plumbing and dishwasher and remove the mold?

2. Did Landlord breach any duties owed to Tenant before entering the apartment on August 28, 2014?

3. What remedy did Tenant have as a result of Landlord's telling him to vacate the apartment?

4. As between Tenant and Landlord, who has a right to the $3,000 in rent that Tenant deposited with the Clerk of court?

5. What remedy does Tenant have regarding the recovery of his security deposit?

Explain your answers fully.

1. **Warranty of Habitability**: Landlord breached the warranty of habitability. In Ohio, a landlord is required to maintain the property in a habitable manner. Upon notice by the tenant, the landlord must repair damage rendering the property unfit for ordinary living purposes within a reasonable time. Here, landlord breached this warranty with regard to the mold and plumbing. The mold and plumbing rendered the premises unfit for living and posed a health risk to the tenant. The plumbing was leaking causing the mold to worsen and eventually requiring water in the kitchen to be turned off. The tenant made numerous attempts to notify the landlord of the defective condition of the apartment, but the landlord did not fix the problem within a reasonable time. The broken dishwasher would likely not amount to a breach of this warranty because it does not render the apartment unfit for living, but the landlord still owed a duty to repair this within a reasonable time. Thus, the landlord breached the warranty of habitability.

2. **Notice**: Landlord was required to give Tenant notice before entering. In Ohio, a landlord must provide a tenant with at least a 24 hour notice prior to entering his apartment, unless there is an emergency that requires immediate entry. Here, landlord used his key to enter tenant's apartment without notice for the purpose of serving him with a notice to vacate. Even if landlord had entered to attempt to fix the mold, this would not have constituted an emergency because the mold had been there for months. This is not an emergency that would require immediate entry and thus landlord should have provided the tenant with notice before entering.

3. **Retaliation**: Tenant can sue the Landlord for retaliatory eviction. A landlord is not permitted to retaliate against a tenant for reporting him to the proper housing authorities. The landlord may not threaten eviction or raise the rent in retaliation. Here, the landlord provided tenant a notice to vacate and threatened to have him evicted because tenant had reported him to the housing authorities. Moreover, a landlord is not justified in threatening eviction merely because a tenant seeks repairs for damages to the property. Thus, tenant has an action against the landlord for retaliation.

4. **Rent**: Tenant has a right to a portion of the rent deposited with the Clerk of Court. A tenant is permitted to deposit their monthly rent with the Clerk of Court if the landlord violates any duties owed to the tenant. The court will determine what amount, if any, the tenant is entitled to depending on the severity of the breach of duty by the landlord. Here, the tenant has a right to a portion of the rent paid because he was unable to use his apartment in a habitable manner, i.e., the plumbing and mold issues. Moreover, the tenant had to seek medical attention for the mold growing in the apartment. The landlord will likely be awarded a portion of the rent because the tenant remained in the apartment and was able to use the premises for other purposes, such as sleeping and storing his possessions. Thus, the court will find that tenant is entitled to a portion of his rent that is held by the Clerk of Courts.

5. **Security Deposit**: Tenant can sue landlord to get a portion of security deposit returned. A tenant has a right to be returned his security deposit, less the reasonable cost of damages he caused to the apartment. Here, the tenant does not dispute the $500 to repair the holes in the wall and the scratches on the woodwork. Upon a finding by the court, however, tenant is entitled to receive the remaining $500 because he left the apartment in an excellent and clean condition Landlord was not entitled to keep an amount of the security deposit in excess of actual damage to the apartment. Thus, the court will find that the landlord must return $500 to the tenant.

QUESTION 12

Lawyer, a solo practitioner in Anytown, Ohio, received the following communications in the ordinary course of her practice:

1. Notice from the court of the date and time of hearing for Client A's uncontested divorce.

2. Check from Insurance Co. payable to Client B and Lawyer in settlement of lawsuit that Lawyer had undertaken on a contingent-fee basis and settled on behalf of Client B.

3. Letter from Client C, whom Lawyer has been representing in a bodily injury lawsuit, informing Lawyer that she [Lawyer] is fired and that Client C will proceed pro se.

4. Letter from the Office of Disciplinary Counsel informing Lawyer that a check from her IOLTA was dishonored due to insufficient funds, requesting a written explanation and copies of IOLTA bank statements for the three months prior to dishonor of the check.

5. Notice from Lawyer's professional liability carrier that her legal malpractice insurance was canceled.

6. Check refunding court costs, payable to Lawyer with a reference on the check to a case in which Lawyer prevailed and Client D received a settlement. Lawyer had advanced the court costs at the inception of the case. When she sent Client D a check for the net settlement and a final reconciliation of accounts, she did not deduct the court costs from the amount remitted to Client D because she expected a refund of costs from the court.

Applying the Ohio Rules of Professional Conduct to each of the foregoing items, identify the applicable Rules and describe the ethical duty imposed on Lawyer and the action, if any, required of Lawyer. Explain your answers fully.

It is not necessary to identify Rules by number.

1. Lawyer (L) must comply with her duties of competence, diligence, and communication. Re: competence, L must take all reasonable steps to prepare herself to represent A in the divorce proceeding, including knowledge, understanding, and proper application of the applicable divorce statutes and case law to A's case. Re: diligence, L must note the hearing date & time in her calendar and be sure to make any interim filings and arrive at court on time. Re: communication, L must contact A and update her as to the status of her case and hearing date & time.

2. L must deposit the check into her established interest bearing client trust account (IOLTA). She must promptly notify B that she has received the check. Because this was a contingent fee agreement, L must provide a final written statement to B showing the final calculations of fees and expenses in conformity with the terms of their prior written contingent fee agreement. Assuming B does not dispute L's calculation; L must then promptly distribute to B the amount she is owed and withdraw her own portion of the settlement and deposit it into her operating account. L is required to perform a monthly reconciliation of the IOLTA account and maintain records for 7 years.

3. L must seek permission to withdraw from the court where the lawsuit is currently pending on the grounds of C's termination of L's services. L must also promptly return all of C's property to C that is now in L's possession, including any unearned portion of a retainer as well as C's client file. L also would be well-advised to send a written communication to C, confirming that L is no longer representing C, as any reasonable mistake as to whether an attorney-client relationship exists and/or when it terminated is construed in favor of ongoing representation. L's duty of confidentiality regarding any information she learned during the course of her representation of C will continue indefinitely, absent a mandatory duty to disclose (duty of candor to tribunal, avoid fraud).

4. L must prepare the requested explanation and documents and submit them in a timely manner to the Office of Disciplinary Counsel. A lawyer has a duty to comply with all disciplinary inquiries and provide any and all information that is requested. Because L was already under a duty to maintain IOLTA records for 7 years and perform a monthly reconciliation, she should have this information already available. L's duty to refrain from acting in a dishonest, deceitful, or fraudulent manner requires that she respond truthfully and fully to ODC's request.

5. L must provide written notice to all current and future clients that she does not maintain the required level of malpractice insurance. She must inform them of the risks of possibly limited recovery in order to obtain informed consent. All clients must sign this notice.

6. L must deposit the check into her IOLTA account. L must still comply with her duty of communication and notify D that she received the funds and her understanding that L is entitled to them. Assuming that D does not dispute L's claim, L can withdraw the funds from the IOLTA account and deposit them into her operating account.

MPT 1

IN RE HARRISON

In this performance test item, examinees are associates at a law firm representing Daniel Harrison, who has purchased a tract of land in the City of Abbeville, Franklin. Although the land is currently zoned "R–1" (single-family residential), it had been used for over 35 years as a National Guard armory and vehicle storage facility; when he purchased the land, Harrison assumed that it was "grandfathered in" and not subject to the residential zoning ordinance because the National Guard's use of the property predated the R–1 zoning change. Harrison wants to have the land rezoned so that it can be used for a commercial truck-driving school, but the City Council has denied his rezoning application. Harrison seeks the firm's advice as to whether he can successfully pursue an inverse condemnation action against the City. Examinees' task is to draft an objective memorandum identifying each of the inverse condemnation theories available under Franklin and federal law and analyzing whether Harrison might succeed against the City under each of those theories. The File contains the instructional memorandum from the supervising attorney, a summary of the client interview, a recent appraisal of the tract, and an email exchange between Harrison and a real estate agent. The Library contains the Franklin and federal constitutional "takings" clauses and two Franklin cases that discuss various regulatory takings theories.

To: Esther Barbour

From: Applicant

Re: Daniel Harrison Matter

Memorandum

Daniel Harrison bought a 10 acre tract ("tract") of land in the City of Abbeville from the federal government who previously used it as a National Guard Facility. He bought the land in order to build and operate the land for industrial use. The land is zoned for single family residency and Mr. Harrison knew about that zoning prior to his purchase. After applying for the rezoning use, the city denied his request and Mr. Harrison has asked us to represent him in an inverse condemnation proceeding.

The Franklin Constitution and the United States Federal Constitution prohibit the government from taking a "person's property" without just compensation. While the State Constitution says "no person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation" is different from the Federal Constitution's language, the Court has found that little real difference exists between the two. (See Newpark Ltd. v. City of Plymouth). Because the Franklin Constitution is so similar to the Federal Constitution, the Court's historically have applied federal judicial principals in their determination of whether the State or a Municipality within the State of Franklin has "taken a persons property."

In Newpark Ltd. v. City of Plymouth, the Franklin Court of Appeals held that an inverse condemnation action "occurs when the government takes private property for public use without paying the property owner, and the property owner sues the government to recover compensation for the taking." (Footnote 1). Mr. Harrison becomes the Plaintiff, as the property owner, and it is "inverse" because in a normal taking action, the Government is the plaintiff because it is taking the property and sues to the defendant property owner. (Footnote 1).

I. Does Mr. Harrison Have Standing to Bring Claim?

A threshold matter that must be discussed is whether or not Mr. Harrison has standing to bring the suit. As the interview notes reflect and the e-mails shows, Mr. Harrison knew about the regulation and zoning to single family residences when be purchased the property. Under Franklin Law, in Newpark, the Court held, "we note that the fact that zoning restriction had already been enacted when Newpark bought the tract does not bar it from bringing a takings action against the City, regardless of whether Newpark had notice of the restriction. Newpark. Therefore, Mr. Harrison, under current law, has standing to bring the claim against the City.

II. Was There a Taking?

First, it must be determined whether or not the city of Abbesville has committed a "taking of the property" by its failure to rezone the tract. In the State of Franklin, there are four types of takings: (1) Total Taking, (2) A partial taking, (3) land-use exaction taking, and (4) substantially advancement taking. This memorandum will deal with whether a taking has occurred under a partial taking, land-use extraction, or a regulatory taking. This memorandum will explain each type of taking, apply the facts, and analyze the law.

A. Total Taking

The first form of a taking that needs to be evaluated is whether the City committed a "total regulatory taking." A total regulatory taking occurs, where the regulation deprives the property of all economic value. Newpark. The Court has

held that a total taking is when a property owner is "called upon to sacrifice all economically beneficial uses in the name of the public good." Newpark, emphasis original. Under the Supreme Court case of Lucas v. South Carolina Coastal Council, a total regulatory taking is limited to the extraordinary circumstance when no productive or economically beneficial use of the land is permitted and the owner is left with only a "token interest."

Mr. Harrison's valuation of the property if it were to be used for his intended purpose has been valued at approximately $200,000.00 or double his investment. However, in light of the city refusing to change its zoning restriction, an unofficial approximate value based on a local real estate agent is only "a few hundred dollars" an acre. In Venture Homes Ltd. v. City of Red Bluff, the Court concluded that the value diminished while not conclusive is a factor in determining whether a taking has occurred. (In Venture, the Court factored this when weighing whether a partial taking as occurred). However, in Newpark, in discussing whether there was a total taking, it must deprive the owner of all economic value. The absence of profit "does not equate with the impossibility of development." Newpark. In Newpark, the Court held that the absence of profit does not negate whether the owner has been deprived of all economic value. Rather, the test is "entains a relatively simple analysis of whether value remains in the property after the governmental action." Here, while minimal and far below what he paid for each acre, Mr. Harrison does have some "value" left in the property. The standard that Mr. Harrison will be required to show, that the deprivation in value is "tantamount to depriving the owner of the land itself."

The fact the land is worth so little without the development is also not conclusive because the land could be developed into something more in line with the area. As the city council noted, the land could be developed into a residential area because of the parks and municipal airport. In addition the land's value is at least to the city - apparent as a medical or business/professional office park.

Further the Court rejected the argument in Newpark that a property is valueless because it cannot be developed it will remain vacant. The Court called this a "fallacy" as it equates the "lack of availability for its most economically valuable use with the condition of being valueless." Because the city could reasonably conclude that the property retains some residential use, whether it is likely or unlikely based on the opinion of the real estate agent, is irrelevant in whether there has been a total taking. Therefore, it is unlikely Mr. Harrison will succeed on this claim.

B. Partial Taking

The second regulatory taking that must be evaluated is whether the city of Abbesville committed a "partial taking." In Newpark, the Franklin Court of Appeals held a partial regulatory taking, occurs when the regulation goes "too far." In Venture Homes, the Franklin Court of Appeal expanded upon the notion of what a "partial taking" is and how the regulation goes "too far." In Venture, the Court defined a partial regulatory taking as "a taking may arise where there is not a complete taking, either physically or by regulation, but the regulation goes "too far" causing an unreasonable interference with the landowner's right to use and enjoy the land." Venture; quoting Penn Central Transp. Co. v. New York City (citation omitted).

In Venture, the Court laid out a three part balancing test to determine whether the Court went too far. The balancing test weighs (1) the economic impact of the regulation, (2) the extent to which the regulation interferes with the property owner's reasonable investment-backed expectations, and (3) the character of the governmental action. Newpark; citing Sheffield Dev. Co. v. City of Hill Heights (Franklin Supreme Court case, citation omitted). The Court also noted that this is not mathematical, as like in Newpark, the Court is not responsible for underwriting land developers risk in buying and developing land. Venture.

(1) Whether or not the economic impact on the property is a factual inquiry and only part of the balancing test. Venture is most likely distinguished from Mr. Harrison, because while the economic impact of the regulation in Venture was $2.7 million dollars it was only 4% of Venture's total value of the land. Here, however, Mr. Harrison's land was appraised at $200,000 for a specific use and with the economic impact, with an unofficial appraisal is only a few

hundred dollars an acre. While this is significant, if not a total devaluation of the land, it is only one factor that must be considered.

The Court, however, will also weigh the numerous special use permits that the city council gave Mr. Harrison such as a day care center, medical or business offices as to whether there has been a takings under the Constitution.

(2) In Venture, the ordinance at issue "caused minimal interference with Venture's reasonable investment-backed expectations." Venture. In Venture, the owner of an apartment complex sued the City when the city rezoned his multi-purpose zoning to include PUD zone within Venture's land for 350 homes. Venture further conceded that the only harm that was caused was a result in increased competition and diminution of its value.

In Sheffield, the Franklin Supreme Court held that the existing and permitted uses of the property "constitute the primary expectation" of an affected landowner for purposes of determining whether a regulation interferes with the landowner's reasonable investment-backed expectations." Venture; citing Sheffield, supra. In Venture, the additional apartment complex did not interfere with the primary expectation of Venture Homes. But in Mr. Harrison's case, this is likely to succeed.

Mr. Harrison purchased the land in March 2014 for $100,000.00 after almost 30 years of use as a National Guard Armory and Vehicle Storage building. For more than 30 years, heavy trucks were operating on this land and using this facility for commercial/industrial purposes. He purchased the land in order to continue that use. His reasonable investment backed expectation, subjectively was that he bought the land thinking that it was "grandfathered in" but is also objective in that he wants to continue to the use of the land in a like and similar way by leasing to the trucking school. Therefore, Mr. Harrison is most likely to succeed on this part of the balancing test.

(3) The least concrete factor in the balancing test to determine whether or not there was "taking" is the character of the government action. In Venture the Court wrote that "if the rezoning was general in character, that weighs against the property owner, whereas if the rezoning impacted the owner's property disproportionately harshly, that weighs in the owners favor that a taking did occur." Venture. In Venture, Venture Homes argued that the creation of a PUD zone within their PUD zone was done by the City for the sole satisfaction of another private developer. The city claimed that new PUD was crafted to "created a more modern pedestrian-friendly environment." Here, the city in 1994 was concerned about a local park and continues to worry. While, there is no direct or concrete test, it is likely that the prior two factors weigh more as the Court noted in Venture, "Venture presented evidence that could lead a reasonable fact finder to conclude that one of the City's purposes, for enacting the ordinance was to benefit the private developer.... because the other two Penn Central factors particularly the first weigh so heavily against Venture, there is no taking here."

In light of all three factors and specifically, as noted in Penn Central and Venture the land value was so demonstratively affected in value, it is likely that Mr. Harrison will succeed on his claim that the land was a partial taking.

C. Land Use Exaction

In Newpark, the third type of taking is a land-use exaction, which occurs when the governmental approval is conditioned upon a requirement that the property owner take some action that is not proportionate to the projected impact of the proposed development. This is not relevant to Mr. Harrison.

D. "Substantially Advance" Taking

In Lingle v. Chevron the United States Supreme Court overturned the substantial advancement test to determine if a taking had occurred. But in the 2007 case in Newpark, the Franklin Court of Appeals continued to hold that in Franklin, the substantial advancement test continues. (See footnote 2). Under this test, the Court examines the relationship

or nexus "between the effect of the ordinance and the legitimate state interest is supposed to advance." The Court noted that this is not similar to the rational basis test but rather, the standard requires "that the ordinance substantially advance" the legitimate state interest sought to be achieved rather than merely analyzing whether the government could rationally have decided that the measure achieved a legitimate objective." Venture. In Venture, the stated goal "a more pedestrian friendly" area was argued by Venture Home's to be pretext. But, the Court expressly denied this claim writing "We are not required to consider the City's actual purpose. Instead we look for a nexus between the effect of the ordinance and the legitimate state interest it is supposed to advance."

In Mr. Harrison's case, the land boarders a city park and baseball field and is also near the municipal airport. However, growth in the area has been stagnant since the 1960's. At the Council meeting members were concerned about the proximity to the park and suggested that it would be willing to grant a special use for the land. This is a legitimate state interest and therefore, it is unlikely that Mr. Harrison will be defeated.

Conclusion

Mr. Harrison is unlikely to succeed if he were to argue that there has been a total taking, as there is some substantial value. Mr. Harrison will also fail under the Substantially Advance test because the stated reason for the denial and the actual reason for the denial are not relevant to determine if the state's interest is enough. But Mr. Harrison is likely to win on a claim of inverse condemnation based on a [END OF ANSWER]

MPT 2

IN RE COMMUNITY GENERAL HOSPITAL

Examinees' law firm represents Community General Hospital, which has received a letter from the Office of Civil Rights (OCR) of the U.S. Department of Health and Human Services. The letter from the OCR states that it has learned of three cases in which Community General disclosed protected health information without the written patient authorization required by the federal Health Insurance Portability and Accountability Act (HIPAA) regulations. If Community General cannot justify the disclosures, the OCR will pursue an enforcement action against the hospital. Examinees' task is to draft a letter responding to the OCR, parsing the HIPAA regulations, and setting forth the argument that the disclosures fit specific exceptions to the general rule requiring a written authorization from a patient (or the patient's representative), and that therefore there has been no HIPAA violation by hospital personnel. The File contains the instructional memorandum, the letter from the OCR, a memorandum from the hospital's medical records director discussing the three patients' cases, a letter from a treating physician, a pathology report, and a memorandum from the supervising partner outlining the purpose and structure of the HIPAA regulations. The Library contains a Franklin state statute requiring health care professionals to report gunshot and stabbing wounds to law enforcement and excerpts from the HIPAA regulations [found at 45 C.F.R. §§ 164.502 and 164.512].

A

Jackson, Gerard, and Burton LLP
Attorneys at Law
222 St. Germaine Ave.
Lafayette, Franklin 33065

February 24, 2015

Robert Fields, Investigator
U.S. Department of Health and Human Services
Office of Civil Rights
1717 Federal Way
Lafayette, Franklin 33065

Re: Response to Audit Results for Compliance with HIPAA Regulations

Dear Mr. Fields:

I write you on behalf of Community General Hospital ("CGH") in response to the letter dated February 2, 2015 outlining your recent audit of their patient health care records. CGH performed an internal investigation into the alleged disclosures of protected health information that you identified under the provisions of 45 C.F.R. § 164.500 et seq. and believes that in each case the disclosures were justified for the reasons outlined below.

The Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. § 201 et seq. (the "Privacy Rule") provides various justifications for the disclosure of "protected health information" ("PHI") by "covered entities" (including CGH) without an individual's authorization.

Patient #1

The disclosure of Patient #1's PHI was justified. The Privacy Rule permits a covered entity to disclose PHI without individual authorization as required by law. Specifically, 45 C.F.R. § 164.512 (a)(1) provides that a covered entity may disclose PHI as required by law, so long as it is limited to the relevant requirements of said law. Further, 45 C.F.R. § 164.512 (f)(1) permits the disclosure of PHI as required by laws that require the reporting of certain types of wounds of physical injuries. The law that required the disclosure in the present instance, Franklin Statute § 607.29, provides that the physician treating the victim of a gunshot wound shall make a report to the chief of police of the city or the sheriff of the county in which treatment is rendered by the fastest possible means. In addition, the statute requires the physician to submit a written report within 24 hours sent via first-class U.S. mail to the same appropriate entity outlined above.

In the case of Patient #1, the treating physician called the Lafayette Police Department to report the wound. As the chief of police is the individual in charge of the entire Police Department, phoning the department generally rather than the chief of police himself was appropriate, particularly given the timeliness required by the statute ("fastest possible means"). The chief of police is no doubt a busy person and phoning the department he is in charge of is the fastest and most appropriate means of alerting him to the gunshot wound suffered by the victim. Furthermore, the contents of the physician's letter (discussed below) suggest that the physician spoke directly to the chief of police as required by the statute. Accordingly, the physician's disclosure of Patient #1's PHI in this instance was justified

Similarly, the disclosure of Patient #1's PHI through the letter sent directly to the chief of police was justified under the Franklin Statute and the Privacy Rule. The written report was sent via first-class U.S. mail within 24 hours of treatment and included only the information required by the statute. The amount of information disclosed in the letter is further

supported by 45 C.F.R. § 164.502(b)(2), which provides that the "minimum necessary" standard does not apply for disclosures that are required by law. Accordingly, the physician's disclosure of Patient #1's PHI in this instance was also justified.

Patient #2

The disclosure of Patient #2's PHI was justified. 45 C.F.R. § 164.512 (f)(4) provides that a covered entity "may disclose protected health information about an individual who has died to a law enforcement official for the purpose of alerting law enforcement of the death of the individual if the covered entity has a suspicion that such death may have resulted from criminal conduct." Further, 45 C.F.R. § 164.502 (f) provides that a covered entity must comply with the requirements with respect to PHI of a deceased individual.

In the case of Patient #2, although the executive vice president is not a physician, they are nevertheless a covered entity as they are employed by CGH. Furthermore, disclosing the relevant PHI to the police detective was correct given that a police detective is no doubt a law enforcement official for purposes of the regulation as they are the law enforcement member in charge of investigating a suspicious death. Because the executive vice president was aware of the strife between the decedent patient and his family members, she had the necessary suspicion that Patient #2's death resulted from criminal conduct. Additionally, the pathology report in the record makes it clear that Patient #2's death was due to acute arsenic poisoning at 12 times the expected normal environmental exposure, most likely from the ingestion of arsenic trioxide. As such, the executive vice president's disclosure of Patient #2's PHI to the detective was justified given their suspicion that the death may have resulted from criminal conduct.

45 C.F.R. § 164.502 (b)(1) requires the disclosure of PHI to be only the minimum necessary to accomplish the intended purpose of the disclosure. Here, although it appears at first blush that the executive vice president's disclosure was impermissibly voluminous, providing the earliest medical records were necessary to establish that the fatal illness was not caused by natural matters. Simply providing the pathology report would not have been sufficient to show with enough persuasiveness that Patient #2's death indeed resulted from criminal conduct. Accordingly, the executive vice president's disclosure in this instance was justified.

Patient #3

The disclosure of Patient #3's PHI was justified. The Privacy Rule permits a covered entity to disclose PHI without individual authorization "[w]here the covered entity believes that disclosure is necessary to prevent or lessen a serious and imminent threat to a person or the public, when such disclosure is made to someone it believes can prevent or lessen the threat." Specifically, 45 C.F.R. § 164.512 (j)(1) permits the disclosure of PHI if the covered entity believes in good faith that the disclosure is "necessary to prevent or lessen a serious and imminent threat to the health and safety of a person" and the disclosure is "to a person...reasonably able to prevent or lessen the threat." It further provides that a covered entity that discloses PHI pursuant to paragraph (j) is presumed to have acted in good faith with respect to the belief of the threat if the belief is based upon the covered entity's actual knowledge or in reliance on a credible representation by a person with apparent knowledge.

In the case of Patient #3, the treating physician believed that the patient intended to harm his employer and had the means to do so via the gun allegedly located in his home. The physician's belief of this threat was based upon his witnessing of Patient #3's verbal threat to harm his employer combined with Patient #3's sister's belief that he had a gun in his home. Patient #3's sister made a credible representation given her familiarity and closeness to her brother. The fact that Patient #3 was found with no gun on his persons has no effect on the justification of the disclosure. Accordingly, the physician's reliance on both the sister's statement and his experience with Patient #3 justified this disclosure.

The regulation also demands that the covered entity make the disclosure to a person reasonably able to prevent or lessen the threat. In this instance, the physician made the disclosure to a Franklin State Trooper. As a member of the local law enforcement agency, the state trooper was assuredly a person reasonably able to prevent or lessen the threat made by Patient #3. The fact that he was in the Emergency Department on an unrelated matter has no bearing in this instance. Furthermore, the physician's disclosure was the minimum necessary information to accomplish the intended purpose of the disclosure.

45 C.F.R. § 164.512 (f)(3)(ii) further provides that a covered entity may disclose PHI if "[t]he covered entity is unable to obtain the individual's agreement because of incapacity or other emergency circumstance" and if "[t]he disclosure is in the best interests of the individual as determined by covered entity, in the exercise of professional judgment." Here, the physician was unable to obtain the Patient #3's agreement due to his incapacity induced by the PCP he had taken. Furthermore, the physician correctly believed that the disclosure was in Patient #3's best interest to prevent him from committing a crime that would adversely affect him. Because of this, as well as the reasons outlined above, the disclosure of Patient #3's PHI was justified.

Accordingly, no enforcement action under HIPAA is warranted under any of these instances for the justifications stated above.

Sincerely,

Examinee

On the cover:

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

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