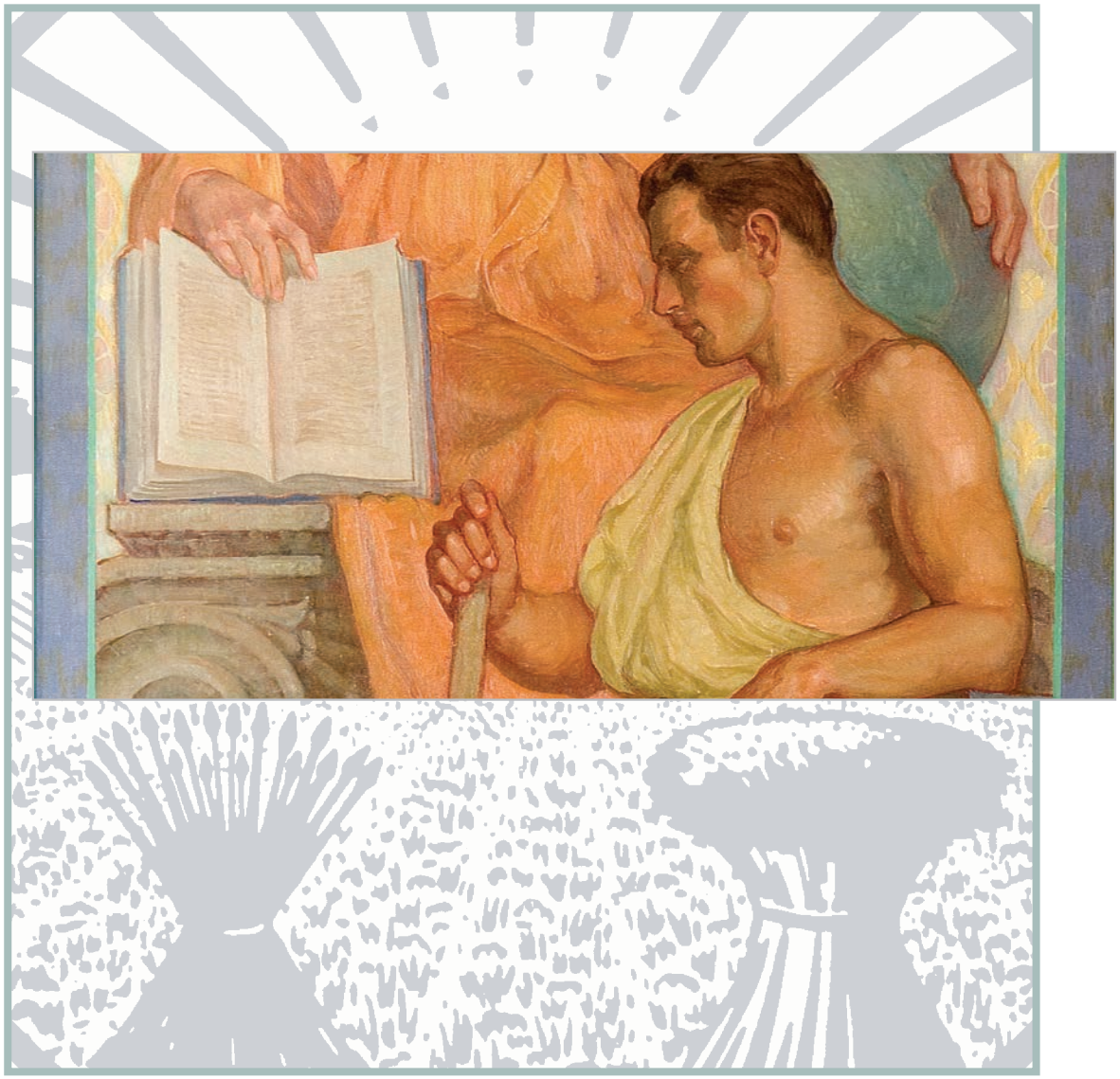
THE SUPREME COURT *of* OHIO

July 2015 Ohio Bar Examination

Essay Questions & Selected Answers

Multistate Performance Test Summaries & Selected Answers



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OHIO BAR EXAMINATION

JULY 2015 OHIO BAR EXAMINATION

Essay Questions and Selected Answers

MPT Summaries and Selected Answers

The July 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 July 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 July 2015 MPTs and their corresponding point sheets are available from the NCBE. Check the NCBE's website at www.ncbex.org for ordering information.

QUESTION 1

Tenant rents an apartment from Landlord on the 3rd floor of a small complex in Anytown, Ohio. The building is right across the street from her granddaughter's elementary school, where Tenant also attends meetings with a neighborhood watchdog group. Tenant, herself the victim of a sexual assault many years earlier, is actively involved in Protect Anytown from Sex Offenders (PASO), a group organized to disseminate information about registered sex offenders in the area. As she left for her monthly PASO meeting one evening, Tenant passed Landlord in the lobby and reminded him that several lights in the hallway outside her apartment were burned out. Landlord assured her that he would replace the light bulbs while she was gone.

Tenant returned home from her PASO meeting several hours later, carrying a stack of flyers about a registered sex offender who had recently been seen in the neighborhood. As she stepped out of the elevator on the 3rd floor and the doors closed behind her, Tenant discovered that Landlord had not yet replaced the hallway lights. She could vaguely see a man at the end of the hall, holding an illuminated cell phone. Believing that it was Landlord, she walked toward him, guided down the hallway by the dim light from his cell phone.

In the dark hallway, Tenant could not see the ladder that Landlord had propped against the wall, so she fell over it, sustaining injuries to her knee and ankle. As Tenant was lying on the floor and crying in pain, the man approached her, still holding his cell phone. As he got closer, Tenant discovered that it was actually Neighbor, a man who had recently moved into another apartment on the 3rd floor. As Neighbor reached down to help her to her feet, Tenant realized that he was the sex offender pictured in her pile of flyers! Uncertain whether Neighbor was attempting to help her or assault her, Tenant broke away and hobbled back toward the elevator.

Because she did not want to risk waiting for the elevator, Tenant decided to take the stairs. Although the stairwell was fairly well lit, in her panic, and because she was already injured, Tenant fell down the stairs, sustaining serious injuries. Neighbor was, in fact, the sex offender pictured on the PASO flyers. Landlord had rented the apartment to Neighbor without checking into the information Neighbor had furnished in his written rental application, which included Neighbor's correct name.

Anytown has the following landlord/tenant ordinances:

Ordinance I - A landlord shall make all repairs and do whatever is reasonably necessary to put and keep the premises, including common areas, in a fit and habitable condition.

Ordinance II - A landlord of residential premises located within 1,000 feet of any school shall not rent premises to anyone who is listed on the state sex offender registry.

Tenant has filed a two-count negligence action against Landlord in an Ohio court alleging a right to recover for her injuries because: (1) the lights were burned out and, (2) Landlord had rented to Neighbor. On each count, did Landlord breach any duties of care to Tenant? Fully explain the common law and/or statutory basis for each duty.

DO NOT discuss issues of causation, damages, or affirmative defenses.

(1) Burned out lights

Landlord breached a duty of care to Tenant. Generally, a duty of care is owed to any foreseeable plaintiff to exercise ordinary care to prevent injuries. However, in the landlord-tenant relationship under the common law, a landlord generally does not owe a duty of care to a tenant. There are a few exceptions to this general rule, where the landlord does have a duty to exercise some level of care. For example, a landlord does have a duty of care to a tenant to: (1) warn of any known latent defects, (2) to reasonably make safe any common areas where the landlord retains control, (3) for negligent repairs, (4) for short term leases that include furnished apartments, and (5) to repair known hazards where the tenant holds the land open to customers, and the landlord has reason to know of the condition and that the tenant is not likely to fix the hazard.

Here, the second exception applies, where the burned out lights were in the hallway of the third floor. Accordingly, Landlord had a duty to exercise reasonable care to make the common area of the hallway safe. Tenant reminded Landlord that several lights in the hallway outside of her apartment were burned out. Thus, Landlord had notice of the condition. Further, Landlord assured Tenant that he would replace the light bulbs while she was gone. Several hours later, Landlord had not fixed the lights. Instead, the hallway was still very dark, and even worse, a ladder was left in the dark hallway. A reasonable landlord in the same or similar conditions would have fixed the lights, and further, would not have left the ladder in the hallway. Thus, Landlord breached his duty of care to Tenant.

Further, negligence per se allows a plaintiff to establish the duty and breach elements of a negligence claim where the statute: (1) is designed to protect the class of persons in which the plaintiff belongs, and (2) is designed to protect the type of injury which the plaintiff suffered. Here, Ordinance I required landlords to make all repairs and "do whatever is reasonably necessary" to keep the common areas in a fit and habitable condition. This type of ordinance is designed to protect tenants, and is designed to keep the premises and tenants safe from injuries occurring on the property. Thus, negligence per se applies and the duty and breach of Landlord can be conclusively established.

(2) Renting to Neighbor

Landlord did not breach a duty of care to Tenant when he rented to Neighbor. First, none of the exceptions apply to the general common law rule that landlords do not owe tenants a duty of ordinary care. Further, while Landlord may be liable under the statute, the statute cannot be used to establish the duty and breach of Landlord under negligence per se. Here, Ordinance II prohibits a landlord located within 1,000 feet of any school from renting to anyone who is listed on the state sex offender registry.

Here, the class of persons this ordinance is designed to protect is school children. The statute specifically restricts renting around schools, presumably to keep registered sex offenders from having contact with children. Tenant is not a child, and does not belong to this class. Next, the type of injury this statute seeks to prevent is sexual offenses, specifically against minors. The statute is not designed to protect general tenants anywhere of any age general protection from being frightened by offenders. Thus, the statute cannot be applied under a negligence per se analysis, and Landlord did not breach a duty of care to Tenant when she was scared by Neighbor, though he was attempting to assault her, and injured herself running away.

QUESTION 2

In 2013, the Anytown, Ohio, Police Department tested hundreds of evidence collection boxes commonly referred to as Rape Kits, which had been stored in conjunction with a multitude of unsolved rape cases. DNA samples contained within the kits were submitted to the state's combined DNA Index System (CODIS), which contains the DNA profiles from known criminal offenders.

One case involved a woman named Sara who, nearly 20 years earlier, reported she was the victim of a sexual assault. Sara claimed she was forced into a vehicle while walking home from a high school basketball game and taken to an unknown location where the assault took place. At the time, she could provide the police with few details regarding her assailant and the case went cold. DNA samples were taken at the hospital where Sara first reported the assault.

A sample taken from Sara at the hospital was among those tested by the Police Department in 2013. That sample proved to be an exact match with the DNA profile of John, a 45-year-old man with both a felony theft conviction and a misdemeanor domestic violence conviction from 2010. John was indicted on one count of rape and one count of abduction.

At trial, the prosecutor called Sara as the state's first witness. His first question on direct examination was as follows:

> Q: Now Sara, please describe for the jury the manner in which you were abducted and how frightened you were when you were pulled into the vehicle?

Defense counsel objected on the grounds that the question was leading and assumed facts not in evidence, and the Court conducted a sidebar to discuss. After the Court provided a ruling, the prosecutor resumed questioning and asked Sara if she recalled the color of the car. Sara stated it had been so long she was not completely certain. In order to jog Sara's memory, the prosecutor requested permission to show Sara a diary she began writing immediately after the assault. Defense counsel once again objected, this time on the ground that the contents of the diary were hearsay.

Under cross-examination, defense counsel asked Sara the following question:

> Q: According to your testimony, you are 100% certain you were driven to the hospital by your mother. Is it not a fact that you told an officer that evening that a friend had driven you and your mother arrived later?

The prosecution objected on the grounds that the question was leading and assumed facts not in evidence.

When the state rested its case, defense counsel addressed the Court outside the jury's presence. He indicated that his client intended to take the witness stand to testify that the encounter was purely consensual. Defense counsel moved the Court in limine for an order prohibiting the state from questioning his client about his criminal record during its cross-examination.

1. How should the Court have ruled on defense counsel's objection made during the direct examination of Sara?
2. How should the Court have ruled on defense counsel's objection to the use of the diary?
3. How should the Court have ruled on the prosecution's objection to the question posed by defense counsel during the cross-examination of Sara?
4. How should the Court rule on defense counsel's motion in limine seeking to limit the state's cross-examination after his client takes the stand?

Explain your answers fully.

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

1. Objection during Direct Examination

Defendant objected to Prosecution's question on two grounds: leading and assumed facts not in evidence. Generally, a lawyer cannot ask leading questions during a direct examination. There are a few exceptions, such as when establishing preliminary manners (occupation, age) or an expert's qualifications. Here, no such exception is present. The prosecution asked Sara to describe how frightened she was when she was pulled into the vehicle. This is leading because it suggests the answer to Sara: that she was frightened. It also suggests that she was abducted. This question also assumed facts not yet in evidence. Because this was the first question to Sara and Sara was the first witness for the State (who goes first with their case in chief), there is no chance that any other witness could have testified that Sara was abducted or pulled into a vehicle. Consequently, the question assumed facts that were not yet in evidence. Court should have sustained the objection.

2. Objection to Diary

The diary has the potential to be hearsay, if it were being admitted into evidence itself. Hearsay is an out of court statement admitted to prove the truth of the matter asserted. Nevertheless, the use of the diary is not hearsay, but rather it is a valid instance of present memory refreshed. The diary may be read by the witness if it would help the witness remember the events which she otherwise cannot remember. Here, Sara wrote the diary "immediately after the assault" and the diary contained the information which she could not remember. The diary would help her remember. Thus, it can be used to refresh her memory. Nevertheless, the diary may not itself be entered into evidence because that would be hearsay. Here, however, the diary is not being entered into evidence for the sake of proving the truth of the matter asserted, so there is no hearsay problem.

3. Prosecution's Objection

The Prosecutor objected that the question was leading and that it assumed facts not in evidence. This is cross-examination, so leading questions are permitted. Thus, the fact that the question is leading is not a valid objection and will be overruled. The defense is questioning Sara about her inconsistent statement in order to try to impeach her testimony. An impeaching question does not have to be based on facts that are currently in evidence. Thus, this is also not a valid objection. Consequently, the court should overrule the objections.

4. Motion in Limine

Prosecution wants to introduce evidence of prior bad acts, which are governed by Rule 404. In general, prior bad acts of a defendant are not admissible to prove that defendant acted in conformity with his prior acts. Nevertheless, there are a few exceptions. One such exception is felonies that were committed within the past 10 years (counting either by the time of conviction or the time the sentence ended). If the felony was committed longer ago than 10 years, then it will not be admissible unless its probative value outweighs its prejudicial value. Here, Prosecution wants to introduce two prior bad acts into evidence, a misdemeanor domestic violence conviction and a felony theft conviction. The misdemeanor will not be admissible, because it does not fall into the felony exception and it is not a crime involving dishonesty (another exception). The felony will be admissible because it is a felony (punishable by over 1 year imprisonment) and it was committed in 2010, which is less than 10 years ago. Thus, the judge should rule in favor of the motion in limine as to the misdemeanor conviction, but rule that the felony conviction is admissible.

QUESTION 3

Twisted Productions, Inc. (TPI) is a State of Franklin producer of video games and movies. Recently, TPI released an interactive video game called Kill Baby Kill. In the game, the object for the players is to cause "Ivan," a heavily armed and armored villain, to "kill" computer-generated images of human beings ranging from very young children to elderly persons. Different scores are awarded depending on whether the "kill" is achieved instantaneously or slowly by torture and by dismemberment. Because of the burgeoning sales of Kill Baby Kill, TPI is preparing to release an animated movie based on the same violent theme of the video game, including scenes with computer-generated images of children engaging in acts of sex.

The following lawsuits, relating in one way or another to the TPI productions, have been initiated in the appropriate courts in the State of Franklin by parties having proper standing.

1. *TPI v. State of Franklin*: In response to a growing public outcry over exceptionally violent interactive video games geared toward minors, the State of Franklin Legislature enacted a new law that states:

> It shall be unlawful to market, rent, or sell to minors video games in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in a manner that a reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors, that is patently offensive to prevailing standards in the community as to what is suitable for minors, and that causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.

The State Attorney General has served notice on TPI that, going forward, any further effort to market, sell, or rent the Kill Baby Kill video game will be deemed a violation of the new law. TPI brought a declaratory judgment action against the State of Franklin to invalidate the law on the ground that it violates TPI's free speech rights guaranteed by the U.S. Constitution.

2. *TPI v. City of Green*: The City of Green has an ordinance providing that:

> No public performance of a movie is allowed within the City of Green without a license issued by the Movie Review and Licensing Board. To obtain a license, producer or exhibitor of the movie must submit the film to the Board for review prior to any public showing. The Board shall deny a license to any movie it deems to be obscene.

TPI applied for a license and submitted the movie, based on the video game, to the Board for review. Asserting that it considered the movie to be obscene under the ordinance, the Board refused to issue the license. TPI sued City of Green to invalidate the ordinance on the ground that it violates TPI's free speech rights guaranteed by the U.S. Constitution.

3. *TPI v. City of Blue*: The neighboring City of Blue has a movie-licensing ordinance, which, like the one in the City of Green, requires pre-license submission of the film to a licensing board for review, except that the City of Blue's ordinance has the following additional provisions:

a. The procedure for making an obscenity determination must be of the shortest possible duration;
b. The Board has the burden of proving that the movie is obscene under constitutional standards; and
c. Immediate judicial review and speedy judicial resolution of any obscenity determination must be available.

The City of Blue licensing Board reviewed the movie and, concluding it was obscene, refused to issue a license. Availing itself of the expedited procedure under the ordinance, TPI sued City of Blue to invalidate the ordinance on the ground that it violates TPI's free speech rights guaranteed by the U.S. Constitution.

4. Brad Smith v. PAVV: Parents Against Violent Video (PAVV) is an organization committed to preventing parents from allowing their children access to video games depicting violence. Johnnie Smith's father, Brad Smith, had given Johnnie a copy of the Kill Baby Kill video game for his eleventh birthday, and Johnnie, who had become obsessed with Ivan, the villain in the game, often went to school "acting out" like Ivan. A group of PAVV members began peaceful picketing on the sidewalk in front of Brad Smith's hardware store in Anytown, carrying signs with inscriptions such as "Don't

patronize Brad's – he intentionally exposes children to violence" and "Brad Smith encourages his son to 'Kill Baby Kill.'" As a result, a number of potential customers refused to buy Brad's goods. Based on the language on the signs, Brad later sued PAVV for recovery of damages under a city "interference-with-business-relationships" ordinance. PAVV defended on the ground that application of the ordinance to its activities violated its free speech rights guaranteed by the U.S. Constitution.

How should the court rule in each of the following lawsuits:

1. TPI v. State of Franklin?
2. TPI v. City of Green?
3. TPI v. City of Blue?
4. Brad Smith v. PAVV?

A

1. TIP will win this case. Freedom of speech is a fundamental right that is guaranteed by the 1st amendment of the constitution. When a state seeks to burden this right a party has standing to challenge the action as a violation of their 14th and 1st amendment rights. When a state issues a content base restriction on the freedom of speech it will be reviewed under strict scrutiny. To survive strict scrutiny the state has the burden of proving that the law was necessary to achieve a compelling governmental interest and that it was the least restrictive means of doing so. Here the government will argue that they have a compelling interest in restricting obscene material. The constitutional test for obscenity is whether something is patently offensive and has no literary, artistic, political, or scientific value and it is based on a national standard as determined by the judge, not the jury. Here, while the court may hold that they have a compelling interest to restrict the obscene materials the statute is based on the standards in the community and not the national standard. Additionally, this statute is not narrowly tailored and overbroad and vague. This statute makes it unlawful to sell any game in which there is killing, or dismembering of a human that a reasonable person would find patently offensive. The reasonable person and patently offensive standards are vague and could include a number of games that do not meet the constitutional obscenity standard. Here, TIP should win their declaratory judgment claim.

2. TPI will win this case. At issue here is a prior restraint. For the government to impose a prior restraint, there must be immediate harm and the restraint must be narrowly tailored with a prompt final ruling, a prompt opportunity to review that ruling and if the authority is given to one person with sole discretion, the decision must be based on definite standards. Here, the statute is an invalid prior restraint. The restraint here is invalid because there are time limits for a prompt decision to be made or a final judgment. Furthermore, the board can deny any movie it deems to be obscene. This standard of obscene is not valid because it does not provide adequate protection for the freedom of speech. TPI will win this case.

3. TPI will lose this case because it is a valid prior restraint. The standards for a valid prior restraint are the same as stated above. Here, the duration for making a finding is the shortest possible leading to a prompt decision. Also, here the board has the burden of proving the movie is obscene in accordance with constitution standards. Moreover, the right to have immediate judicial review and speedy judicial resolution of the decisions ensures that the TPI will have a fair opportunity to have any improper decisions of the board overturned. TPI will lose this case.

4. Brad Smith will lose this case. The freedom of speech also protects the right to protest and gather. When gathering, it is lawful to gather in public forums. A public forum is a place where the government cannot place restrictions on speech other than time, place, and manner restrictions. A public forum are those places where people generally gather to express their views and it is not unlawful to do so. Here, the protesters are gathering on the sidewalk. This sidewalk is generally a public forum. The protestors have no right to be on his property but a sidewalk is public property where people can gather to demonstrate. Here, Brad wants to recover under an interference-with-business relationship ordinance. The PAVV, however, will successfully be able to raise the defense of freedom of speech and Brad will lose this claim.

QUESTION 4

Linda bought a used car from Shifty's Used Car Sales (Shifty's) in Anytown, Ohio. In the course of negotiations, the salesperson for Shifty's made a number of statements regarding the car, including a claim that the vehicle had never suffered any physical damage. In order to induce Linda to buy the car, the salesperson for Shifty's included in the sales contract that "Shifty's will buy back the car if what I say is not the honest truth."

After the purchase, Linda obtained a title history for the car and found out the vehicle was bought by Shifty's from a wholesaler in Louisiana after it had been damaged by hurricane waters. In fact, the front end of the vehicle had been replaced because it was ripped off when the vehicle was being pulled from a flooded lot. Linda drove the car back to Shifty's and demanded that Shifty's buy it back. The manager for Shifty's refused to do so.

Linda filed suit against Shifty's in the Common Pleas Court of Anytown, alleging breach of contract and violations of Ohio's Consumer Sales Practices Act (OCSPA). Linda did not file a jury demand with the complaint. Counsel for Shifty's timely filed an answer. One week after the answer was filed, counsel for Shifty's served on opposing counsel, but did not file with the Court, an amended answer that included a jury demand only as to the claimed OCSPA violations.

The case proceeded through discovery and, six months later, the parties appeared at court on the scheduled trial date. Counsel for Shifty's requested the judge summon the jury pool so voir dire could begin. Counsel for Linda then requested that both the OCSPA and the breach of contract claims be determined by the jury. The judge refused both requests and proceeded with a bench trial.

At the conclusion of the presentation of Linda's opening statement, counsel for Shifty's advised the court that she would like to move for a dismissal of Linda's claims because Linda had not shown she was entitled to relief. The judge did not allow counsel for Shifty's to make her motion at that time.

At the conclusion of the case on February 1, 2015, the judge announced his decision from the bench. On February 9, counsel for Shifty's filed a written request that the court issue findings of fact and conclusions of law. The judgment was formally entered on February 10, 2015, in which the judge refused to provide the requested findings of fact and conclusions of law.

Did the judge rule correctly on (i) the requests of Shifty's and Linda regarding the jury issue, (ii) the request of Shifty's to make a motion to dismiss, and (iii) the request of Shifty's for findings and conclusions? Explain your answers fully.

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

A

This is a Civil Procedure question; accordingly, the questions are governed by the Ohio Rules of Civil Procedure.

(i) Jury Issue

Shifty - The judge erred in denying Shifty's request to begin a jury trial. Shifty properly requested a jury. Any party may make a jury demand within 14 days of the last responsive pleading. In this case, Shifty filed an answer, and then filed a jury demand with respect to the OSPCA issue within 7 days of filing the answer (in the form of an amended answer). The filing of the amended answer was allowable because a party may amend its pleadings once as a matter of right within 21 days of filing the initial pleading, or with leave of Court. Leave of court should be freely given. There appears to be no just cause in this case for denying Shifty the right to amend his answer, especially for the purpose of validly demanding a jury. A party may request a trial by jury for certain counts of a case and waive a jury for others, as long as the party does not request a jury where one is not appropriate (in actions such as injunctions). Shifty's jury demand was timely, his request to have a jury try one issue was proper, and accordingly, the court erred in denying Shifty his jury trial on the OCSPA issue.

Linda - The judge correctly denied Linda's jury demand. As stated above, a jury demand must either accompany a responsive pleading or be filed within 14 days of the last responsive pleading. Linda had 14 days from either the day that Shifty filed his answer or the day that Shifty filed his amended answer to request a jury. Linda's counsel did not appropriately exercise that right, and instead requested a jury on the day of trial, which is completely improper. The judge was correct in denying her demand.

(ii) Motion to Dismiss - The court properly denied Shifty the ability to make a dispositive motion after Linda's attorney's opening statement. Shifty's motion would have been proper and actually quite standard if he had timed it correctly. In Ohio, a defendant may move for a directed verdict after the plaintiff has presented its case in chief, and the defendant is entitled to relief if, in viewing the facts in a light most favorable to the plaintiff, the plaintiff has failed to make out a cause of action for which relief can be granted. Unfortunately for Shifty, his attorney made the motion after plaintiff's opening statement – this was improper, as no evidence had been put on to that point. Shifty's attorney should have renewed the motion after plaintiff's case in chief.

(iii) Findings and Conclusions – The judge erred in refusing to issue findings of fact and conclusions of law. In Ohio, a court may issue a ruling from the bench without an opinion. However, upon a timely request of one or both parties, the judge must issue findings of fact and conclusions of law. The court in this case could author such findings or, depending on the local jurisdiction and local rules of Anytown, Ohio, the court could have the attorneys for each party submit proposed findings of fact and conclusions of law, and either adopt, combine, or modify them. In this case, Shifty not only made a proper request, but did it on February 9, which was only 8 days after the court announced its judgment from the bench. Accordingly, Shifty's request was both proper and timely, and he was entitled to findings of fact and conclusions of law by one of the manners described above.

QUESTION 5

Anytown, Ohio, police officers were sent to a residence on Grant Street pursuant to a "possible abused child" call. At the scene, the police spoke with the babysitter (Sitter) who explained the following:

The Mother of Child was away on business for a couple of days. Mother hired Sitter to care for Child, as she had done on a few prior occasions. On this occasion, Sitter brought her 17-year-old daughter (Daughter) with her to help care for Child at Mother's Grant Street home until Mother returned.

Sitter explained further that, while she was attempting to put Child into her crib, she tripped over one of Child's toys in the bedroom and fell against the rail of the crib with Child in her arms. When Sitter tripped, Child hit her head on the railing and Sitter dropped Child to the floor, where she again hit her head. After calming Child, Sitter played with her, and Child seemed to be all right. Child even played with Daughter. Sitter then put Child into the crib to take her nap. After a while, Sitter went into Child's room to check on her, when she discovered that Child was in distress. Using Daughter's cell phone, Sitter immediately called 911, and police and paramedics arrived shortly thereafter. Child died as a result of her injuries.

During the investigation of Child's death, the police sought and obtained four search warrants.

First Warrant: Police obtained a warrant to search the entire residence based on Detective's affidavit that he believed evidence of the crime of child abuse and/or endangering would be found therein. Detective's affidavit to establish probable cause for the search warrant included a summary of Sitter's statement to police and Detective's opinion that he believed, after viewing photographs of Child's injuries depicting multiple bruises to her face, such injuries were not consistent with Sitter's statement. During the search of the residence, police took photographs and measurements of Child's bedroom and seized a laptop computer.

Second Warrant: A second warrant was then obtained to search the laptop. The content of the laptop was obtained and reviewed. The laptop belonged to Mother, but Mother allowed Sitter access to it so the two of them could be in e-mail communication during times when Sitter was staying at Mother's home.

Third Warrant: Based on the information obtained from the laptop, a third warrant was issued to search the residence again "to obtain physical items indicative of criminal conduct" from Child's bedroom and other areas and to take more photographs.

Fourth Warrant: Finally, the police obtained a fourth warrant to seize and search the content of Daughter's cell phone. This warrant was obtained based upon Detective's allegation that cell phone records he had obtained independently indicated that several other calls were made from Daughter's cell phone immediately before and after the 911 call. The cell phone was seized and searched.

As a result of the investigation, Sitter was charged with several counts of endangering children and one count of voluntary manslaughter of Child. Before trial, Sitter timely filed motions to suppress all of the evidence obtained through the execution of each of the four search warrants. The State responded that each warrant was supported by probable cause and claimed that Sitter has no standing to contest the validity of the warrants.

What arguments should each side make in support of its position on the validity of searches pursuant to each of the four warrants, and how should the Court decide the motion to suppress as to each warrant? Explain your answers fully.

The Fourth Amendment of the Constitution protects citizens from unreasonable searches and seizures by the government. A search or seizure is unreasonable if it is not supported by probable cause. All searches and seizures must be supported by a warrant. The warrant must be signed by a neutral and detached magistrate, be supported by probable cause, and state with particularity, the items to be seized and the places to be searched. To challenge a search, a person must have standing. A person has standing if they have a reasonable expectation of privacy in the places that were searched.

Warrant 1: Sitter will argue that she has standing to challenge warrant one. In addition to the rule stated above, overnight guests have standing in any of the areas they would likely use while they are staying over. Here, Sitter and Daughter were staying over at Child's house for a few days while Mother was away on business. Sitter should be expected to enter Child's room while she was staying there. Because in the scope of her duties, Sitter would be expected to enter Child's room to care for her, the court should find that Sitter has standing.

With regard to the Warrant 1, state will argue that the warrant was supported by probable cause. They will also argue that the entire residence should be searched, because blood, or other signs of abuse could be found anywhere.

Sitter will argue that there is no particularity to the warrant of either the place to be searched or the items to be seized. They will also argue that the warrant was not supported by probable cause, and that the laptop should not have been seized.

The court should rule in defendant's favor and grant the motion to dismiss. When Police receive a call from an informant, their basis for probable cause cannot just be that phone call. They must corroborate the call with independent investigation. Here, the affidavit only relied on the caller's, Sitter's, phone call, and her call went against the police being able to suspect her of a crime. The photos only show that the harm was done, but they do not corroborate anything from a call. The residence is particular enough, but there is no info about what to seize. Because the warrant was not supported by probable cause, the court should grant Sitter's motion to dismiss.

Warrant 2: Sitter will argue that the laptop was the fruit of the poisonous tree. The fruit of the poisonous tree doctrine states that anything seized as a result of an unconstitutional search should also be excluded.

The state will argue that the Sitter does not have a reasonable expectation of privacy in Mother's computer, and therefore has no standing to challenge the search. Although she is able to use it, she can't think that a computer that is owned by her employer would be a safe place to store her private things. The state will win on the grounds that she has no standing to challenge the seizure of the laptop.

Because Sitter has no standing, the court should deny Sitter's motion to dismiss.

Warrant 3: Sitter will likely argue fruit of the poisonous tree again and that the warrant does not state the items to be seized with particularity. Sitter has standing, as determined above.

The State will argue that in a child abuse case, anything can be indicative of criminal conduct. The court should grant the motion to dismiss. A warrant must contain a more specific statement of what the police are looking for than, "physical items indicative of criminal conduct." That would give police free reign to search anything. Accordingly, because the warrant is not particular enough, the court should grant the motion to dismiss.

Warrant 4: Sitter will argue that there was no probable cause to search Daughter's phone. State will argue that Sitter has no standing. Even though Daughter is Sitter's child, she has no standing in her phone. The motion should be denied.

QUESTION 6

The following events and transactions occurred in Anywhere, Ohio:

Scenario 1: Amy lost Billy, her Bull Terrier puppy. On a social media site, Amy posted a photo of Billy and publicly offered "a reward of $1,000 apiece to any person or persons who return Billy to me." Mailman, Dog Warden, and Policeman saw Amy's post. The next day, Mailman was working his normal route when he spotted Billy running-at-large. Mailman phoned Dog Warden and Policeman, who were also working their normal beats, to report seeing Billy and to request their assistance to capture him. Dog Warden and Policeman immediately responded to the area. Policeman stopped traffic while Mailman and Dog Warden captured Billy. Thereafter, Mailman, Dog Warden, and Policeman drove directly to Amy's house, verified Amy's ownership of Billy, and returned Billy to her there. In doing so, Policeman was acting in accordance with police regulations requiring police officers to return found property to the rightful owner wherever the owner may be located; Dog Warden went beyond the call of duty by returning Billy to Amy quicker than Department of Dog Warden regulations require, since wardens generally impound dogs found running-at-large for at least 24 hours before returning them to the owner; Mailman was subject to no applicable U.S. Mail Department regulations in returning Billy to Amy. Mailman, Dog Warden, and Policeman now each assert a contractual entitlement to the reward, while Amy claims the promise of the reward for each of them is unenforceable for lack of consideration.

Scenario 2: Ginger hired Handyman to install air conditioning in her home for $2,000. Inexcusably, Handyman walked off the job before completing it. Ginger called Handyman and offered to pay him a $700 "extra fee" if he came back to complete the work. Induced thereby, Handyman returned and finished the job. Ginger paid him the agreed $2,000, but refused to pay the additional $700 extra fee, to which Handyman claims entitlement.

Scenario 3: Doug loaned Ed $500. Ed refused to repay the debt. After the statute of limitations had expired for commencing a cause of action on the debt, Ed sent Doug a signed memorandum stating: "I promise to pay you $400 of the $500 debt I owe and I will pay the rest at my option." Doug now claims a contractual right to collect on the debt (or any part of it) based on this new written promise. Ed refuses to pay.

Scenario 4: Clare saw Nephew, age 18, smoking cigarettes. Clare pled with Nephew to stop smoking, which Nephew initially resisted. Clare then promised to pay Nephew $3,000 if he stopped smoking until age 21. Nephew immediately quit smoking and never smoked again. Nephew has now turned age 21 and claims a contractual right to $3,000 from Clare, which Clare refuses to pay.

Scenario 5: Igor hired Painter to paint Igor's vacant house for $4,000. By mistake, Painter painted a vacant house next-door to Igor's that belonged to Neighbor. Neighbor learned of the mistake after Painter finished painting, and subsequently promised "to pay Painter for the work you did on my house at the price you agreed to paint Igor's house for, because I feel bad for you in having made the mistake." Painter now claims a right to $4,000 from Neighbor, which Neighbor refuses to pay because Neighbor doesn't feel too bad about Painter's mistake after all.

For each of the above scenarios, who is likely to prevail in a contract claim? Explain your answers fully.

Do Not Discuss the Statute of Frauds.

A

1. Amy has a binding contract with Mailman, and must pay him $1,000, but not Policeman or Dog Warden because they were acting as required by law. A unilateral contract is formed when there is an offer and performance as acceptance. A reward in a public posting can be considered an offer if it sufficiently describes the method of acceptance. One who already has a duty to perform, however, cannot accept the offer because his preexisting duty precludes consideration (value to induce performance). Mailman, Dog Warden, and Policeman were aware of the reward offered by Amy for finding and returning Billy. The posting was sufficiently specific in describing that any person(s) returning Billy to Amy would receive the reward. The three brought Billy to Amy at her home and thus fulfilled the terms of the reward offer. Mailman had no preexisting duty to find or return Amy's dog, and thus provided adequate consideration to Amy by returning Billy to her. Policeman, however, was acting as required by police regulations to return the dog to Amy, thus he cannot provide consideration as his duty was preexisting. Similarly, Dog Warden was required by law to find Billy running-at-large. It is a closer call here as Dog Warden went above his duty by returning Billy to Amy early, but ultimately his duty was still preexisting to find Billy in the first place, thus he cannot provide consideration.

2. Ginger does not need to pay Handyman the extra fee. When a promisor has a preexisting duty to perform under contract, additional money must be supported by adequate consideration. Here, Handyman had a duty to install Ginger's air conditioner and was paid $2,000 for it, making this a valid contract. Handyman's walking off the job did not alleviate him of his duty; he is still bound under the contract to install the air conditioner. The fact that Ginger offered Handyman an additional $700 is irrelevant if handyman only promised to perform the duty he was already obligated to do; returning is not adequate consideration. Ginger therefore must only pay $2,000.

3. Ed must pay Doug $400. A debtor's agreement to pay a due and uncontested debt is not valid consideration. An exception applies when the statute of limitations (SOL) has run for the creditor to collect the debt. In that instance, debtor's additional promise to pay will serve as adequate consideration, but only to the promise's extent. Here, Ed promised to pay Doug $400 after the SOL has run. This promise will bind Ed to pay Doug the $400, but NOT anymore because Ed's promise to pay "the rest at my option" is illusory. Because Ed has not actually promised to pay the additional amount, he is only liable for $400.

4. Clare must pay Nephew the $3,000. Consideration for a contract need not be taking an action by the promise; it could also be refraining from doing something the promise is legally allowed to do. Here, Nephew is 18 and thus legally allowed to smoke cigarettes. Clare promised to Nephew that if he refrained from engaging in his legal right until the age of 21, she would pay him $3,000. By refraining from smoking, Nephew has provided Clare with adequate consideration to enforce her promise. Clare must therefore pay Nephew $3,000.

5. Painter will be able to recover from Neighbor via unjust enrichment. A lack of consideration by a party prevents contract creation. Here neighbor provided no consideration to Painter in his promise, and thus is not held liable under contract theory. Unjust enrichment, however, will require a party that is mistakenly enriched to honor a subsequent promise to pay for services. Here, Neighbor enjoys a freshly painted house at no cost to himself. While Painter would normally have to bear his mistake, Neighbor promised to pay. It would be unfair to prevent Painter from recovery while Neighbor enjoys his house, so Neighbor must honor his promise and pay.

QUESTION 7

Duke and Liz married in 1975. Shortly after the marriage, Duke purchased three parcels of real estate for farming purposes in Southwest County, Ohio, those being Parcel A (100 acres), Parcel B (75 acres), and Parcel C (25 acres).

Duke and Liz had two adult children, Clint and Mariah. Neither Clint nor Mariah had any interest in maintaining the family farm. Both have lived out of state since the late 1990s.

In September 2008, Liz became very ill and Duke needed assistance in caring for her needs. Liz had been told she had a life expectancy of 12-18 months. Duke contacted Neighbors who owned an adjoining farm. Duke told Neighbors that if they would agree to provide care for Liz during the remainder of her life, Duke would make a will in which he would devise Parcels B and C to Neighbors on his death. After their discussion, Neighbors sent Duke an email (2008 Email), stating: "This is just to confirm you promised to make a new will leaving us Parcels B and C in return for us caring for Liz as we discussed." Duke never responded to the 2008 Email and never signed any document regarding his promise. There were no other witnesses who overheard the discussion between Duke and Neighbors.

Neighbors provided the requested care for Liz; however, her health quickly deteriorated, and she passed away in November 2008. In 2009, Duke executed a will (2009 Will). Duke felt that since Neighbors had only provided two months of care, Neighbors should not receive both Parcel B and C. The 2009 Will provided as follows:

1. I give to Neighbors my 25-acre Parcel C.
2. I give to my brother, Bill, my 75-acre Parcel B.
3. I give the rest and residue of my estate to my children, Clint and Mariah.

There was no mention in the 2009 Will of Neighbors' 2008 Email to Duke.

Duke's son, Clint, a friend named Fred, and Duke's nephew, Stan, were visiting at the time Duke was getting ready to sign the 2009 Will. Clint and Fred were adults; Stan was the 16-year-old son of Duke's brother, Bill. Duke signed the 2009 Will on the last page below all other provisions in the presence of Clint, Fred, and Stan and asked them to sign as witnesses, which they did.

Duke never told Neighbors that he had changed his mind about the devise of Parcel B. Duke's brother Bill died in November 2014, survived by his wife, Wilma, and his son, Stan, who is now 21.

Duke passed away in December 2014, survived by Clint, Mariah, Neighbors, Wilma, and Stan.

At the time of Duke's death, he owned the following property:

1. Parcels A, B, and C.
2. $100,000 in Southwest Bank.
3. A $50,000 life insurance policy, which named Liz as the beneficiary. There were no alternate beneficiaries named on the policy.

Duke's 2009 Will was presented to probate in the Southwest County Probate Court. The following persons have asserted claims against Duke's estate: Clint, Mariah, Neighbors (who have presented a copy of their 2008 Email in support of their claim), Wilma, and Stan. The executor (Executor) of the estate is Bill, Duke's deceased brother, who has also asserted a claim.

How should each of the claims be resolved, and to whom and in what proportions should Duke's estate be distributed? Explain your answers fully.

A

(1) Clint
Clint will receive the lesser of his intestate share or his share under the 2009 Will. In order to make a valid Will, a testator must intend the document to be a Will, must have testamentary capacity, and must comport with Will's Act formalities. The facts indicate no issues with any of the above, and, in fact, clearly state compliance with the formalities, which are (1) a writing; (2) subscribed to by the testator; and (3) subscribed to by two witnesses with capacity. Here, we are told that the writing was signed below all of the provisions of the Will (subscribed) by Duke, the testator. We are told that he signed before three witness, all of whom then signed at Duke's request. However, this portion of the analysis does present two issues: (1) Stan was only 16 and therefore did not have capacity, as witnesses to a Will in Ohio must be over 18; and (2) Clint was an interested witness because a devise was made to him in the Will. Therefore, Stan will not count as a witness, and Clint will only count if his interest is purged, in accordance with statute. Under Ohio's purging statute, an interested witness need not be purged of the whole devise if he would take by intestacy or under a prior will; however, the witness must take the lesser amount of either what they would have taken in intestacy or the Will. Here, Clint, in intestacy was one of Duke's two children, and because Liz, Duke's spouse, had already died, Clint would have taken one half of the estate. Therefore, Clint will likely take under the Will as it appears to be lesser of the two amounts and he will take half of the residue of the estate. Half of the residue of the estate will be 1/2 of Parcel A and $75,000, as neither Parcel A nor the $100,000 in the Bank were otherwise devised. Further, because the life insurance policy has no contingent beneficiary and Liz is dead, it will also be added into the estate.

(2) Mariah
Because the 2009 Will is valid, Mariah will take half of the residue of the estate not devised under the 2009 Will. This will leave Mariah with the same amount as Clint – 1⁄2 of Parcel A and $75,000.

(3) Neighbors
Neighbors will take under the 2009 Will and therefore, will only take Parcel C. The issue here is whether the oral representations made by Duke and the 2008 confirmatory email by Neighbors to Duke will be enough to constitute either some sort of incorporation or contract to make a will. First, it will not count as an incorporation because we are explicitly told that the 2009 Will made no mention of the email and therefore it cannot be incorporated. As for the email, Neighbors could try to say that they and Duke made a valid contract to make a will; however, such contracts must be in writing and signed by the party to be charged under Ohio law. Here, Duke never signed or acknowledged the email in anyway. Therefore, the Neighbors will take only under the Will and take only Parcel C.

(4) Wilma
Wilma will not take any of Duke's estate because Parcel B, which was devised to her husband (Bill), who predeceased Duke, will go to Stan (her and Bill's son) under Ohio's antilapse statute, as discussed below.

(5) Stan
Stan will take Parcel B. Under common law, if a beneficiary predeceased the testator, the gift lapses (it is void); however, in Ohio, we have an antilapse statute, which saves the gift if the gift is to a stepchild, a grandparent, or a descendant of a grandparent of the decedent. In these cases, the gift goes to the predeceasing beneficiary's descendants. In this case Bill, as Duke's brother, is a descendant of Duke's grandparent, and therefore, when Bill predeceased Duke, Bill's interest passed to his descendants, and his lone descendant is Stan. Therefore, Stan will take Parcel B.

(6) Executor
For the reasons stated in the Stan analysis above, Stan will take in Bill's place and therefore, Bill's executor has no interest in Duke's estate.

QUESTION 8

In 1979, Harry and Sally, husband and wife, acquired ownership of their marital residence (Home) at 8199 Street, Anytown, Ohio, by a duly recorded deed conveying it to them as tenants by the entireties with survivorship rights.

In 1985, Harry inherited from his father a run-down movie theater in downtown Anytown. To restore the theater would cost several hundred thousand dollars, and Harry had no interest in undertaking such a project. The City of Anytown (City), however, wanted to preserve the theater and induced Harry to sell the theater for a bargain price to Pogo, Inc. (Pogo), a nonprofit development corporation owned by City, with the understanding that Pogo would do the restoration and then transfer the property to City to be operated thereafter as City's enterprise.

Harry agreed, but insisted as a condition of the sale, that Paragraph 15 of the purchase and sale agreement (Agreement) between Harry and Pogo, provide that "after the theater is restored and opened to the public, Pogo agrees thereafter that children's movies will be exhibited each Saturday morning for children under 12 years of age at a ticket price of no more than $1.00."

Harry transferred the theater to Pogo by a general warranty deed, which included Paragraph 15 of the Agreement. That deed was duly recorded on September 30, 2014.

On October 15, 2014, to celebrate having concluded the theater deal, Harry hosted a party for a few friends at Charlie's Pub, his favorite watering hole. He had a few too many rum and cokes. Driving his car on the way home, he collided with Paul's car. The accident was clearly Harry's fault, and Paul suffered serious injuries. Paul later sued Harry and obtained a judgment in the amount of $100,000, which he recorded as a lien against Harry's real property.

Paul has now filed a suit against Harry and Sally in the proper Ohio Court of Common Pleas seeking to satisfy his judgment lien by foreclosing on Harry and Sally's Home. Harry and Sally have filed a motion for summary judgment asserting that Paul may not, as a matter of law, foreclose on Home.

Pogo completed the restoration of the theater and, as intended, conveyed the property to City by a limited warranty deed, which stated that the conveyance was made subject to, among other things, "easements, conditions, and restrictions of record."

The City Council determined that showing Saturday morning movies is not the "best use" of the theater and resolved instead that it would use the theater as the venue for weekly Saturday Community Meetings. In support of City Council's decision, the City Attorney rendered an opinion that provisions of Paragraph 15 incorporated into the deed from Pogo constitute an unenforceable restraint on alienation and, therefore, the City is not bound by it.

1. How should the Court rule on Harry and Sally's motion for summary judgment in Paul's suit to foreclose on Home?

2. Is the City Attorney's opinion that City is not bound by the provisions of Paragraph 15 in the deed from Pogo correct?

Explain your answers fully. In answering question no. 2, you may assume that the rule against perpetuities is not an issue.

Tenancy by Entirety

Tenancy by entirety no longer exists in Ohio, but it still did when Harry and Sally were married, so their tenancy by entirety is grandfathered in. Tenancy by entirety requires the four unities – same time, same title, same right to possession, and granted in the same instrument. Tenancy by entirety's "fifth unity" is marriage. Further, survivorship is explicitly mentioned in the conveyance, meaning when one party dies, the other has the right to the entire home. Tenancy by entirety can only be destroyed by divorce or judgment by a joint creditor. It cannot be destroyed unilaterally in Ohio.

(1) Motion for Summary Judgment

The court should grant Harry and Sally's motion for summary judgment. Paul sued Harry and Harry alone. He attached a judgment lien of 100k to Harry's property. This is impermissible. Creditors of one party to a tenancy by entirety cannot get at property shared by a couple by attaching a lien to only one party's interest. Paul cannot foreclose on Home. A lien would only be permissible and enforceable against Home if it were filed by a joint creditor of Harry and Sally. Here, Harry acted unilaterally and the judgment is against him alone, so it cannot attach to property he owns in a tenancy by the entirety. The court should grant Harry and Sally's motion for summary judgment.

Note that under current Ohio law, Harry and Sally would share a survivorship tenancy (called a joint tenancy at common law). Individual creditors can attach to a joint tenancy in Ohio, so opposite result if joint tenancy.

(2) Deed Paragraph 15

Property law favors the free alienability of all real property and thus, disfavors total restraints on alienation. The language at issue, however, is likely enforceable as to the City as a proper restriction on the use of the property because it is does not rise to the level of being a total restraint on alienation.

To enforce a burden at law requires notice, the intent that future parties be bound, that the restriction touches and concerns the land, and both vertical and horizontal privity.

Notice

Notice may be either inquiry, record, or actual notice. Here, the City had actual notice of Harry's restriction. Harry put the restriction in the sale agreement with Pogo. The restriction was also contained in the deed, which Pogo duly recorded. Even if the City did not actually know of the restriction, they had record notice because the restriction was in the deed and the deed, recorded in the chain of title. Finally, Pogo put City on notice of the restriction by the language of its limited warranty deed.

Intent

For a burden to run with property, original party must intend that all successors will be bound. Harry clearly intended to condition the sale on Paragraph 15, which can be presumed from the fact that he included it in the deed.

Touch and Concern

Touch and concern requires a common sense determination that a restriction makes land more valuable in some way. Here, the restriction provides a benefit to the community and ensures the property will be continuously used. It makes the land more valuable.

Vertical Privity

Vertical privity requires transfer of an entire estate, i.e. all interest in that estate. Harry conveyed entire estate to Pogo, who conveyed entire estate to City. Vertical privity is present.

Horizontal Privity

Finally, to enforce the restriction, horizontal privity is required. Horizontal privity requires that transferor and transferee share some interest outside of the restriction. Here, that is satisfied because the theater itself was transferred from Pogo to City.

All five conditions of enforcing the restriction at law are met, so City is bound by the restriction. Further, to enforce the restriction at equity (i.e. as an equitable servitude), neither vertical nor horizontal privity is required. Thus, City could be bound at equity and in law.

QUESTION 9

Q

Expert, a world-renowned art expert, agreed to dispose of two art collections and he also independently undertook the sale of a statue owned by Sculptor.

Museum Collection: The Museum Collection consisted of three paintings, all reputed to be by world-renowned artists, but both Museum and Expert knew that none of the paintings have been authenticated.

Expert's agreement with Museum provides that he would receive a $100,000 fee when the Museum Collection had been sold, and all sales required Museum's prior approval.

Expert offered to sell the Museum Collection to Collector for $500,000. Expert prepared and delivered a proposed invoice to Collector and to Museum for approval. Each painting listed on the invoice stated that it was created by a particular named artist. Museum neither approved nor disapproved the proposed invoice. Thirty days after submitting the invoice to Museum, Expert completed the transaction, received a check payable to Museum from Collector for $500,000, and sent the check to Museum, together with his invoice for his $100,000 fee. Museum deposited the check, but has not paid Expert's fee. Collector has discovered that the paintings are forgeries and has sued Museum for tortious misrepresentation.

Artist Collection: Artist Collection consisted of three large landscape paintings, which Artist has created. One painting, entitled "Landscape of the Future," has been shown at Museum as part of a world exhibit.

Expert's agreement with Artist provided that Expert would receive a commission of 10% on each sale, but that the sale of "Landscape of the Future" could not be for less than $150,000.

Without informing Artist, Expert sold one of the paintings in Artist Collection to himself. Expert purchased the painting under an assumed name. Expert sold the second painting, "Landscape of the Future," to Businessman for $100,000. Expert sold the third painting to Friend for $100,000, with an agreement that, if Friend sells the painting, Expert will receive one-half of the profit and, if Friend does not sell the painting within a year, Expert will receive $50,000. Expert has paid Artist the proceeds of the three sales in separate checks, less his 10% commission. Artist accepted the payments and did not object. One year after the sales, Artist was told of the nature of the three transactions.

Sculptor's Statue: Expert met Sculptor, a world-renowned sculptor, at an exhibition of Sculptor's works. Without telling Sculptor, Expert offered to sell Sculptor's latest statue to Museum for $200,000. Museum immediately accepted the offer and paid Expert the purchase price. Expert sent Sculptor his check for $180,000, that amount being the purchase price less a 10% commission. The statue has not been delivered to Museum, but Museum has planned and publicized an exhibit featuring the statue. Sculptor received a demand that he deliver the statue to Museum and an invitation to speak at the opening of the exhibit. Sculptor simply ignored the demand and invitation from Museum and threw both the invitation and Expert's check into the trash.

1. With respect to Museum Collection,
   (a) Is Museum liable to Collector for Expert's representation?
   (b) Is Museum obligated to pay Expert's fee?
2. With respect to Artist Collection,
   (a) May Artist rescind the sale Expert made to himself?
   (b) May Artist rescind the sale of "Landscape of the Future" to Businessman?
   (c) May Artist rescind the sale of the painting purchased by Friend?
   (d) May Artist recover the commission retained by Expert?
3. With respect to Sculptor's statue,
   (a) Can Museum require Sculptor to deliver the statue to it?
   (b) What rights, if any, does Museum have against Expert?

Explain your answers fully.

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

A

This question is related to agency law, and the answers to the questions will depend on the relationship between various parties as the principal and Expert as the agent. An important note that applies to all the answers in this question is that apparent authority does not appear to come into play with any of these scenarios. Apparent authority is based on the representations the principal makes to a third party, and the principals in these scenarios did not appear to communicate with anyone, but Expert in any way.

1) With respect to the Museum Collection,

a) Museum is liable to Collector for Expert's misrepresentation. Expert had the actual authority to act as Museum's agent in selling the fraudulent paintings, and so Expert's representations during negotiations with Collector are imputable to the Museum. Furthermore, Museum was aware that the paintings were forgeries. Museum cannot in good faith suggest that it was not complicit in the misrepresentations Expert made to Collector when Museum knew with certainty that those misrepresentations were made. Museum's ratification of the agreement (discussed below) further implicates Museum as aware of and consciously benefitting from the misrepresentation (given the high price).

b) Museum is obligated to pay Expert's fee. Expert acted outside the bounds of his authority when he completed the sale to collector without Museum's express allowance. Were that the end of the problem, Expert could not collect. But Museum ratified Expert's agreement by cashing the check. By taking the benefit of the agreement, Museum agreed to be bound by it, and therefore is required to pay what Expert is owed for setting up the deal.

2) With respect to Artist Collection,

a) Artist may rescind the sale Expert made to himself. As Artist's agent, Expert owed Artist certain fiduciary duties, including the duty of good faith. By self-dealing as Expert did here, Expert acted outside the scope of Artist's best interest (there is no way to know that Expert's price he charged himself was fair). Artist did not ratify the deal by accepting the check as he had no idea of the true nature of the deal.

b) Artist may not rescind the sale of "Landscape of the Future." This is another case of ratification. Expert acted outside the scope of his authority by selling Landscape for less than the stated minimum price, but Artist accepted the benefit of the sale (knowing that the sale violated the terms of the agreement) and did not object. Therefore, Artist is precluded form objecting now.

c) Artist will be able to rescind the sale of the painting purchased by Friend. Expert has again violated his fiduciary duty of care to Artist by engaging in self-dealing. By setting up a sale that will in some way divert the profits of the sale from Artist to Expert, Expert has violated his duties as an agent, and therefore did not act with authority in making the sale.

d) Artist may recover the commissions retained by Expert for those sales that are rescinded, as Expert did not actually earn those commissions. Expert is entitled to his commission for Landscape, as that sale was ratified (but Artist has valid legal claims against Expert for breach of duty).

3) With respect to Sculptor's statue,

a) Museum cannot require Sculptor to deliver the statue. The contract that Expert made with Museum was not valid. Expert did not have the actual authority to make the contract with Museum as Sculptor never gave Expert permission to do anything, and, as mentioned in the first paragraph of this answer, Expert had no apparent authority to act. Sculptor did not cure the bad contract after the fact through ratification, as he accepted no benefit from the contract.

b) Museum can recover damages from Expert. When an agent acts on behalf of an undisclosed (or in this case, false) principal, the third party can recover for breach from the agent.

QUESTION 10

The State of Franklin has experienced financial problems in the last few years. The Franklin Legislature made the following changes in state law to reduce its expenditures and help balance its budget:

Statute Number One: "Benefits for qualified indigents under the Franklin Public Assistance Program are limited to bona-fide residents of the state. In order to be eligible for benefits, an applicant must be able to prove that he or she has been a resident of the state for a minimum of six months."

Statute Number Two: "The Veterans Assistance Program (which formerly gave all veterans a $500 annual payment) shall provide $25 annually to veterans of the armed forces for each full year they have resided in the State of Franklin."

Statute Number Three: "Benefits under the Franklin Indigent Medical Assistance Program shall not include payment for elective abortions that are not medically necessary." (The statute continues to provide for all necessary expenses of childbirth.)

Jane moved to Franklin from another state two months ago. She is a veteran of the armed forces. She is unemployed, with no source of income and no savings or significant assets. She has just learned she is pregnant.

Jane applied for benefits under the Franklin Public Assistance Program, but was denied because she failed to meet the six-month residency requirement. She tried to register to receive benefits under the Franklin Veterans Assistance Program, but was told she was ineligible because she had not lived in Franklin for a full year. She sought to terminate her pregnancy through the Franklin Indigent Medical Assistance Program, but was turned down because an abortion was not medically necessary.

Jane has filed a lawsuit challenging the constitutionality of each of the three Franklin Statutes. She asserts that each of the statutes violates her rights under the Equal Protection Clause embodied in the Fourteenth Amendment to the United States Constitution. The lawsuit is proper in all procedural respects.

What will the Court decide with respect to each of the three statutes? Explain your answers fully.

A

The Equal Protection Clause, through the 14th Amendment, prevents the state from discriminating against certain groups of people or depriving a group of people of their fundamental rights. The court will determine on what grounds discrimination is occurring based on the face of the statute, or whether the statute has a disparate impact on a group with a discriminatory intent. Once the right class is determined, the court will apply the appropriate test.

Statute 1

This law is invalid as it infringes on the fundamental right to interstate travel. Under the Privileges or Immunities clause, all citizens have a fundamental right to interstate travel and to be treated as citizens when they have permanently moved to a new state. The law, therefore, is facially discriminatory against out-of-state citizens who move into the state by depriving them of state assistance. Since a fundamental right is implicated, strict scrutiny applies, and the state must prove that the statute is narrowly tailored to further a compelling government interest. There are other ways to balance the state's budget than through discriminating against new citizens of the state's ability to get state aid. For instance, the government could reduce aid to all of its citizens uniformly, and thus remove any discriminatory intent or impact. Therefore, Statute 1 is invalid. However, it could be argued that the right to receive state aid is not a fundamental right, and therefore rational basis scrutiny should uphold the statute. However, the disparate impact and discriminatory intent behind the law is based on the people being new, out-of-state citizens.

Statute 2

Statute 2 is invalid because it is not narrowly tailored to further a compelling government interest. While the face of the law seems to suggest the discrimination is taking place based on whether someone is a veteran, which is subject to rational basis test, the court will find its disparate impact and discriminatory intent behind the law is actually directed at out-of-state citizens. Here, the law refuses to pay the same amount to out-of-state veterans, as it does to in-state veterans. As stated above, the Privileges or Immunities clause provides that interstate travel and the right to be treated as a full citizen of the state upon permanently moving there is a fundamental right subject to strict scrutiny. Here, the law has a disparate impact on citizens who recently moved into the state, and is backed by the discriminatory intent to not provide full veterans' aid to "new" citizens. The state must therefore prove the statute is narrowly tailored to further a compelling state interest. This statute is not narrowly tailored as there are other ways the state could address veterans spending, such as reducing the overall annual payment or providing other forms of aid to veterans other than cash.

Statute 3

Statute 3 is a valid limitation on government spending and will be upheld. The right to have access to a pre-viability abortion is subject to the undue burden test, which states the government may not place substantial obstacles that prevent a woman's ability to get a pre-viability abortion. Historically only extensive recordkeeping and spousal consent have held to be undue burdens. Here, the statute is not limiting access to abortions, but rather is removing state funding that pays for abortions. There is no fundamental right to have the state pay for an abortion. Thus the law merely needs to be rationally related to a legitimate state purpose. Here, the balancing of the state's budget is a legitimate state purpose, and the law is rationally related to it.

QUESTION 11

National Bank (NB) loaned $500,000 to Jones, a farmer who resides in Anywhere, Ohio. In order to secure the loan, Jones signed a security agreement covering "all of my existing and hereafter acquired equipment, personal property, accounts receivable, inventory, artwork, and antiques" as collateral for the loan. NB properly perfected its security interest. Jones subsequently defaulted on the loan. NB then took actions to recover the collateral given as security for its loan, and the following events occurred:

1. Acme Co. owed Jones the sum of $20,000 on open account for services Jones had provided to Acme. NB sent Acme a certified letter stating that NB held a security interest in Jones' accounts receivable to secure a loan, that Jones had defaulted on his loan, and that Acme should forward any payments due to Jones directly to NB instead of to Jones. Acme's Chief Financial Officer, Sara, received NB's letter, but lost it and did not want to take the time to look up NB's address; Sara just sent a check for $20,000 to Jones (payable to Jones) with instructions that he should "endorse this and forward to your bank, the name of which I can't recall." Contrary to Sara's instruction, Jones cashed the check and lost all of the money on his favorite horse at the track. NB sued Acme for $20,000.

2. NB's repo man, Darth, found Jones' tractor on the shoulder of the highway adjacent to one of Jones' cornfields one night. Unable to move the tractor, he removed the distributor cap and let all of the air out of the left front tire so that "Jones can't hide this from us when we come to get it." Because his tractor was disabled, Jones was unable to plant his crop the next day as planned, causing the loss of the entire crop for the year.

3. Darth found Jones' brand new Ford F-100 pick-up truck in Jones' driveway at midnight, hot-wired the ignition, and took the truck. Jones had a sign in his yard that said, "No trespassing – trespassers will be prosecuted."

4. Jones had used part of the loan from NB to purchase a valuable antique painting, which he proudly placed on the wall of his living room. NB knew this and got an NB employee (disguised as an insurance inspector) to get into Jones' home on the pretense of doing an insurance inspection, whereupon she grabbed the painting and ran. Jones chased her out of the house (without uttering a word) but, being older and very much out of shape, he could not catch her. As she drove out of the driveway, she rolled down the window of her Hummer and yelled, "See ya, loser!"

Jones sued NB, claiming that all of NB's acts in attempting to repossess the collateral were unlawful. He asserts that, although the security agreement was silent on this point, NB was required to, and failed to, give him advance notice of the procedures it intended to employ in effecting the repossessions.

With respect to the following claims, who should prevail?

1. NB vs. Acme for $20,000.
2. Jones vs. NB for disabling his tractor and damages for the lost crop.
3. Jones vs. NB to recover his truck.
4. Jones vs. NB to recover the painting.

Explain your answers fully.

Under Article 9, a secured party can resort to self-help repossession upon a debtor's default. The Rules are silent as to what exactly a creditor can and cannot do, but essentially, a creditor cannot "breach the peace." "Breach the peace" is not defined in the UCC. Rather, it is a case-by-case determination. While the act of repossession can be delegated, any liability resulting from a breach of the peace still remains with the secured party. Further, a secured party does not have to give a debtor notice of repossession. If the peace is breached, the secured party is liable for any damages caused, and may be liable for conversion, trespass and most of the time punitive damages.

1) *NB v. Acme*: NB will recover the $20,000 from Acme. A secured party who is unable to recover collateral via self-help can resort to judicial proceedings to recover the collateral. Here, NB attempted to repossess the account of Acme by writing a letter to Acme requesting them to forward the proceeds to NB. This was reasonable under the circumstances, and not a breach of the peace. A certified letter is reasonable notice. Acme, rather, acted negligently, sending the letter to Jones and failing to look up NB's address due to laziness. NB can thus attempt to recover via a judicial proceeding since the self-help method did not work. The court will rule that Acme's negligence caused the collateral to end up where it did not work. The court will rule that Acme's negligence caused the collateral to end up where it did not belong, and NB will succeed in the action even though Acme must "pay twice."

2) *Jones v. NB* – Tractor: NB will win the suit against Jones because it did lawfully repossess the tractor. At the outset, as mentioned above, a secured party is not required to give notice to the creditor before attempting the repossess of the collateral. Further, collateral that is too big to move easily can be disabled and rendered ineffective to assist the repossession of the collateral. Here, there was no breach of the peace by NB. First, the tractor was subject to the security agreement as equipment. Second, NB can delegate the duty to repossess to Darth, but will remain liable for any unlawful tactics. Darth, however, did not act unlawfully. He disabled the large tractor making it easier to repossess, but did no damage to the tractor. Thus, NB is not liable to Jones for breach of the peace or the subsequent loss of his harvest.

3) *Jones v. NB* – Truck: Likewise, NB will succeed. Court has allowed a secured party to repossess a vehicle in the driveway of the debtor by hotwiring the car. If the car were in the garage, then a breach is more likely to have occurred. Here, the truck was subject to the security agreement as collateral since it was equipment. "Personal property" is an improper description, however, and if it was not equipment, it would make the repossession invalid. Also, the Truck was in the driveway, not in the garage. Darth lawfully hotwired the Truck and repossessed it, not breaching the peace. It makes no difference that Jones had "No Trespassing" signs, as some trespassing is allowed, as long as it does not breach the peace.

4) *Jones v. NB* – Painting: Finally, Jones will win since NB breached the peace twice in regards to repossessing the painting. Courts allow for some harmless trickery when repossessing collateral, but that cannot be taken over the debtor's objection. Here, the painting was subject to repossession. NB attempted to deceive Jones by sending in a disguised employee to acquire the painting. While basic trickery would have been allowed, it crossed the line when it gained unauthorized entry. When the employee fled and Jones chased, although Jones did not verbally object, his actions of pursuit showed that he did not consent to the taking. Accordingly, NB will be liable to Jones for breach of the peace, and may have to pay conversion, trespass or punitive damages.

QUESTION 12

Scenario 1: Attorney, an Ohio patent lawyer, has represented Seller's high-tech company for several years and has been involved in a number of patent disputes, some of which remain unresolved and confidential. Seller's products have nevertheless continued to incorporate some of the disputed patents.

Seller has entered into negotiations with Buyer for the sale of the company. A condition of the deal is that Attorney shall provide a formal written evaluation in the form of a legal opinion that confirms that Seller has the legal rights to sell or assign everything that the parties have included in the transaction. In the negotiations, Buyer agreed to pay Attorney's customary legal fees for the legal evaluation and opinion.

Scenario 2: Lisa, recently admitted to practice law in Ohio, is in the final year of a clerkship with Judge and is seeking future legal employment. She has met and interacted on behalf of the court with several lawyers whose cases she has worked on during her clerkship. She wants to begin negotiating with some of the firms for a job as an associate lawyer.

Scenario 3: Partner, a member of an Ohio law firm, met with Defendant, who asked Partner to represent him in a criminal case. During the initial meeting, Defendant revealed information that, if true, would be adverse to a current client of Partner's firm in the matter for which Defendant was seeking representation.

What ethical issues confront Attorney, Lisa, and Partner under the Ohio Rules of Professional Conduct in the foregoing scenarios, and what can be done to resolve each one? Explain your answers fully.

You need only refer to the Rules by their substance, not by number.

Attorney

Third Party Payment
If Attorney is still considered Seller's lawyer, generally, third party payment to an attorney is prohibited; however, it may be allowed with the written consent of the client and so long as the third party is informed that the lawyer does not represent him. Here, Buyer seeks to pay for Attorney's services while Attorney is Seller's lawyer. This is only allowed if Buyer is informed that Attorney is Seller's lawyer and with Seller's written consent.

Conflict of Interest
Under the Ohio Rules of Professional Conduct, a lawyer may not represent clients whose interests are adverse, absent informed, written consent by the parties. Here, the interests of Buyer and Seller are potentially in conflict, as they are currently in negotiations for the sale of Seller's high-tech company. In order to prepare the opinion for Buyer, Attorney must obtain the informed, written consent of both Buyer and Seller in order to proceed.

Confidentiality and Honesty
A lawyer has a duty of honesty and confidentiality with his or her clients. Therefore, Attorney has a duty of honesty with regard to both Buyer and Seller; Lawyer has a duty of confidentiality with regard to the current patent disputes for which Attorney represents Seller. Attorney may not disclose the confidential information of Seller without Seller's informed, written consent. That confidential information is vital to Attorney's honesty to Buyer. Without that consent, Attorney is likely unable to be honest with Buyer, and therefore, he must decline to write the evaluation and opinion.

Lisa

In Ohio, a judge or judicial clerk may not use their influence with the court in order to bargain with attorneys for future employment. However, they may seek future employment, provided that it is made clear that future employment will not impact the Court, the judge is given notice, and the judge or judicial clerk does not participate in any cases involving these potential future employers in the future. Here, Lisa is a clerk for Judge; she is seeking future employment. Lisa must not use her influence with the Court in order to obtain that future legal employment. Lisa must notify Judge of potential employers with whom she is negotiating. Lisa must refuse to work on any cases brought by potential employers before Judge.

Partner

Partner may not use the information obtained from Defendant to aid the current client.
Under the Ohio Rules of Professional Conduct, with limited, non-applicable exceptions, lawyers have a duty to keep confidential all information received from clients in anticipation of litigation from persons who reasonably believe that the lawyer is acting as their attorney. Here, Partner is having a meeting with Defendant to discuss representation. At this meeting, it is reasonable for Defendant to believe that Partner is acting as his lawyer. He gives Partner information that directly affects a current client. While Partner has a duty of loyalty to the client, Partner must keep this information confidential.

Conflict of Interest
Partner must decline to take on representation of Defendant or request that both Defendant and the current client waive the conflict of interest. Under the Ohio Rules of Professional Conduct, a firm may not represent clients whose interests are adverse, absent informed, written consent by the parties and a timely screening of the appropriate attorneys. Since Defendant's interests are adverse to a current client of the firm's interests, Partner must decline to represent Defendant unless both Defendant and the current client are made aware of the conflict and give written consent to the firm's representation. At that point, the appropriate attorneys must be screened from one another: they may not discuss the matter, aid one another, or share in the fees from the clients in any way.

MPT 1

IN RE BRYAN CARR

In this performance test item, examinees are associates at a law firm representing Bryan Carr, who seeks legal advice regarding his potential liability for certain credit card purchases that his father made using Bryan's credit card account. There are a number of credit card transactions (automotive repair, groceries, fuel, books, and power tools) made at different vendors over a period covered by four credit card statements. Bryan has not yet paid the most recent statement, but he paid the others before realizing that his father had used the credit card for items other than the automotive repair (which is the reason he gave his father the card). Examinees' task is to draft an opinion letter to the client. In the letter, examinees are to analyze each of the credit card transactions in light of the facts, relevant statutes, and case law to determine the client's responsibility for payment for each charge. The File contains the instructional memorandum from the supervising attorney, the firm's guidelines for drafting opinion letters, a transcript of the partner's telephone conversation with the client, a copy of a letter Bryan Carr wrote authorizing his father to use the credit card, and credit card statements for the months at issue. The Library contains various sections of the federal Truth in Lending Act, excerpts from the Restatement (Third) of Agency, and two cases.

Dear Mr. Bryan Carr,

You asked whether Acme State Bank can hold you responsible for each of the charges made by your father using your credit card. The Federal Truth in Lending Act governs liability of cardholders for unauthorized use of their credit cards. In your situation, it is likely that your father's purchases were authorized. Unfortunately, you are probably liable for all of the charges made, except for the purchase of the power tools.

The Federal Truth in Lending Act ("TILA") protects credit cardholders from unauthorized use perpetrated by those that are able to obtain possession of the card from its original owner. The statute relies on agency law to limit the liability of cardholders for all charges by that user if made without "actual, implied, or apparent authority" and "from which the cardholder receives no benefit." 14 U.S.C. §§ 1602(o). If certain conditions are satisfied, then the cardholder can only be held liable for up to $50 of the amount charged. In other words, if your father had actual, implied, or apparent authority to use the card, then you are liable for his purchases and all charges made to your credit card.

Did your father have actual authority to make purchases using your credit card?

Yes, your father had actual authority for the van repairs.

Your father only had actual authority to charge $1,500 for the van repair. According to agency law, "actual authority" is what the agent reasonably believes that he is authorized to do based on the principal's manifestations to the agent. Restatement (Third) of Agency §3.01. Here, you are the "principal" and your father is the "agent." You gave your father explicit permission to charge his van repairs to your credit card. You gave him possession of your credit card and orally told him that "that [the van repairs] was the only purchase or charge he should make on the card." So you are conclusively liable for $1,500 of $1,850 charged for his van repairs at Schmidt Auto Repair on March 16, 2015.

Did your father have implied authority to make purchases using your credit card?

Yes, your father had implied authority for the full cost of van repairs.

Your father also had implied authority to charge additional $350 for his van repairs. According to agency law, "implied authority" is a subset of actual authority. It is the actual authority either (1) to do what is necessary, usual, and proper to accomplish or perform an agent's express responsibilities or (2) to act in a manner in which an agent believes the principal wishes the agent to act based on the agent's reasonable interpretation of the principals' manifestations. BAK Aviation Systems, Inc. v. World Airways, Inc, Franklin Court of Appeal (2007). Meaning, what else could your father reasonably believe that he had permission to do, based on your original express instructions? Your father reasonably could believe that you would wish for him to get a full repair on his van, even if it cost an additional $350 above what you had both discussed. This fulfilled your ultimate objective – for your father to have a fully repaired and functioning van. Because your father had implied authority to make the van repair charge, you are liable for the full amount and cannot seek protection under TILA.

Did your father have apparent authority to make the remaining purchases using your credit card?

Yes, your father had apparent authority for the charges.

Your father probably had apparent authority to make the remaining purchases using your credit card. You voluntarily transferred possession of the credit card to your father. While TILA clearly protects cardholders in cases of theft, loss, or fraud and regard those involuntary transfers as "unauthorized use" under §§

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1602(o) and 1643, the statute does not expressly address your situation – where you voluntarily transferred your credit card to your father. Agency law fills the gap.

"Apparent authority" exists entirely outside of the principal-agent relationship. BAK. Apparent authority looks instead to the principal's relationship with third parties. The principal creates apparent authority through his words or actions that when reasonably interpreted by a third party would indicate that the card bearer (agent) has the cardholder's (principal's) consent. BAK, citing Restatement (Third) of Agency §3.03. Meaning, did you, through your words or actions, make the third parties (e.g., Friendly Gas Station, Corner Store, Rendell's Book Store, Franklin Hardware Store, Acme State Bank) reasonably believe that your father could make purchases using your credit card? Yes, you did.

A cardholder is liable for all charges when the cardholder voluntarily relinquishes the card for one purpose and gives the bearer apparent authority to make additional charges. In BAK, the defendant, employer World Airways, Inc., gave a credit card to one of their pilots. The Pilot was expressly authorized to use that credit card for gas. However, Employer also limited that authorized use only for non-charter flights involving their own Executives. He was expressly prohibited from charging gas to fuel charter flights involving non-World customers. The Court held that by giving the pilot the credit card, World Airways "imbued him with more apparent authority than might arise from voluntary relinquishment in other contexts." BAK. All of his purchases on the credit card were for fuel, all for the same plane. The only difference in the charges were the identity of the passengers. And how was the gas station to know that Pilot had authority for some fuel purchases and not others? World Airways was held liable for all of Pilot's charges.

Applied to your situation, your father is the functional equivalent of that Pilot. You voluntarily gave him possession of the credit card and you even gave him a letter that expressly permitted him to use the card. By your own admission, the letter did not restrict his authority specifically to the van repairs. So when he had possession of the card, how was any store to know that he was not allowed to make that purchase using your card? Unfortunately, you imbued him with apparent authority. Any reasonable store clerk at Friendly Gas Station, Corner Store, and Rendell's could reasonably believe that your father had permission – he presented the physical card and had a signed letter. In fact, with respect to Friendly Gas Station, he made two purchases within two weeks. The charge was not disputed, the card was not reported lost or stolen; you made no manifestations – through words or actions – to this third party that would give them any notice of unauthorized use.

Your father had apparent authority to make authorized charges on your credit card; therefore, you are liable for the charges he made at Friendly Gas Station (both on April 10 and April 21, 2015), Corner Store (on April 16, 2015), and Rendell's Book Store (on May 16, 2015).

What makes the Hardware Store purchase different from the other purchases?

You should not be liable for the purchase of power tools.

However, you should not be liable for your father's purchase of the power tools from the Hardware Store because the store clerk was negligent. When the third party is negligent in verifying an agent's authority, then the Principal cannot be held liable for Agent's actions. Transmutual. The trial court in that case originally found that the credit card issuer had negligently issued the card to employer defendant's employee. The employee should never have had the card to make those charges and therefore the employer should not be liable.

Applied to your situation, on June 21, 2015, when your father purchased the power tools, he no longer had possession of the card or the letter. He had returned both to you. To a reasonable third party, your father would no longer have actual, implied, or apparent authority. Any use of the card would therefore

be unauthorized. The store clerk should never have charged a card when the customer did not present the physical card. Any reasonable clerk would have been suspicious of customer who walked in with a piece of paper that he had scribbled down a credit card name, number, and expiration date. You are right – he must have been out of his mind. Your father made an unauthorized purchase and the store clerk acted negligently in allowing him to make that purchase.

But how does this affect your liability with Acme Bank? The final ruling of Transmutual was actually a reversal – the employer was ultimately found liable because, in that case, the employer acted negligently as well. "When a principal acts, either intentionally or through negligence, or fails to disapprove of the agent's acts or course of actions so as to lead the public to believe that his agent possesses authority... then he is bound by the acts of the agent within the scope of his apparent authority." Transmutual, citing Farmers Bank v. Wood. The employer had failed to take internal precautionary measures to discover the fraudulent purchases. The employer failed to reasonably inspect their credit card statements. They actually paid the Bank for three years of fraudulent charges, paying each statement on time and in full. The employee that had obtained an unauthorized credit card and made tens of thousands of dollars of purchases was actually the same purchase to "review" and inspect each statement. Of course, she approved each one and paid them in full. The Court thus ultimately held that Employer's negligence created apparent authority for the employee's actions and precluded them from TILA protections.

Applied to your situation, you properly inspected this June statement and you informed the bank promptly. With respect to this particular charge, you should not be liable.

Unfortunately, this will not help you with the previous charges. The Court has found it proper to consider the fact that a cardholder pays all credit card charges. Transmutual. As discussed above, your father had apparent authority because he had possession of the card and he also had the letter authorizing him generally to make purchases (without any restrictions). And even if he did not have that apparent authority in those ways, because you did not timely inspect and dispute the charges, you continued to allow the Bank to believe that any charges made by your father were authorized. You admitted that you usually do not review the bills very carefully. Your bank generated the statement reasonably. And because you did not carefully review each charge, your bank had no way of knowing that certain charges were unauthorized. Unfortunately, it will also not be a defense that you and your father shop at the same stores – if you had no idea that some charges at a specific store were authorized while others were not, then your bank had no way of knowing either. Banks rely on the reasonable examination of responsible holders and the notice that they should receive in case of fraud. Negligence on the part of cardholders will preclude TILA protections. TILA will apply in this case and your liability will be limited to $50.

In conclusion, (1) You properly paid Acme State Bank for all charges made prior to the June statement; you were liable for those full amounts; and (2) You should only have to pay $50 of the $1,200 for the power tools.

I hope this helps. Please let me know when you would like to further discuss the above. Thank you very much.

Best,

/s/ Miles Anders

MPT 2

IN RE FRANKLIN ACES

Examinees are associates at Franklin Arts Law Services, a pro bono provider of legal services for the Franklin arts community. The client, Al Gurvin, is seeking legal advice regarding whether he has a claim against ProBall Inc., the owner of the Franklin Aces football team, for copyright infringement resulting from unauthorized use of his design for a team logo for the Franklin Aces. The task for examinees is to draft a letter to the client addressing the likelihood of success of an infringement claim against the team, and recommending whether Gurvin should pursue litigation or accept the settlement offer that the team has made (a season ticket to the Franklin Aces' first season in their new stadium). Because the client is not an attorney, the letter should explain the legal standards for infringement and fully evaluate the strength of Gurvin's claim and the proposed settlement, but in language that a non-lawyer can understand. The File contains the instructional memorandum, a newspaper article about the team's relocation to Franklin City, a transcript of the client interview, descriptions of Gurvin's original sketch and of the logo ultimately chosen by the team, a letter from the team's General Counsel denying liability and making a final settlement offer, and two affidavits. The Library contains three cases.

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Franklin Arts Law Services
Pro Bono Legal Services for Franklin Arts Community
224 Beckett Avenue
Franklin City, Franklin 33221

July 28, 2015

Mr. Gurvin:

I have had a chance to research your claim against the Franklin Aces professional football team, as well as contact Jose Alvarez ("Mr. Alvarez), counsel for Franklin City Sports Complex, regarding a potential settlement offer. According to Mr. Alvarez, the Franklin Aces, through the Franklin City Sports Complex, are willing to offer a settlement consisting of the following: a season ticket for a single seat, in a prime location, to all home games for the first season of the Franklin Aces (retail value is $5,000). Given my research on this issue, my suggestion would be to accept this settlement offer from Franklin Aces for two reasons. First, I do not believe that you would be successful in litigating your claim. Second, even if you were successful in litigating your claim, I do not believe that you could recover more than $10,000 (before costs of litigation), and thus, accepting a settlement offer worth $5,000 (with no costs of litigation) seems advisable. The reasons for this opinion are detailed below.

I. LAW AND ANALYSIS

A. The Franklin Aces Logo You Designed is Likely Copyrightable Material, and Thus, Would be Protected Material Under the Federal Copyright Act.

The Franklin Aces Logo you designed is likely considered copyrightable material under the federal Copyright Act, and thus, it would be entitled to protection under the statute. Material is protected by the federal Copyright Act if it is considered to be copyrightable. Oakland Arrows Soccer Club, Inc. v. Cordova (Dist. D.C.)(1998). Material is copyrightable if it is an "original work of authorship." Id. Under the law, this standard is met if the work is "independently created by the author" and "possess at least some minimal degree of creativity." Id (quoting Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340, 345 (1991)). This standard is meant to be low, and as such, material that possesses "some creative spark" will be considered copyrightable material. Id. If material is properly copyrightable, pursuant to 17 U.S.C. §408(a) and §411, it is protected by the Copyright Act, even if it is not registered with the U.S. Copyright Office. Id.

However, material is not subject to copyright if it falls under the exceptions listed in 37 C.F.R. §202.1, which include those designs that are "familiar symbols or designs," as well as those that consist entirely of "information that is common property containing no original authorship." 37 C.F.R. §202.1. See e.g., Oakland Arrows (finding that a sports team logo consisting of a triangle, colored red, white and blue was not copyrightable material, as it fell under the "familiar symbol" exception).

Your Franklin Aces logo is likely considered copyrightable material under the federal Copyright Act, and thus, would be protected by the statute. First, your design was independently created by you. Once you learned that the Franklin Aces were going to come to Franklin, you designed and sketched the logo at issue. Further, your design possesses a degree of creativity, as you made a series of choices in creating your design: you decided that a hand would hold the cards vs. having just the cards, you decided in which order to have the hand hold the cards, you selected the colors, etc. Finally, your Franklin Aces design does not fall under a listed exception to the Copyright Act. Your design is not a "familiar symbol or design." Though a deck of cards might be considered a familiar symbol, a hand holding that deck is likely not considered to be such. Your design is not merely a shape or symbol, but it involved more thought and combined many elements. Finally, your design is not "common property containing no original authorship." Even if the symbol of a card deck was widely and commonly known, it was not

widely or commonly associated with this particular usage, and it is not widely or commonly also associated with a hand holding those cards. As a result, your Franklin Aces logo is likely considered copyrightable material, and it is protected under the Copyright Act, even though you did not register it with the U.S. Copyright Office.

B. Even if the Franklin Aces Logo You Designed is Copyrightable Material, You Would Likely Be Unsuccessful in Proving Copyright Infringement.

Even if your Franklin Aces logo would be considered copyrightable material, however, you will likely be unsuccessful in proving that Franklin Aces infringed on your logo's copyright, and thus, you will not recover on your claim. In order to show that actionable copyright infringement occurred under the Copyright Act, two requirements are necessary: 1) the works in question must be substantially similar; and 2) the alleged infringer must have had access to the copyrighted work. Savia v. Malcolm, U.S. Dist. Ct. Franklin (2003). If either one of these requirements is not met, a claim of copyright infringement will not be successful. Id. However, these requirements are also measured on a sliding scale. Id. Thus, if there are a lot of similarities between the works, less evidence of access to the copyrighted work is necessary to show infringement. Id. However, "plausible evidence of access" is always required to be successful on a claim for copyright infringement.

Two works are considered "substantially similar" if they have a literal and direct similarity. For example, in Malcolm v. Savia, two songs were found to be substantially similar because they contained similar melodies. Id. Further, an alleged copyright infringer is said to have "access" to copyrighted material if evidence can be adduced to show that that access existed or was merely "plausible." Id. Plausible access can exist even if a person was only "unconsciously" aware of the copyrighted material. See e.g., Fred Fisher, Inc. v. Dillingham, 298 F. 145 (S.D.N.Y. 1924)(finding a musician that kept up with popular music and claimed not to have heard the song in question liable for copyright infringement where he had "plausible" though unconscious access to the song in question); Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177 (S.D.N.Y. 1976) (finding that a musician could have access to copyrighted material, and thus, be liable for copyright infringement, even if he only "unconsciously" copied it). It is only if no plausible evidence of access exists where a person will be found not to be liable for copyright infringement. See e.g., Savia v. Malcolm (finding that a composer could not be liable for copyright infringement of a song's melody where the only venue to hear the song was an NC-17 movie, and the composer was four years old at the time the movie came out).

Your Franklin Aces Logo is likely substantially similar to the logo offered by ForwardDesigns and the Franklin Aces. Even though the outline in the hand in your logo is somewhat different from the finalized Franklin Aces logo, the general scheme of the two designs is substantially similar. Both are a hand holding four aces of different suits from a deck of cards. This is especially true given the fact that the suits are shown in the exact same order in both designs. However, plausible evidence of access to the copyrighted material does not exist in your case. Though you sent your logo to Daniel Luce ("Mr. Luce"), the CEO of Franklin Sports, there is no direct or circumstantial evidence that he then passed your logo on to the Franklin Aces and ForwardDesigns. There is no direct evidence of access, as Mr. Luce denies in his sworn affidavit that he ever passed the logo on. Instead, he alleges that he merely threw it in the garbage can. Moreover, Monica Dean, the designer for ForwardDesigns, also denies in her sworn affidavit that she ever saw your logo. There is also no circumstantial evidence of access. Even though the Franklin Aces, through ProBall Inc., and Mr. Luce, through Franklin City Sports Complex, share a suite of offices, they are on different floors. Accordingly, there is no plausible evidence that someone from ProBall Inc. or ForwardDesigns had access to your design merely due to their location within the Franklin City Sports Complex. Finally, though the access to the fax machine where you sent your logo to Mr. Luce is on the second floor of the complex and is accessible by all of the Franklin Sports Authority's departments, there is no evidence that anyone from the Authority took your fax and gave it to someone at ProBall on the fifth floor. As such, it will be incredibly difficult to show that the Franklin Aces had access to your logo given the dearth of evidence of access. As the court did in Savia, it would likely find that, without more, your allegations were based on mere "speculation." As such, it is likely that you would be unsuccessful on a claim of copyright infringement against the Franklin Aces.

C. Even if You Could Prove Copyright Infringement, You Would be Limited in Your Damages to $10,000.

Even if you were successful on your copyright infringement claim, your damages would be substantially limited. For an action of copyright infringement where the copyright is not registered with the U.S. Copyright Office, damages for infringement are limited to actual damages suffered by the plaintiff plus the infringer's profits. Herman v. Nova, Inc., U.S. Dist. Ct. Franklin (2009). When actual damages to a particular plaintiff are readily calculable, evidence of what the services would be worth on the market can be used to calculate the extent of the damages. Id. Damages for a violation of a copyright registered with the U.S. Copyright Office are not limited in this way, and instead, successful plaintiffs are entitled to statutory damages and attorney's fees. Id.

As you did not register your copyright with the U.S. Copyright Office, your damages would be limited to actual damages and the infringer's profits. As the value of your work is not necessarily calculable, despite the fact that you offered to "sell" Franklin Aces the copyright for tickets to the game in the new stadium, your actual damages would likely be limited to $10,000 – the payment made by Franklin Aces to ForwardDesigns for design work. If you could show that Franklin Aces infringed on your copyright, you could also be awarded the profits that they had accrued from the infringement. However, as they have not yet acquired any profits from the infringement, as the Franklin Aces gear will not go on sale until next year, this recovery would be zero. As such, you would be limited to recovering $10,000 in damages if you could successfully prove that Franklin Aces infringed on your copyrighted design.

II. RECOMMENDATION AND CONCLUSION

Given the fact that you will likely not be able to prove that Franklin Aces infringed on your copyrighted material and that your damages would be limited to $10,000, I advise that you accept the settlement from Franklin Aces. This settlement would enable you to receive what you wanted for the copyright in the first place: season tickets to the Franklin Aces games for a year. Moreover, even if you were successful in proving copyright infringement and could collect the $10,000 in damages, you will also have to pay court costs and attorney's fees, thus decreasing your award. Litigation is expensive, and settlement is certain. As such, I would advise, given the law related to your case, that you accept the proposed settlement from Franklin Aces. The above is merely my legal recommendation, and thus, you are fully entitled to disregard it and pursue litigation on this matter. However, I would again caution you from doing this given the expense and duration of litigation. That being said, should you decide to pursue litigation, I would be more than happy to assist you in finding a competent litigator who could assist you in your cause of action.

Kindest regards,

Eileen Lee, Esq.

Published by
The Supreme Court *of* Ohio
Office of Bar Admissions
614.387.9340
sc.ohio.gov
December 2015

THE SUPREME COURT *of* OHIO

65 SOUTH FRONT STREET COLUMBUS OHIO 43215-3431