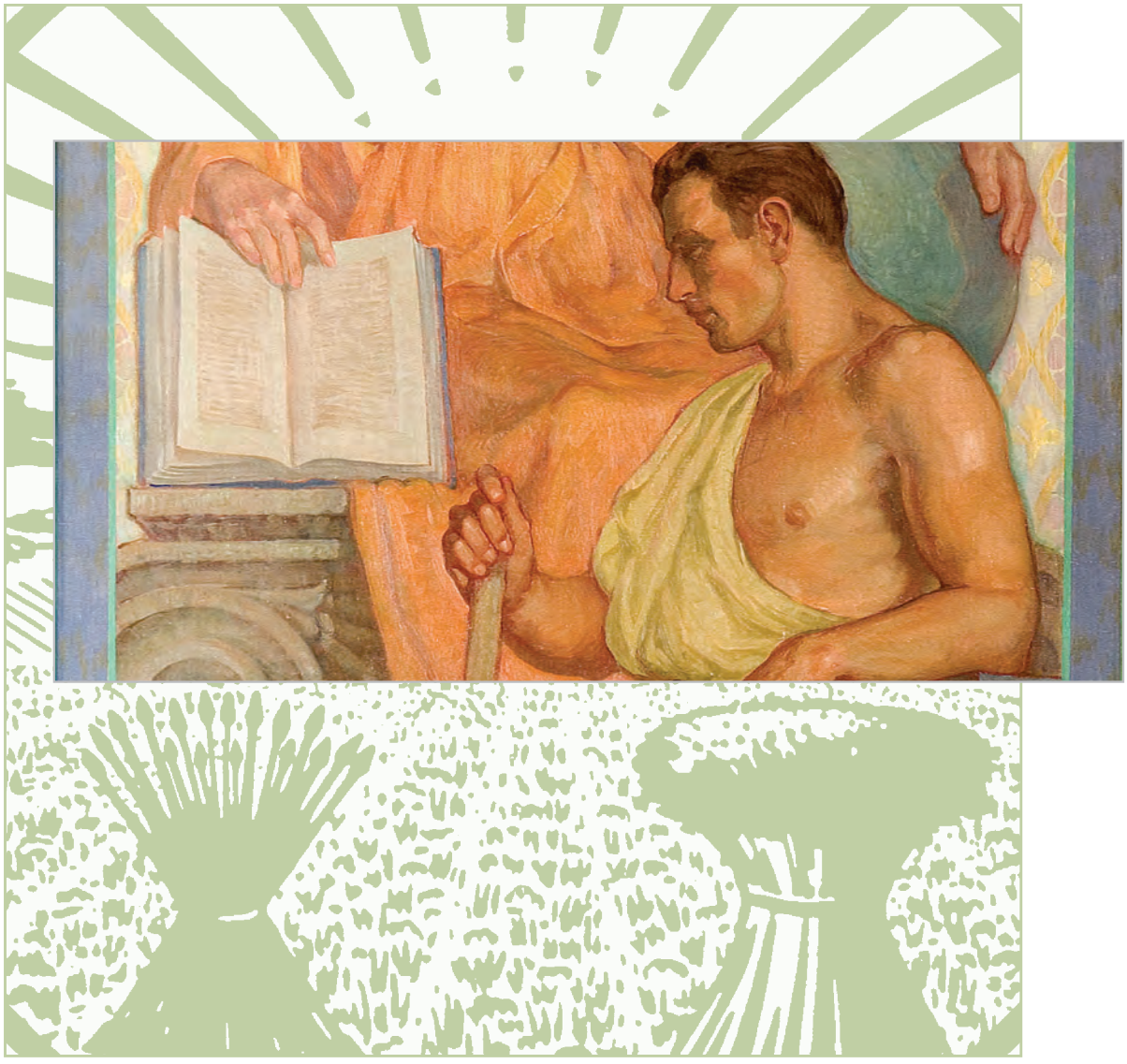
THE SUPREME COURT *of* OHIO

July 2014 Ohio Bar Examination

Essay Questions & Selected Answers

Multistate Performance Test Summaries & Selected Answers



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OHIO BAR EXAMINATION

JULY 2014 OHIO BAR EXAMINATION

Essay Questions and Selected Answers

MPT Summaries and Selected Answers

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

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

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

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

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

QUESTION 1

1. Rena v. ACME: ACME Insurance Company insures Rena, a jeweler, against burglary of jewelry from her locked display cabinets, "provided entry to the cabinets is made by force, for which there are visible marks upon the exterior cabinet doors, if entry is made through the cabinet doors." While the policy was in effect, it is undisputed that Burglar broke into the store and picked the locks on the cabinet doors, leaving no marks on the cabinet doors, and thereby stealing the contents thereof. ACME denied Rena's claim for coverage. Rena sued ACME for breach of contract.

2. Bob v. Carl: Bob contracted with Carl to install a solar panel on top of Carl's trailer, for which Carl agreed to pay $2,000 "on condition of satisfactory completion." Bob installed the system, but Carl refused to pay, citing his honest dissatisfaction with the work. It is undisputed that Carl had never stated any dissatisfaction with the work until it was completed, and that Carl had run into financial difficulties immediately prior to the completion of the installation. Independent experts in the field all agree that the solar system installed on Carl's trailer is entirely satisfactory and was installed in a workmanlike manner. Bob sued Carl for breach of contract.

3. Homey v. Pete: On April 1, Homey, a homeowner, entered into a contract with Pete, a plumber, for an April 2 installation of a lawn irrigation system on Homey's property. Homey, a "do-it-yourselfer," agreed to perform some of the work himself. The contract provided: "Pete promises to install underground piping and sprinkler heads in trenches that Homey promises to dig and maintain during installation." Homey dug all the necessary trenches, but inexplicably failed to maintain them, such that they became filled with rainwater by April 2, which severely hindered Pete's installation. Pete stopped work and refused to continue with the installation unless Homey fixed the problem. Homey refused to fix the problem and sued Pete for breach of contract.

4. Ziggy v. Tina: In July, Tina, the owner of a concert hall, and Ziggy, the promoter of The Mullets, a famous 1980s hair band, entered into a contract whereby Tina agreed to let Ziggy use the hall for a performance by The Mullets scheduled for the evening of December 15. In return, Ziggy promised to get the band there and to pay Tina a percentage of receipts. On December 14, Tina learned that Ziggy and the members of the band were vacationing on an island in the Pacific that had been struck by a cyclone, resulting in the grounding of commercial flights. Therefore, Tina called Ziggy demanding assurance that the band would be able to make the scheduled performance. Ziggy said that he hoped the band could make it, and that he would try to charter a private plane to fly the band from the island to a local airport near the concert venue. Tina told Ziggy that she had to know by noon on December 15 whether the band was going to make the scheduled performance, because, otherwise, Tina was prepared to make alternative arrangements to rent the hall to someone else. Ziggy called Tina at 3:00 pm on December 15 to tell her that the Mullets had just landed at the local airport and would be able to play. However, at 2:00 pm Tina had rented the hall to someone else, believing that the Mullets were not going to make the scheduled performance. Ziggy sued Tina for breach of contract.

For each of the above scenarios, what arguments are likely to be made by each party in support or defense of the claimed breaches of contract, and who will likely prevail? Discuss your answers fully. ***Do Not Discuss the Statute of Frauds***.

- The issue here is whether Rena can recover from ACME for breach of contract. This contract stated an express condition that recovery was subject to the limitation that entry had to be made by force for which there was physical evidence. Rena will argue ACME breached the contract and ACME will argue that there was a condition precedent to their performance and that because the damage to the exterior doors did not occur they are excused from liability. The court is likely to agree with ACME because the parties are the master of their own contracts; this condition was expressly stated in the contract with clear "provided that" language, and it was agreed to by Rena. Thus, because the condition failed to occur, ACME is not liable on the contract.

- The issue here is whether satisfaction has an objective or subjective standard. Here, Carl will argue that he is not subjectively satisfied with the completion of the solar panel, thus the condition subsequent to his performance failed and he is not liable under the contract. Bob will argue that where there is acceptance conditioned upon satisfactory completion, there is a component of good faith that is involved. In situations involving personal taste, there is a subjective good faith component; in situations not involving personal taste there is an objective good faith component. Here, installing solar panels does not involve subjective taste and thus, a good faith objective standard should be used. Thus, because independent experts in the field agree that the solar system is satisfactory, Carl is likely required to perform under the contract and Bob would win. If Bob didn't win on that ground, he could also argue that he is at least entitled to restitution because he conferred a benefit upon Carl. Additionally, Bob could argue that in all sales contracts there is a good faith component and, based upon the evidence that Carl was experiencing financial difficulties, that his breach was likely not motivated by good faith, thus violating the good faith requirement.

- The issue here is whether Homey's breach entitled Pete to stop performance or if Pete was still bound under the contract. Under common law, a material breach excuses performance by the other party whereas substantial performance and only a minor breach obligate the other party to continue performance and sue for damages. Thus, Pete will argue that Homey materially breached and Homey will argue that he substantially performed, making Pete liable to continue under the contract and sue for damages. The court could rule either way on this breach; however, it is likely a minor breach because Homey completed the major part of his duties under the contract of digging the trenches and Pete was still able to complete his portion of the contract because the water was a minor setback.

- The issue is whether Tina breached the contract. Ziggy will argue that she performed under the contract as she had the Mullets ready to play at the venue on December 14, pursuant to the contract; however, Tina had rented the hall to someone else. Tina will argue that she asked for assurances and when she failed to get them she had to mitigate to avoid her losses. A party can ask for adequate assurance when it appears likely that the other party will be unable to perform. Here, because of the plane being grounded, it was reasonable for Tina to demand assurances from Ziggy. Ziggy said that she hoped to be able to perform, but failed to contact Tina back by noon of the day of performance. Therefore, the court will likely find that Ziggy did not provide adequate assurances by not stating definitively that the Mullets would perform and not contacting Tina by the noon deadline. Therefore, Ziggy will likely lose as Tina was permitted to try to mitigate her damages.

QUESTION 2

In 2013, Student, a college sophomore at Smallville University in Ohio, unexpectedly received failing grades in several of her major courses. In an interview with one of her professors, Student broke down and disclosed that she suffered from depression caused by a sexual relationship with her high school track coach (Coach) three years earlier when she was seventeen. The professor explained to Student that, by law, the professor was required to report the allegations to the Smallville police, and the professor did so.

Upon receipt of the report, the police conducted an investigation. They recorded an interview with Student, who said that the sexual encounters had occurred on four occasions in the spring of 2011 in Coach's office after practice and after all of her teammates had left the school premises. The relationship ended the month of her graduation, and she said that the emotional trauma of the experience caused her to lose her spiritual faith to the point she considered herself an atheist.

The police also interviewed Coach. He vehemently denied the allegations, stating that he never stayed around the school after practice because during that time he was moonlighting as a bartender at the local tavern. Coach speculated that Student made this story up because he used to be extra hard on Student at practice when he noticed her slacking. He also remembered an instance when Student had lied to Teammate about having finished a race faster than she actually had finished.

The police took a sworn statement from Teammate, who, coincidentally, worked as a sales clerk at a local dress shop where Coach's wife was employed. Teammate acknowledged that Student had "fibbed" to her about having finished a race faster than she really had. When asked whether she ever observed Student and Coach alone together in high school, Teammate recounted that one evening in 2011 close to graduation, she returned to school to collect a forgotten book bag and observed Student tearfully rushing out of Coach's office. Teammate also stated that she had noticed many times during practice that Coach seemed to be scolding Student severely, to the extent that Student would begin crying.

The County Grand Jury indicted Coach on four counts of unlawful sexual contact with a minor. During the discovery phase of the case, the prosecution learned that Coach had one misdemeanor conviction for inducing panic when he unlawfully set off a fire alarm in his college dorm room. The prosecution also obtained tax records, which revealed that Coach had actually started his moonlighting job in the fall of 2011, after Student had graduated.

On the trial date, both Student and Teammate appeared pursuant to the state's subpoena. Teammate informed the prosecutor that, after giving the issue much thought, she decided it was not in fact Student who left the office in 2011 as she had indicated in her statement, and that she intended to say this when she was called to testify. The prosecutor suspected that Teammate was not being candid about why she recanted.

During a hearing just before the commencement of the trial, the Court agreed to address the following preliminary issues:

1. The prosecutor moves the Court to call Teammate as a Court's witness, and the defense objects. How should the Court rule? Explain fully.

2. The prosecutor moves in limine to prevent defense counsel from examining Teammate about her observations of Coach's harsh treatment of Student on the ground that it is irrelevant. How should the Court rule? Explain fully.

3. If Student denies on direct examination that she lied to Teammate about the finish time in one of her races, may the Court allow defense counsel to produce another witness to corroborate this accusation? Explain fully.

4. Will defense counsel be permitted to cross-examine Student about her being an atheist on the ground that her oath sworn upon a Bible is meaningless to her? Explain fully.

5. Assuming Coach takes the stand, will the prosecutor be permitted to cross-examine Coach with his tax records about the period he claimed he was moonlighting at the local tavern and about his prior conviction? Explain fully.

1. A witness can be called to testify to any matter with which they have personal knowledge. When a witness testifies differently than they had previously, it is not a bar on further testimony. Instead, the previous inconsistent statements can be used as a method of impeachment. Here, Teammate made a sworn statement and then later indicated that he would testify differently than what he originally stated. This is not grounds for disqualifying a witness. Instead, the Prosecutor can impeach the witness with the sworn statement and inquire into the student motivation and potential bias (he works for Coach's wife) as a motive for changing his testimony. Therefore, the court should allow Teammate to testify.

2. Any evidence that is probative and has a tendency to make a material fact more or less probable is relevant and, therefore, admissible. Here, observations about the treatment of Student by Coach are relevant. They can demonstrate a motive for Student to lie, or a motive to succumb to sexual advances, or even an alternative explanation for the student's depression (and, therefore, related dip in academic performance). So while Coach's treatment of student may not be directly related to the alleged sexual encounters between the two, they are indeed probative of their relationship and could have a tendency to make other material facts more or less probable. Therefore, the testimony should be allowed.

3. Evidence of extrinsic matters is not allowed to be inquired into with evidence of specific occurrences. Evidence of a witness' character is allowed to be inquired into in the form of reputation and opinion. Here, the Coach is on trial for unlawful sexual conduct. While Student's reputation for truthfulness and fibbing are relevant and material, testimony about a specific instance of fibbing on a race time is extrinsic and not relevant to the facts of this case. Further, calling a student up to specifically recall an incident of fibbing is prohibited as an improper form of character evidence. Any issues with regard to the truthfulness of Student's statement bears on her credibility as a witness. Therefore, the court should not allow another witness because lying about a finish time in a race is a matter entirely extrinsic to the facts of this case.

4. For a witness to be competent to testify they must affirm or take an oath to tell the truth and demonstrate that they are capable of knowing the difference between a truth and a lie. Further, religious convictions are not relevant if they are inquired upon for reasons of prejudice. In Ohio, relevant evidence must be excluded if its prejudicial effect substantially outweighs its relevance. Here, Student made an affirmation as requested by the court and is competent to testify. Asking about her atheism has no bearing on her ability to speak truthfully and will most certainly have a prejudicial effect on the fact finder. As such, the line of questioning should be prohibited as there is no proper purpose for the question.

5. Any evidence is relevant if it has a tendency to make any material fact more or less probable. Further, evidence of prior convictions must be admitted for crimes occurring within the last ten years that have an element of truthfulness or deceit as an element. Any other conviction within the last 10 years may be allowed at the court's discretion, if relevant, and not substantially more prejudicial than probative. Here the tax records are relevant because they demonstrate when Coach started moonlighting, which is a fact at issue for his defense as he is accounting for his inability to have committed the alleged crimes. The prior conviction of inducing panic, however, should be excluded because it does not involve dishonesty, nor is it relevant to any of the other elements of this crime. Therefore, it should be excluded.

QUESTION 3

State Bank is involved in the following priority disputes in its efforts to claim collateral used to secure loans to its customers:

1. State Bank provided line of credit and inventory financing to Ace Widget Company (Ace) in Anytown, Ohio. Ace both manufactures and buys widgets for resale to customers. State Bank maintains a security interest in all of Ace's "existing and after acquired inventory and accounts." State Bank's security interest was properly perfected by filing in 2010.

Wonder Wizards (WW), a vendor to Ace, sold inventory and equipment to Ace as follows:

A. Shipment of widgets delivered on October 1, 2011 for $20,000;
B. Shipment of widgets delivered on October 15, 2011 for $15,000; and
C. Shipment of a drill press used to make widgets, delivered on November 1, 2011 for $10,000.

Ace purchased all three shipments from WW on credit with payment due 45 days after delivery. WW obtained a security interest in the form of a signed security agreement for "all of Ace's inventory and equipment" to secure payment of the purchase prices. On October 10, 2011, WW filed its financing statement in the proper filing office covering "inventory and equipment" as collateral.

On December 1, 2011, Ace defaulted on all of its obligations and State Bank wants to take the widgets and drill sold to Ace by WW.

2. On May 1, Digital Equipment Co. (Digital) in Anytown, Ohio, signed a security agreement with State Bank to enable it to secure an operating loan from State Bank of up to $50,000 to fund its payroll. The security agreement gave State Bank a security interest in "all of Digital's inventory and equipment to secure all existing loans and future advances." On May 2, State Bank filed its financing statement in the proper filing office describing the collateral as "all of Digital's assets." State Bank transferred $40,000 to Digital on May 10.

   As the payroll date grew closer, however, the President of Digital realized that he would not have sufficient funds to meet Digital's payroll at the end of the month. Without telling State Bank, on May 20 he borrowed (on behalf of Digital) $30,000 from Finance Company (Finance) and signed a security agreement giving Finance a security interest in "all of Digital's inventory and equipment now owned and hereafter acquired." On the same day, Finance filed its financing statement in the proper office describing the collateral as "all inventory and equipment of Digital." Finance funded the loan to Digital on June 1.

   On June 3, State Bank, unaware of the Finance loan, advanced an additional $10,000 to Digital under the terms of its original loan. Digital has defaulted on all of its obligations. Both State Bank and Finance claim all of the inventory and equipment worth $50,000.

3. On May 1, State Bank loaned money to Blacktop Is Us (Blacktop) pursuant to a security agreement that granted State Bank a security interest in "all of Blacktop's inventory and equipment, now or hereafter acquired, to secure all existing loans and future advances." Blacktop manufactures and sells highway construction materials. State Bank funded the loan in the amount of $150,000 and filed its financing statement on May 1.

   On August 12, the President of Blacktop sold an antique clock that he used in his office at Blacktop to Sandy for $10,000. At the time that she purchased the clock, Sandy did not know about State Bank's security interest. She paid for and took possession of the clock on August 13 and neither Sandy nor Blacktop told State Bank that she had purchased the clock. On October 15, State Bank loaned Blacktop another $100,000 pursuant to the future advance clause in the original security agreement. In November, Blacktop defaulted on its loan. State Bank wants to repossess the clock from Sandy to help pay off the debt.

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

In a priority contest between State Bank and the following claimants, who will have priority?

1. State Bank vs. WW for the widgets and drill press.
2. State Bank vs. Finance for the inventory and equipment.
3. State Bank vs. Sandy for the antique clock.

Explain your answers fully.

Secured transactions are governed by Article 9 of the Uniform Commercial Code. A security interest is a charge against the property of another to serve payment of a debt or performance of an obligation, where that property is collateral. In order to have an enforceable security interest, secured parties must take steps known as attachment, which is evidence by an intent to create a security interest, the debtor having rights in the collateral, and the secured party giving value. After attachment, in order to have superior rights in the collateral as against other secured parties, a secured creditor must take steps known as perfection. There are five ways to perfect a security interest: filing, possession, control, automatic perfection, and temporary perfection. While there are many exceptions, the general rule for determining who has priority between perfected secured parties is that the first to file or perfect, whichever occurs earlier, prevails.

1. Bank v. WW

Bank has priority over the two shipments of widgets, but Wonder Wizards has priority over the drill press. Bank's security agreement with Ace gave it an interest in Ace's existing and after-acquired inventory and accounts. Such clauses are enforceable under Article 9. It properly perfected by filing in 2010. While WW acquired a purchase money security interest (PMSI) in the widgets by selling them on credit and retaining an interest in them, Bank filed first. Bank acquired a perfected interest in them once Ace received them since filing had already occurred. The widgets are inventory because they are held for sale by Ace. Secured creditors with PMSIs in inventory may have priority over earlier-perfected security interests, provided they (1) have perfected the interests by the time the debtor acquires possession of them, and (2) give notice to all other conflicting secured parties of its intent to acquire a PMSI in that inventory. With respect to the October 1 shipment, WW was not perfected yet because it had not filed. With respect to the October 15 shipment, it had filed, but neglected to give notice to Bank of its intent to do so. However, WW will have priority in the drill press because it qualifies as equipment (everything that's not consumer goods, farm products, or inventory), and WW had an enforceable and perfected security interest in equipment, while Bank did not.

2. Bank v. Finance

Bank has priority in the $50,000 of equipment and inventory. Both are perfected secured parties, and the general rule is that the first to file or perfect prevails. Here, Bank perfected its security interest by filing on May 2. The future advance clause in the security agreement was valid, and the supergeneric description of "all of Digital's assets" in the financing statement was valid as well, though such a description would be insufficient in a security agreement. Finance Company, however, did not file or perfect its security interest until June 1. Although Bank's security interest in the later loan of $10,000 technically did not attach until June 3 (when it gave value), it filed back on May 2, thus giving it priority.

3. Sandy has priority in the clock.

Generally a perfected secured party will prevail over a buyer not in the ordinary course. Sandy is not a buyer in the ordinary course because Blacktop is not in the business of selling clocks, although the clock did qualify as equipment. Although Bank had a perfected security interest in the clock dating back to May 1, an exception exists for buyers regarding future advances. Specifically, a buyer not in the ordinary course will have priority over property that serves as collateral for a future advance made by a secured party after it learns of the buyer's purchase or an advance made more than 45 days after entering into the security agreement. Here, almost three months have passed, and thus Sandy will prevail.

QUESTION 4

Owner owned a large commercial building in downtown Anytown, Ohio. The building had a number of tenants: mostly law firms, accountants, and other small businesses that followed a standard 8:00 am to 6:00 pm work day. Owner leased space on the first floor of the building to a restaurant/bar featuring upscale American cuisine (Restaurant). The restaurant, kitchen, and bar closed every day at 10:00 p.m., except on Friday and Saturday nights when the kitchen closed at 11:00 pm and the bar remained open until 1:00 am.

Restaurant was in the third of a seven-year written lease agreement with Owner. Restaurant's business had been growing and, in recent months, had picked up on Fridays and Saturdays in particular until revenue from these two nights constituted approximately 45% of the weekly receipts.

Owner decided that the extra hours Restaurant was open was causing an increase in utilities and building security costs that Owner did not want to cover. Therefore, Owner advised Restaurant that beginning the following month, Owner will force Restaurant to close its doors no later than 9:00 pm every day of the week.

Restaurant hired an attorney to file a complaint against Owner for breach of lease. Restaurant also directed its attorney to take any and all other legal measures available to prevent the limited hours from going into effect next month. Restaurant's attorney promptly filed suit.

Owner received a copy of Restaurant's properly-filed summons and complaint. Owner requested that its attorney take any and all appropriate legal measures to have the lawsuit dismissed by the court as quickly as possible.

Regardless of which party might ultimately prevail,

1) Describe the procedural remedies available to Restaurant to prevent the change in hours from taking effect and the procedural requirements attendant to each.

2) What pre-trial motions are available to Owner to have the case resolved by the court as a matter of law? As to each, state the timing, the legal standard used, and the evidence the court would consider.

Explain your answers fully.

(1) Temporary Restraining Order & Preliminary Injunction

The provisional remedies available to Restaurant are a temporary restraining order and a preliminary injunction. In order to obtain a temporary restraining order (TRO), Restaurant must show, by setting forth specific facts, that an immediate and irreparable harm is likely to occur to Restaurant due to Owner's change in hours before notice can be given to Owner. The court may grant the TRO even if notice is not given to Owner, but Restaurant must have attempted to give Owner notice before seeking the TRO, even if unsuccessful. The TRO would stay in effect for 14 days, but can be extended in extenuating circumstances.

Restaurant could seek a preliminary injunction. In order to obtain an injunction, Restaurant must show that (1) Restaurant is likely to succeed on the merits of the case; (2) Restaurant is likely to experience immediate and irreparable harm; (3) equity favors Restaurant; and (4) the public interest favors the granting of the injunction in the case. Restaurant must also post an injunction bond, in the event that the injunction is wrongfully granted and Owner would suffer damages.

(2) Motion to Dismiss, Motion for Judgment on the Pleadings, & Motion for Summary Judgment

Owner may file a motion to dismiss under Rule 12(b)(6) of the Ohio Rules of Civil Procedure, a judgment on the pleadings under Rule 12(C), or a Motion for Summary Judgment under Rule 56. To have the suit dismissed by a 12(b)(6) motion, Owner must show that Restaurant has failed to state a claim upon which relief may be granted. This motion may be made on its own or as part of Owner's answer (which must be filed within 28 days of Restaurant's summons and complaint). The court would only rely on the allegations in the pleadings when ruling on a motion to dismiss for failure to state a claim.

Owner may also file a 12(c) motion for judgment on the pleadings. This motion may be made any time prior to trial. The court would consider the allegations in the parties' pleadings in ruling on this motion as well.

Owner may file a motion for summary judgment under Rule 56. Owner may make a motion for summary judgment anytime after the pleadings, but before the action is set for trial or pre-trial. If the action is set for trial or pretrial, Owner needs leave of court to file this motion. A motion for summary judgment will be granted if the moving party shows that there is no genuine issue of material fact for trial. The court should grant the motion if, after construing the evidence in the light most favorable to the non-moving party, the court finds that reasonable minds could come to but one conclusion and that conclusion is adverse to the non-moving party. Owner's motion for summary judgment must be supported by evidence outside the pleadings, such as affidavits based on personal knowledge and other parts of the record. The non-moving party may not simply rely on the allegations in the pleadings, but must come forward with specific facts showing a genuine issue for trial in order to withstand a motion for summary judgment. The court would consider the attached evidence and parts of the record provided in support of each party's motions when ruling on the motion. The non-moving party must be served with the motion for summary judgment at least 14 days before the hearing on the motion takes place.

In addition, if Owner files a 12(b)(6) motion and also attaches supporting documentation to it (such as affidavits and parts of the record), the court may treat the motion as a motion for summary judgment and rule on it accordingly.

QUESTION 5

1. The City of Old, located in the State of Franklin, is a sleepy, peaceful community of 10,000 people. A large percentage of individuals living in Old are over the age of 55. Most of the individuals living in Old are empty nesters. Recently, a few families with young children began moving into Old. Some of the long-time members of the Old community became irritated with the youth and exuberance of the youngsters as well as with the candy wrappers littering the community and the chewing gum stuck under the tables at the local diner. In response to growing complaints about the behavior exhibited by these youngsters, the Old City Council passed an ordinance prohibiting any household from being occupied by more than two persons under the age of 12. Mark and Melinda Young, a married couple, have four children under the age of 12. They are one of the families that recently moved into Old. As a result of the recently passed ordinance, when the Youngs' lease expired, their landlord began eviction proceedings. As an alternative, the landlord has offered to allow Mark to continue to live in the apartment complex with two of the children and Melinda to live in another unit in the same complex with the other two children at no increase in monthly rent. The Youngs challenge the ordinance in court.

2. The State of Franklin provides a food stamp benefit to its low-income residents that is more generous than most other states. As a result, the Franklin Legislature passed a law that provides reduced food stamp allowances to eligible low-income residents during their first year of residency in Franklin. These residents would receive the same allowance that they received from the state where they previously lived. The purpose of the law is to reduce the state's welfare budget. Franklin's Office of Budget and Management estimates that the new law will save the state between $6-8 million annually. Several new residents (Residents) of Franklin, who are eligible to receive the food stamp benefit, have challenged the new law claiming that they are receiving between $150 to $300 less per month than those recipients who have lived in Franklin for more than a year.

3. Cable Company (Company) operates a small cable system in the State of Franklin. It has approximately 150 employees. One of the benefits of employment is a company-sponsored pension plan. Under the plan, employees are eligible to receive a pension at the age of 65. The amount of the pension is calculated using a formula that takes into account how long the employee has worked at Company and the employee's annual compensation. Any employee who leaves Company before the age of 65 loses all pension benefits, unless the employee has worked at Company for at least 10 years and is 55 years or older at the time of separation. The pension plan has been in place since 2000. On June 1, 2013, Company announced that, as a result of customer losses from people switching to Company's competitors or watching video over the Internet, Company has decided to shut down its operations effective January 1, 2014. Consequently, many of Company's employees will not be eligible to receive a pension benefit. On July 1, 2013, the Franklin Legislature passed a law under which a private employer of 100 employees or more who provided pension benefits is subject to a "pension funding charge" if the business terminated the plan or closed an office in Franklin. The charge was assessed if the pension funds were insufficient to cover full pensions for all employees who had worked at least 7 years. Periods of employment prior to the effective date of the law were to be included in the 7-year employment criterion. The new law will cost Company $500,000 to cover the newly vested pensions. Company challenges the new law.

4. As a young adult, Bob was twice tried and convicted of breaking and entering, a felony offense. These crimes occurred in 2006 and 2008. After being convicted of his second offense, Bob served a year in prison. After losing his job and pension as a result of Company closing, Bob went back to a life of crime. Not being very good at it, Bob was again arrested for breaking and entering in March 2014. Unbeknownst to Bob, in 2012, the Franklin Legislature passed a law providing that breaking and entering carries a prison term of between one and five years, but where an individual has been previously convicted of at least two other felonies, the term shall be between one and ten years. Bob was tried and convicted of breaking and entering and sentenced to a ten-year prison sentence. Bob challenges the new sentencing law as applied to him.

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

A. The Youngs' challenge of the Old ordinance?
B. The Residents' challenge of the Franklin Food Stamp law?
C. Company's challenge of the Franklin Pension Law?
D. Bob's challenge of the Franklin Sentencing Law?

Explain your answers fully. Do not make any Equal Protection arguments.

1. The City of Old will be held to strict scrutiny due to substantive due process. Substantive due process provides the strict scrutiny test for government actions that regulate a fundamental right. The broad categories of fundamental rights are the right to privacy, the right to travel, and the right to vote. Under the fundamental right to privacy, blood relatives that live together cannot be prevented from doing so by zoning laws. Here, the Old City Council passed an ordinance, a government actor, affecting the rights of blood relatives who wish to live together, namely Mark and Melinda Young and their four children. Therefore, the zoning ordinance will be subject to strict scrutiny. Under strict scrutiny, the government must prove that regulation is necessary to further a compelling state interest. Most likely, the city council will fail because "irritation with the youth in the community" is not a compelling state interest and there is a less restrictive means to take care of this, namely create littering laws. Therefore, the Youngs should prevail.

2. The State of Franklin has violated substantive due process here. The fundamental right here is the right to interstate travel. Normally the state can impose a reasonable restriction on certain benefits, like the right to vote, so long as the restriction is reasonable (30 days maximum). The State is putting a one-year-residency restriction on the right to receive food stamps by low-income families. Those who live here longer differ from those who have not, by providing certain residents with the benefit of better food stamps. Again, this regulation will be subject to strict scrutiny; the regulation is necessary to further a compelling state interest. Here, the State could very well have a compelling interest in reducing the state welfare budget, but there is a less-restrictive means of achieving that: reduce the value of food stamps overall. Therefore, the residents should prevail.

3. Under Constitutional law, the State may not pass a law that substantially interferes with retroactive contracts (the Contracts Clause). Here, the law that is affecting the Contract entered into by Company and employees was the right to receive a pension at age 65. This pension was to vest only if the employee worked at the Company for 10 years and is 55 years or older at the time of separation. The new law passed by Franklin, retroactively, meaning it is changing an instrument created in the past, affects the contracts that have asserted different terms for pension plans. Laws that retroactively affect the rights of contracts are void. The Company should prevail.

4. Here, Bob is asserting what looks to be a challenge to ex post facto law. Ex post facto laws are criminal laws that affect the burden of proof after a person has been convicted, the sentencing of a crime after a person has been convicted, etc. Here, government changed the law for the breaking and entering sentence from one to five years to one to ten with two prior felony convictions. Ex post facto laws in the case of sentencing require that the law change the punishment of a crime already convicted for, and here, Bob had not been convicted of the crime yet when the sentence was changed. Therefore, Bob's challenge will most likely fail.

QUESTION 6

Dave owned an old house that he was remodeling. Paul, a friend of Dave, stopped at the house to see how his friend was coming along with his remodeling project. Paul, who had just come from a bar, had been drinking and was intoxicated. Dave was working on the first floor and did not notice that Paul was intoxicated. Dave continued to work on the first floor and suggested that Paul check out the second floor and let him know what he thought of the remodeling project so far. Paul went up to the second floor on his own to check it out.

On the second floor, the rooms were unfinished and the entire area appeared to be "under construction." In the center of one of the second floor rooms, Dave had previously cut a three-foot by three-foot hole in the floor, opening through to the first floor. Dave covered the hole in the floor with a blue plastic tarp. Assuming that anyone walking in the area would avoid stepping on the tarp, Dave failed to warn Paul about the hole. There were no signs or other warnings that there was a hole under the tarp. Dave was planning to install some ductwork in the floor and then repair the hole.

Paul went up and, while walking around the second floor, stepped on the tarp and fell into the hole in the floor, catching himself with his arms. Paul was able to climb out of the hole on his own. As a result of this fall, Paul fractured his right arm. Shaken, but able to walk, Paul walked to the stairs and started down to the first floor. The stairs were in good order with no hazards. Paul stumbled and fell down the stairs, breaking his left leg.

Paul sued Dave for injuries to his arm and leg within the appropriate statute of limitations.

On what legal theories can Paul base his claims for personal injury, what defenses might Dave assert, and what is the likely outcome on each theory? Explain your answers fully.

Paul's Negligence Claim: Paul may assert a negligence claim against Dave. In order to establish a negligence claim, Paul must assert four elements: duty, breach, causation, and damages. Ordinarily, individuals owe the duty to others to be a reasonably prudent person – an objective standard. However, certain relationships and scenarios can alter the duty of care and require heightened standard of care, such as when individuals are at another's premises.

Paul was a social guest at Dave's home, thus is considered a "licensee." Under Ohio law, social guests are held to a standard similar to the common law "invitee" status, where the owner of the premises owes the social guest a duty to protect against known hazards and the hazards that could have been discovered upon reasonable inspection. The premises' owner, thereby, should either warn or notify the social guest of any known, potentially hazardous conditions on the premises. Paul can argue that Dave breached this elevated duty of care by failing to warn him of the hole.

Paul will also argue that Dave's failure to warn Paul of the hole caused both his arm and leg injury. For the causation element of negligence to be satisfied, there must be both legal and proximate causation. Legal causation is the "but-for" causation, which provides that but for Defendant's breach of their duty of care, Plaintiff would not be injured today. Proximate causation is more of a fairness evaluation, which holds that Defendants will not be liable for unforeseeable, attenuated damages. On these facts, Paul would argue that Dave both legally and proximate caused his injuries. But for Dave's failure to warn of the hole, Paul would not have injured his arm. Paul would also argue that it was reasonably foreseeable that, if he had been injured from the hole, tripping down the stairs was also foreseeable and Dave should be liable for both injuries.

Paul will likely prevail in his negligence claim against Dave for his arm injury, but not for the leg injury. Dave owed Paul a heightened duty of care, and failed to warn Paul of the hole in the floor, even when he suggested Paul "check it out." Thus, Dave breached the heightened "invitee" status duty of care. Further, it is reasonably foreseeable that falling in the hole could injure Paul's arms; however, it was likely not foreseeable that Paul's arm injury would cause him to fall down the stairs, even though the stairs were hazard-free. Thus, there was no proximate causation for the leg injury.

Dave's Defenses: First, Dave may assert that Paul was comparatively negligent in his behavior in his home. Comparative negligence is an affirmative defense, which provides that Paul's own negligence contributed to his injuries, thus the damages awarded to Paul (if any) should be reduced. Dave has a strong defense here. Paul was intoxicated when he entered Dave's home and Dave was unaware. Paul's intoxication may have added to Paul's judgment of the risk of the hole in the floor. If Dave prevails on the comparative negligence defense, the award to the Plaintiff, Paul, would be reduced by the percentage of fault assigned to him by the jury. Ohio follows a partial-comparative negligence theory – if the jury finds Paul's negligence to be greater than 50%, Paul would not recover at all. If it is below 50%, Paul's damages would be reduced by the percentage of his fault.

Secondly, Dave may also assert that the danger was "open and obvious." If a danger was open and obvious, Paul would not be able to recover, as Paul negligently disregarded the open and obvious condition. Dave would argue that the tarp was sufficient warning to know not to step on it, thus was an "open and obvious" condition. However, a tarp on the second floor of home does not unambiguously send the message that there is a hole in the ground – for example, it may merely be covering something. Dave's defense would fail.

QUESTION 7

Ammo Unlimited, Inc. (Ammo) is a corporation operating and existing under the laws of the State of Ohio. Its sole business is the development and operation of retail sporting goods establishments throughout the country with an emphasis on the sale of firearms and ammunition. Its inventory for sale to the general public includes high-powered rifles, handguns, military assault weapons, oversized ammunition clips, and other forms of ammunition. Given its status as a licensed distributor of firearms, Ammo is required to comply with all federal and state firearms regulations, including conducting background checks on all purchasers of firearms. It is the policy of the corporation's board of directors to require strict compliance with all applicable firearms regulations by its agents and employees.

Mack is a convicted felon with an extensive criminal history of violent offenses. He harbors an intense hatred for the Anytown Titans, the local professional football team, because he was released by the team many years ago. One evening, while drinking at his favorite saloon with his friend Stumpy, he saw a news report that the Titans' players and coaches would be attending a charity fundraising event at the Anytime Auditorium in two days. Mack said, "They'll be sorry. I'm gonna slaughter them all." Stumpy responded, "I'm with you all the way."

The next morning, Stumpy drove Mack to the local Ammo store. Once there, Mack and Stumpy approached the firearms display and spoke with the clerk (Clerk) regarding the purchase of weapons and ammunition. Clerk knew Mack from high school and was familiar with his criminal history. Mack asked Clerk what weapon he should purchase if he wanted to "kill a lot of people all at once." Acting on Clerk's advice, Mack selected a semi-automatic assault rifle and several oversized ammunition clips. Given his acquaintance with Mack, Clerk did not conduct the necessary background checks required by law and sold the items to Mack. While Clerk's attention was diverted, Stumpy grabbed several more boxes of ammunition for Mack's weapon and concealed them in the pockets of his coat. The two men left the store with the weapon, clips, and ammunition.

On the day of the fundraising event, Stumpy drove Mack to the Anytown Auditorium to carry out the attack on the Titans' players and coaches. He dropped Mack off at the auditorium's rear entrance armed with the weaponry purchased at Ammo. The two had planned that Stumpy would wait in the vehicle in a specific location in the parking lot, await Mack's return, and provide their getaway. However, as Mack headed toward the auditorium, Stumpy decided not to be involved in the plan any longer and fled the scene. Meanwhile, Mack entered the auditorium and opened fire on the Titans' personnel, killing several people. As he fled to the parking lot, he was apprehended by the police and taken into custody. Stumpy was arrested several hours later at his home.

Later that afternoon, Clerk recognized Mack's face from news bulletins about the shooting at Anytown Auditorium. Clerk contacted his regional manager (Manager) indicating that he had selected and sold the weaponry to the alleged perpetrator and deliberately failed to conduct a background check as required by law. Manager advised Clerk to deny any knowledge of the situation, if questioned, and that Manager also would deny any knowledge of the situation. When questioned by authorities, both Clerk and Manager denied any knowledge of what had transpired.

1. With what crimes should Mack and Stumpy be charged, and of what crimes will each be convicted? Explain fully.

2. With what crimes should Clerk, Manager, and Ammo be charged, and of what crimes will each be convicted? Explain fully.

1. Crimes of Mack and Stumpy

Mack can be charged with and convicted of aggravated murder. A murder by prior calculation and design constitutes aggravated murder. Murder requires that a killing be done with malice, which includes the knowledge of or the purpose to cause the death of another person. The conversation at the bar in which Mack declared a plan to commit a slaughter shows the requisite purpose to satisfy malice. As for prior calculation and design, he and Stumpy put together a plan and thought the murderous scheme through to satisfy that requirement. It is clear that Mack's conduct caused the death of other people. Therefore, Mack is guilty of aggravated murder.

Stumpy can be charged with and convicted of complicity to aggravated murder. Complicity requires that a person act with purpose to have another person commit a target crime and then some act in assistance with that crime. Stumpy had agreed to help Mack with the slaughter at the bar, which shows that he acted with the required purpose. He then later acquired ammunition and drove Mack to the scene, which was assisting conduct. Though he may argue as such, Stumpy did not adequately withdraw from the crime because he did not render his prior assistance ineffective in any way or inform police of the plan.

Before the actual commission of the aggravated murder, Mack and Stumpy could have been charged with and found guilty of conspiracy. Conspiracy requires (1) agreement between two or more people to commit a crime, (2) intent to enter into that agreement, (3) a purpose to commit the crime, and (4) an overt act in furtherance of the crime. Mack and Stumpy intentionally entered into an agreement at the bar with a purpose to commit a slaughter at the auditorium when Stumpy said "I'm with you all the way" and Mack accepted his assistance. The two then together committed an overt act by acquiring weapons and going to the scene of the crime. However, the crime of conspiracy in Ohio merges into the principal crime, which, in this case, is the aggravated murder or complicity, so Mack and Stumpy will not be convicted separately of conspiracy.

Mack and Stumpy can both be convicted of theft. Theft in Ohio requires that a person with intent to deprive another of property knowingly obtains control over that property (1) without consent and (2) by deception, force, or intimidation. Without Clerk's consent or the consent of anyone else at Ammo, Mack and Stumpy acted in concert and accomplished the theft by taking the ammo by deception with the ammo being hidden in clothing.

2. Crimes of Clerk, Manager, and Ammo

Clerk and Manager can be charged with and are guilty of obstruction of justice, which is the Ohio equivalent of accessories after the fact. Obstruction of justice occurs when a person knowingly hinders a criminal investigation. Clerk and Manager knowingly lied to police about their conduct and the slaughterous plan of Mack and Stumpy, which impeded the police investigation. Thus, they will be found guilty of obstruction of justice.

Clerk may be charged with complicity, but his conviction of this crime is uncertain. Again, complicity requires that a person act with purpose to have another person commit a target crime and then some act in assistance with that crime. While Clerk offered assistance in the form of his advice, it is not clear that he had purpose to have Mack commit the crime. It will be difficult to prove that mental state beyond a reasonable doubt, as would be required.

Because Ammo's policy was to require background checks and did not endorse the crime committed by its agents, it is considered conduct beyond the scope of employment. Therefore, Ammo cannot be charged with a crime, unless it later ratified the conduct.

QUESTION 8

Jay and Sandy married in 1975. Jay and Sandy had two children, Cam and Phil, who were born in 1980 and 1981, respectively. Cam and Phil both dropped out of high school and have bounced from job to job.

Jay was upset with the habits and lack of motivation of Cam and Phil and executed a valid Ohio Will in 2005 (2005 Will). The dispositive provisions of the 2005 Will provided as follows:

> I give all of my property to my wife, Sandy, if she survives me. It is my desire to disinherit my sons, Cam and Phil, and, therefore, if Sandy does not survive me, I give all of the rest and residue of my property to the Savior Church.

Jay gave a copy of the 2005 Will to the Savior Church in late 2005. The Pastor was appreciative of his gesture. Jay and Sandy subsequently divorced in 2008; however, they remained amicable. In 2009, Jay was introduced to Gloria who was fifteen years younger than Jay. After a brief romance, Jay and Gloria married in late 2010. Gloria had one adult child from a previous marriage, Ann.

Shortly after the marriage, Jay executed a valid Ohio Will in early 2011 (2011 Will). The dispositive provisions of the 2011 Will provided as follows:

1. I hereby revoke my 2005 Will in its entirety.
2. I give $10,000 to Sandy.
3. I give $5,000 to my stepdaughter, Ann.
4. I give all of the rest and residue of my property to Gloria.

There was no mention or reference to Cam or Phil in the 2011 Will. Jay had always assumed that Gloria would survive him so Jay did not include any other alternative provisions regarding his residuary estate.

In 2012, Ann asked Jay to loan her some money to pay off a debt. As opposed to making a loan, Jay gave Ann a letter, which provided as follows:

> I am giving you 20 shares of XYZ stock, which is worth approximately $5,000. This gift is intended to satisfy a provision in my 2011 Will, in which I had bequeathed you $5,000.

Jay contemporaneously transferred the 20 shares of XYZ stock to Ann and placed a copy of the letter in his safe deposit box with his 2011 Will. Jay never made any revisions to the 2011 Will regarding Ann.

Jay decided to buy a motorcycle in 2013 to convince Gloria he was not “over the hill.” Jay thought by buying the motorcycle, Gloria would be less concerned about their difference in age. While both Jay and Gloria were riding the motorcycle in late 2013, Jay lost control and crashed. Jay was killed instantly. Gloria was critically injured and died three days later without regaining consciousness.

At the time of Jay’s death, he owned the following property:

1. $100,000 in ABC Bank titled solely in Jay’s name.
2. A $20,000 life insurance policy, which Jay had purchased in 1995. Jay had designated Sandy as the beneficiary on the policy in 1995. There were no alternate beneficiaries listed and Jay never changed the beneficiary designation.

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

Jay is survived by Sandy, Ann, Cam, and Phil. An executor (Executor) has been appointed the fiduciary of Gloria's estate. Sandy, Ann, Cam, Phil, Executor, and the Savior Church have all claimed an interest in Jay's property.

What rights, if any, does each of the claimants have in the following property:

A. The $100,000 in ABC Bank?
B. The $20,000 insurance proceeds?

Explain your answers fully.

A

Sandy: Sandy takes the $10,000 mentioned in the 2011 will. An express grant in a validly executed will is enforceable, even to an ex-wife. Although her interests in the first will were terminated even before its revocation, she still takes the gift in the new will. Thus, Sandy takes the $10,000.

Sandy does not take the life insurance policy. Although life insurance is a valid method to pass property outside of probate, divorce terminates these interests. The policy was taken out in 1995, and the couple was subsequently divorced in 2008. Although they remained amicable, this is irrelevant. The benefits of the plan were terminated at law by divorce.

Ann: Ann takes only the XYZ stock shares that she was gifted by Jay. Satisfaction is an inter vivos gift that is intended to be an advance on a gift from a valid will. In Ohio, the presumption is that ambigouis inter vivos gifts are not satisfactions or advancements. There is no presumption that parties listed in the will are treated equally. However, there is an exception when there is a valid writing identifying the gift as a satisfaction. This letter can be admitted to interpret the gift, and the court will find that it is a satisfaction of Ann's gift under the will.

Cam and Phil: Cam and Phil each take half of the $90,000 left in the bank and the $20,000 life insurance policy. In Ohio, words of disinheritance in a will are ineffective to cancel gifts to those parties if those parties are entitled to take through intestacy. Here, the revoked 2005 will intended to disinherit Cam and Phil. However, this is problem for two reasons: Firstly, that will was revoked in its entirety, and secondly, words of disinheritance in a will in Ohio are ineffective to prohibit these parties from taking through intestacy. The fulfillment of the terms of the will are accomplished after Sandy is paid. Thus, the rest passes through intestacy. At intestacy, children have a superior right to anyone, but spouses, and, as discussed below, Gloria has pre-deceased Jay. Thus, the first generation entitled to take splits the total inheritance evenly. $45,000 will go to Cam and $45,000 will go to Phil. Phil and Cam will also take the life insurance policy. The interest of the intended beneficiary, Sandy, was revocated by operation of law. Gloria, for reasons to be discussed, predeceased Jay. Thus, Cam and Phil have the best claim to these proceeds.

Executor: Gloria's estate gets nothing under this will. Gloria was entitled to receive the residue of the property if she survived Jay. However, survivorship is interpreted according to the 120-hours rule. A person must survive the grantor by five days in order for the gift to be effective. Here, Gloria died only three days after Jay. She did not survive him by 120 hours, and thus, will be treated as having pre-deceased Jay.

Gloria does not fit within the anti-lapse statute to save her gift. The anti-lapse statute operates to save a gift intended for certain parties if they predecease the grantor. However, the anti-lapse statute only applies to grandparents, their descendants, and stepchildren. Gloria is Jay's wife: she does not fit within any of these exceptions. Thus, the gift to Gloria fails, and the residue passes through intestacy.

Savior Church: Savior Church gets nothing. Express words of revocation in a subsequent will validly executed effectively revoke the previous will. The 2011 will was validly executed, and it revoked the previous will through clear words of revocation. The new will has no mention of the church. Therefore, the church takes nothing.

QUESTION 9

Broker and Manufacturer, both of whom are citizens and residents of Canada, decided to start a business to manufacture airplane parts in Good City, Ohio. Broker and Manufacturer engaged an Ohio lawyer to organize an Ohio corporation to be known as "Air Parts." The lawyer prepared Ohio Articles of Incorporation and an Appointment of Agent, which were signed by Broker and Manufacturer and filed with the appropriate government entity. The Articles provided that the corporation's name would be "Air Parts" and its purpose would be to manufacture airplane parts anywhere in the world, and it authorized the issuance of 100 shares of without-par-value common stock. No other provisions were contained in the Articles. The Appointment of Agent designated Broker as the Statutory Agent, and Broker signed the form accepting appointment and showed his address as being a post office box in Good City, Ohio.

Air Parts sold 100 shares of its without-par-value common stock for $1.00 each. Broker purchased 48 shares, and Manufacturer purchased 52 shares. Each party paid for the stock. No stock certificates were issued. Manufacturer acted as President, and Broker acted as Vice President. No one acted as Treasurer or Secretary. Except for the Articles of Incorporation and the document which Broker signed agreeing to be the Statutory Agent, no other documents were signed by Broker or Manufacturer.

Manufacturer, acting as President, developed a business plan for the manufacture of $1,000,000 of airplane parts in the first year. The business plan was presented to Good Bank, and Good Bank made Air Parts a loan of $1,000,000. Manufacturer, on behalf of Air Parts, signed a Note and Security Agreement for the loan whereunder Air Parts granted Good Bank a security interest in all of its assets to secure the payment of the loan.

Broker, without consulting with Manufacturer, purchased a gold mine for Air Parts in Canada and gave the seller Air Parts' Promissory Note, which he signed on behalf of Air Parts for the purchase price of $1,000,000.

The following matters require resolution.

1. Were the Articles of Incorporation (Articles) properly prepared?
2. Were Manufacturer and Broker, being Canadian residents and citizens, prohibited from signing and filing the Articles?
3. Was the appointment of Broker as Statutory Agent proper?
4. Have all of the actions required to organize an Ohio corporation been taken?
5. Are the President and Vice President sufficient officers for Air Parts?
6. Was Manufacturer properly authorized to obtain the loan from Good Bank?
7. Was the acquisition of the gold mine by Air Parts properly authorized?
8. Are Manufacturer and/or Broker liable for any of the debts of Air Parts?
9. What, if anything, may Manufacturer and Broker do to correct any deficiencies in the organization and operations of Air Parts?

Discuss your answers fully.

1. Articles of Incorporation must contain the name of the incorporator, the address of the principal place of business, and the number of shares to be issued. These Articles were improperly prepared because they contained a PO Box instead of a principal place of business address and because the corporation's name did not contain the required "LLC," "Corp," or "Co" in the name to designate that the entity is a corporation.

2. Manufacturer and Broker were not prohibited from signing and filing the Articles. The promoter need not be an Ohio or U.S. resident. Manufacturer and Broker may sign and file as Canadian residents.

3. The appointment of Broker as Statutory Agent was not proper because the address of the Statutory Agent may not be a post office box. The Statutory Agent is the corporation's designee for purposes of service, and a person may not be served at a post office box. A physical address is required.

4. No, the actions required to organize an Ohio corporation have not all been taken because the stock was issued without par value. Par value is a minimum value established for each share. Ohio requires corporations to issue par-value stock.

5. No, the President and Vice President are not sufficient officers for Air Parts. Ohio requires each corporation to have a President, Secretary, and Treasurer. Air Parts does not have a Secretary or Treasurer.

6. Manufacturer was not properly authorized to obtain the loan from Good Bank because he was not duly elected President. A corporation's officers must be elected by directors, and the directors are chosen by the initial incorporators, or by shareholders at an initial meeting. Here, the shareholders, Broker and Manufacturer, elected no directors. Therefore, Manufacturer was not properly elected as President and not authorized to obtain the loan.

7. The acquisition of the gold mine was also not properly authorized. Broker was not properly authorized to obtain the loan from Good Bank because he was not duly elected Vice President. A corporation's officers must be elected by the directors, and the directors are chosen by the incorporators or the shareholders. Here, the shareholders elected no directors and thus officers could not be elected. Therefore, Broker was not properly elected as President and not authorized to acquire the gold mine.

8. Manufacturer and Broker are personally liable for the debts. A promoter is an individual who takes action to set up the corporation before directors have been selected. Promoters are personally liable for the debts of the corporation that they incur before the selection of directors. Promoters are also liable to each other for the debts they incur within the scope of their role as promoters. They may later seek indemnification for the debts from the corporation. Here, because directors have not been elected and the corporation's officers have therefore not been duly elected, Manufacturer and Broker are promoters. They are personally liable for the debts they incurred to Good Bank and the gold mine.

9. Manufacturer and Broker may amend the Articles of Incorporation to properly name the corporation, issue par-value stock, and add an address of the principal place of business. They may amend the Articles of Incorporation through a 2⁄3 vote of the shareholders, which in this case would require both of them to vote to do so. They may also select directors. Generally, three directors are required, but if there are fewer than three shareholders, there may be fewer than three directors, as long as there is at least two directors for two shareholders or one director for one shareholder. Here, they may choose two directors since there are two shareholders. Once they have properly selected directors, they may then be duly elected as officers of the corporation.

QUESTION 10

In January 1985, Adam purchased a lot with a rustic cabin (Cabin) and a separate vacant lot (Lot) on a lake located in Laketown, Ohio. In January 1987, Adam told Bob that, because of their past friendship, Bob could live in Cabin and use Lot. Although Adam never delivered a deed to Bob, Bob immediately took possession of Cabin in January 1987, and while living there, Bob made the necessary improvements to make it habitable.

On January 2, 1989, Adam sold Cabin and Lot to Zane, an out-of-state real estate developer. Zane, who never visited Cabin or Lot, took title to Cabin and Lot in his own name. He transferred title to Lot as a gift to his one-month-old daughter, Daughter. Adam never told Zane about Bob. Eventually, Zane decided to sell Cabin, but he continued to pay the real estate taxes on Cabin and Lot while he searched for a purchaser.

Between January 1987 and January 1, 2009, Bob lived in Cabin. During this period of time, Bob maintained fire insurance and utilities, and he listed Cabin as his address on his Ohio driver's license and for voting registration. Bob made all repairs and otherwise maintained Cabin, including trimming the trees on its property to reduce fire danger and shoveling snow during the winter.

Also in 1987, Bob began using Lot. Between 1987 and January 1, 2009, Bob built a windmill on Lot to generate electricity for Cabin, and every summer he maintained a small garden. Each year he invited people in the Laketown community to summer barbeques he held on Lot. At the Christmas season, Bob set up a "Santa's Village" for the amusement of children in the town. Otherwise, Bob took care of Lot as if it were his backyard.

In December 2008, Bob accepted new employment in another state. Bob told his sister (Sister) that she was free to move into Cabin and that she was free to use Lot as well. Sister accepted Bob's offer, and on January 1, 2009, the day Bob moved out of state, Sister moved into Cabin. From January 1, 2009 to July 2014, Sister maintained fire insurance and utilities for Cabin. She also listed Cabin as her address on her Ohio driver's license and for voting registration. She made all repairs on Cabin and otherwise maintained Lot, just as Bob had done. Sister continued Bob's summer and Christmas traditions on Lot. She still used the windmill for electricity.

In addition, Sister, who is an artist, built a 12-foot-by-20-foot shed on the back portion of Lot in October 2010. She uses the shed as her art studio almost every day. Often her customers visit her studio to view and purchase her artwork.

On July 1, 2014, Zane and Daughter traveled to Ohio to visit Cabin and Lot for the first time. They discovered Sister living in Cabin and the shed that had been built on Lot. They called Sister an illegal squatter and ordered her to vacate both properties. Sister refused, stating that she was the rightful owner.

In July 2014, in the proper court, Zane and Daughter filed separate actions to quiet title and to evict Sister from Cabin and Lot. Sister filed counterclaims stating that she is the rightful owner.

1. As between Sister and Zane, who is likely to prevail on the claim of ownership of Cabin? Discuss your answer fully.

2. As between Sister and Daughter, who is likely to prevail on the claim of ownership of Lot? Discuss your answer fully.

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

1. Ownership of Cabin: Sister will prevail

In Ohio, title to property can be obtained lawfully through adverse possession if the person has possession for a period of 21 years. This doctrine encourages rightful owners to not neglect their property. However, Bob's adverse possession did not begin in 1987. His possession began on January 2, 1989, when the cabin was sold to Zane. To constitute adverse possession, the possession must be actual, open and notorious, continuous, exclusive, and hostile. Here, the possession was not hostile from 1987 to January 2, 1989, because Adam allowed Bob to use the cabin. However, January 2, 1989, is when the adverse possession period actually began. Since January 2, 1989, Bob has actually possessed the property (maintaining fire insurance, listing it as his address, and using it for voting registration purposes), it has been continuous, he did so openly and exclusively, and it was without the permission of Zane. Bob then possessed the cabin in this nature from January 2, 1989 to January 1, 2009 – a period of just under 20 years. Thus, on his own he did not receive adverse possession because it was less than 21 years. However, he then allowed his sister to move into the cabin. A period of adverse possession can be tacked onto the prior adverse possessor's period if there is privity. Here, Sister is a blood relation to the brother and he allowed her to move in, so there was sufficient privity. Sister then moved into the cabin on January 1, 2009, and possessed the property until July 2014 in the same manner as Bob. She maintained insurance on the property (which is indicative of actual possession), listed the Cabin as her residence, and other actions to constitute an actual, open and notorious, continuous, exclusive, and hostile possession. Zane was still unaware that the property was being possessed. Thus, Sister possessed the property for an additional 5 years. Tacking on Bob's possession period with Sister's is almost 25 years, which satisfies the adverse possession period in Ohio. Thus, Sister will prevail on the claim of ownership of the cabin because she met all elements of adverse possession under Ohio law.

2. Ownership of Lot: Daughter will prevail

As discussed above, Bob possessed the lot for just less than 20 years. He possessed the lot in a manner that was actual, open and notorious, exclusive, continuous, and hostile. He built a windmill on lot to constitute open possession and actual possession. He also did this without the permission of the rightful owner, Zane. The only issue might be continuous possession as he maintained the garden in the summer and had barbeques and then he also made known use of it in the winter. However, courts have found that use of a summer vacation property for just a summer constitutes continuous usage. Here, Bob would satisfy the continuous usage because of the gravity and nature of his actions. When Sister took the Lot in 2009, she was able to tack Bob's time to hers. She continued the summer and Christmas activities and used the windmill. She also satisfied the elements of adverse possession. Thus, by tacking Bob and Sister's possession period, they possessed the period for almost 25 years, enough to satisfy the 21-year requirement in Ohio. However, when the daughter received the title to the Lot, she was only one-month old. A rightful owner can toll the time for adverse possession when she suffers a disability, such as infancy, and that disability occurred from the inception of the possession period. Thus, until she reached the age of 18, the time period of possession was tolled (from 1989 to 2007 the possession was tolled). Therefore, Sally only possessed the property from 2007 to 2014, a period of seven years. This seven-year period would not meet the requirement for adverse possession and, therefore, the Daughter has ownership of the Lot.

QUESTION 11

Doctor Pharm (Doctor) is a university professor and world-renowned expert in the therapeutic use of snake venom neurotoxins. Through his research at the university, Doctor had been experimenting with cobra venom to develop a treatment to reverse the effects of Alzheimer's disease. Because cobras are one of the world's most venomous snakes, the cages and doors in the lab were equipped with an electric locking system to ensure that the cobras did not escape from their cages or the lab. The heat and humidity in the lab were also carefully controlled because the cobras require a tropical climate to survive.

Early last March, Doctor lost his grant funding and had to close the lab. Hoping to continue his progress toward finding a cure for Alzheimer's disease, Doctor moved the lab to his home's garage in suburban Anytown, Ohio. He brought the cobras in their cages, along with lab's locking system and climate-control equipment. Although the electricity in the garage was sufficient to power the cage and door locks, the climate-control equipment was connected to a separate power source, a gasoline generator. Doctor set up the generator outside the garage because it was noisy and emitted carbon dioxide fumes.

Neighbor, who lived next door to Doctor, immediately began to complain to Doctor about the generator, which sat close to Neighbor's kitchen window. Neighbor liked to sit in his kitchen and relax while having a cup of coffee and reading the morning newspaper, but the loud noise and vibrations from the generator made it impossible for him to do so. Doctor explained that he could not turn off the generator or his cobras would die. Neighbor could no longer enjoy his morning coffee at home so he started going to his office early each morning to have his coffee and read the paper.

In an effort to save money feeding the cobras, Doctor decided to catch field mice and other rodents in his and surrounding yards. Neighbor's deck was surrounded by a flower bed and bushes, which Doctor knew was a perfect habitat for rodents. After Neighbor left for his office some mornings, Doctor would go onto his property to catch rodents. The process of crawling through the flower bed and bushes became cumbersome, however, so Doctor decided to set a few mouse and rat traps in Neighbor's bushes, unbeknownst to Neighbor.

During the middle of April, while Doctor was away from home, a severe thunderstorm caused a brief power outage. During the 10-minute outage, Coby, the smartest and fastest of Doctor's cobras, was able to slither out of his cage and escape the garage while the electric locking system was down. Coby went directly to Neighbor's yard because he could smell rodents in the bushes.

After the storm ended, Neighbor came out onto his deck to check his yard for storm damage. As he walked over to the edge of the deck, he saw Coby slithering toward him on the deck railing. Neighbor recognized the characteristic head of the cobra and was immediately terrified that he could be bitten by the venomous snake. As he quickly moved away from Coby, Neighbor fell backwards down the deck steps into his yard, injuring his back and leg.

As Neighbor tried to pull himself to his feet, he fell into one of the bushes and caught his hand in a rat trap, which broke his finger. Neighbor's screams frightened Coby, who quickly slithered back to Doctor's yard. Doctor, who had just returned home, was able to catch Coby and return him to his cage.

Neighbor intends to file a civil action against Doctor. Assume that Doctor did not violate any zoning or criminal laws by keeping the cobras or operating the generator.

Excluding negligence, under what common law tort theories might Neighbor sue to recover damages from Doctor? Explain fully.

Strict Liability For Damage Caused by a Wild Animal - The issue here is whether or not Coby is properly considered a wild animal or a domesticated animal. Owners of wild animals are strictly liable for foreseeable damage caused by the escape and trespass of those animals upon the land of others, whereas owners of domesticated animals are only liable if the escaped animal had known destructive or otherwise undesirable tendencies against which the owner should have taken precautions. Wild animals are often defined under the common law as those animals not normally suitable to be subjugated and controlled for the productive use and purposes of mankind. Here, Doctor will attempt to argue that many people keep snakes as pets, and therefore, Coby was domestic rather than wild. Doctor will likely also attempt to argue that Coby is being kept in his house for an extremely productive and important use for mankind: researching a cure for Alzheimer's disease. However, the redeeming social value of Doctor's research and the fact that others keep different varieties of snakes as pets will not save Doctor, nor render Coby a domesticated animal. Cobras are one of the world's most venomous snakes, and, as such, are different in kind from non-venomous snakes. Similarly, while groundbreaking research is important, it is likely not essential or proper in a neighborhood setting. If Doctor's snakes escaped, as was foreseeable during a power outage when Doctor employed an electric locking system, Doctor was therefore liable for the foreseeable damage his snaked caused. Neighbor being startled by a full-grown cobra on his back porch certainly qualifies. Thus, Neighbor may recover against Doctor in strict liability for the damages resulting from actions of Doctor's wild animals.

Private Nuisance - Doctor's generator likely constituted a private nuisance to Neighbor. A private nuisance is defined as the defendant's substantial and unreasonable interference with the plaintiff's use and enjoyment of his land. Analyzing a nuisance claim is essentially a cost-benefit analysis taking into account the facts and circumstances of the case. Neighbor should allege that Doctor's gasoline generator generates noxious fumes and table-shaking vibrations, in addition to being quite noisy, which interferes with the use of his whole house when he is home. Here, Doctor will again argue that his research was quite valuable for society at large, and that without the generator, his snakes would die and the research would be frustrated. Doctor will assert that this is more important than Neighbor's mere right to read his newspaper and drink coffee in the mornings. However, the nature of uses in the surrounding area is quite relevant to a nuisance inquiry. Neighborhoods are seldom the place for cutting-edge medical research (which is dubious in this case, as Doctor's funding was cut), and outdoor generators are usually only used in emergencies. By contrast, residents often enjoy the seclusion of their home for a few moments of sanity before beginning the workday. Thus, Doctor's interference with Neighbor's land will be deemed substantial and unreasonable and Neighbor may recover in private nuisance.

Trespass to Land - Trespass to land is intentionally causing a physical invasion of someone else's land. The defendant's intent to invade the land is sufficient; the defendant need not intend any harm to result, and a court can award nominal damages to the plaintiff. Here, Doctor repeatedly entered Neighbor's backyard without Neighbor's permission to catch field mice by setting traps. Although Doctor did not intend to injure neighbor by his invasion, his entering Neighbor's land, coupled with the strict liability from his snake, actually caused Neighbor physical injuries. Thus, Doctor may recover for his actual damages (physical injuries) in addition to nominal damages.

QUESTION 12

Tabitha, a new lawyer, is trying to establish an Ohio law practice. She has recently entered into the following two engagements.

Tabitha represents Gloria in a divorce action. Because Gloria does not have access to any funds from which to pay Tabitha, Gloria suggested, and Tabitha agreed, that she take her case on a contingent fee basis and wait to be paid a percentage of whatever assets are awarded to her in the divorce. Both Tabitha and Gloria expect the divorce to be a contentious and protracted matter. Because Gloria cannot even fund the necessary case expenses, she suggested, and Tabitha agreed, that Gloria would work 10 hours a week as an office assistant, but would not be paid wages. Instead, her work as office assistant would be credited against case expenses at the rate of $20 per hour.

In a separate matter, Tabitha was approached by a more experienced, but disbarred former lawyer, Mentor, who conducts heavily advertised free seminars throughout Ohio. The seminars primarily teach married senior citizens about the advantages of living trusts in estate planning. Mentor also is the principal of an insurance agency that sells life insurance and annuities. Tabitha agreed to be designated as the recommended attorney for Mentor's agency, to whom he refers couples who attend his seminars and want legal assistance to establish living trusts.

Mentor screens the prospective clients by having insurance associates affiliated with his agency interview them in their homes to obtain all of their financial and family information and determine whether they might benefit from having living trusts and/or life insurance or annuities. The information is forwarded to Mentor and Tabitha for review. If Tabitha confirms that living trusts would be beneficial for a particular couple, she informs Mentor that she will undertake to represent that couple. Paralegals employed by Mentor's insurance agency prepare the necessary documents, including the living trust instrument, subject to Tabitha's approval and supervision. The insurance associates deliver the documents to the clients' homes for approval and signature. At these meetings, insurance is frequently purchased if the clients choose to fund any part of their plans by insurance.

The clients are provided the entire package of services at the flat rate of $1,800, not including any premiums for insurance. One-half of the charge is collected when the client first signs up for the living trust and the balance when the documents are delivered and signed.

All checks are made payable to Tabitha and deposited in a special law office trust account in an Ohio bank from which only Tabitha and Mentor can draw. Tabitha withdraws $500 for her attorney fees each time clients execute estate plans prepared under her supervision. Mentor transfers the balance from each estate-planning client to his insurance agency's account to cover the expense of employing the insurance associates and paralegals. Mentor does not share any commissions his agency earns from policies sold to Tabitha's clients.

1. What, if anything, can Tabitha do to ensure that (i) her fee arrangement with Gloria and (ii) the services-for-case-expenses arrangement do not violate the Ohio Rules of Professional Conduct? Explain fully.

2. Does Tabitha's arrangement with Mentor violate the Ohio Rules of Professional Conduct? Explain fully.

1. (i) Tabitha's current fee arrangement with Gloria is a violation of the Ohio Rules of Professional Conduct (RPC). A contingent-fee agreement in a divorce action is an improper fee agreement under the RPC. Had the agreement pertained to collect an amount owed in arrears stemming from a divorce settlement, a contingent fee agreement may be proper. An attorney may advance a client the reasonable costs of litigation in compliance with the RPC, which may be a viable option for Tabitha in her representation of Gloria. Lawyers are also strongly encouraged by the RPC to engage in pro bono service, which could be another option if Tabitha agrees to represent Gloria free of charge.

   (ii) In order to ensure the service-for-case-expenses arrangement is compliant with the RPC, several steps must be taken. As her attorney, Tabitha owes a fiduciary duty to Gloria. Her employment arrangement constitutes a transaction with a current client, which is governed by the specific conflict of interest rules under the RPC. Although a lawyer transacting with a client in the ordinary course of business on terms or rates that would be available absent the lawyer-client relationship, Tabitha should treat employment relationship as a lawyer-client transaction to ensure she is in compliance with the RPC. The terms of the employment agreement must be fair to the client so she should pay Gloria what any non-client employee would be paid for the same work. Also, she should fully explain the transaction to Gloria and receive her informed consent confirmed in writing to the transaction. Tabitha should disclose her capacity in the transaction in the writing and give Gloria the opportunity to seek the advice of independent counsel. If she complies with these steps, this arrangement will survive scrutiny as a transaction with a current client under the RPC.

2. Tabitha's arrangement with Mentor violates several rules of the RPC. First, the RPC prohibits exclusive referral agreements. It appears in becoming the "designated" recommended attorney is exclusive, which is impermissible under the RPC. Additionally, the arrangement at issue combines legal and non-legal services in a manner in which they are not distinct to the potential clients. When the services are non-distinct, a lawyer must notify the client that the attorney-client relationship will not apply to the production of the non-legal services. If the lawyer does not do this, the lawyer will be bound by the RPC in providing and transacting in both services. Here, Tabitha did not make it clear to the clients and potential clients that her services were distinct from the non-legal service of providing insurance. The RPC will govern the entire arrangement.

   A lawyer has a duty under the RPC to ensure that her agents or persons, whom she exercises supervisory power over, comply with the RPC. Here, it appears that the insurance agents would be engaging in impermissible in-person solicitation of clients for pecuniary gain by meeting clients at their homes. A lawyer cannot cause an agent to accomplish an impermissible solicitation that the lawyer herself could not do.

   It is a violation of the RPC to split fees with a non-lawyer and to have one be able to draw on a client trust account. Tabitha is splitting fees by allowing Mentor to draw money from the $1,800 fee charged for the legal service. The flat fee in itself is not an issue under the RPC so long as it is reasonable. But as the money is from the provision of legal service, Mentor cannot share in this money, nor can he draw on the client account.

   Tabitha also is likely assisting another in the unauthorized practice of law. Mentor has been disbarred, but is arguably providing legal advice at his seminars, depending on whether the information is individualized and targeted. Tabitha is furthering Mentor's business in her provision of legal services.

MPT 1

IN RE KAY STRUCKMAN

In this performance test item, examinees are associates at a law firm representing Kay Struckman, a local attorney. She has asked for legal advice on the proposed modification of her retainer agreements with existing clients. Specifically, Struckman wants to know whether she may ethically seek to modify her retainer agreements with existing clients to include a provision requiring the use of binding arbitration to resolve future fee disputes, and whether any resulting modification using the language she proposes would be legally enforceable. The task for examinees is to draft a memorandum for the supervising attorney addressing whether Struckman's proposed arbitration clause is ethical under the Franklin Rules of Professional Conduct and legally enforceable. The File contains the instructional memo from the supervising attorney and a letter from Struckman. The Library contains Franklin Rule of Professional Conduct 1.8, an ethics opinion from the Columbia State Bar Association, two Franklin cases, and an Olympia case.

MEMORANDUM

To: Steve Ramirez

From: Examinee

Re: Kay Struckman Consultation

Based on existing case law, as well as the Franklin Rule of Professional Conduct 1.8, it is both ethically and legally permissible for Ms. Struckman to modify her existing retainer agreements to include binding arbitration for fee disputes.

1. Ethicality of Modifying Retainer Agreements with Existing Clients

Ms. Struckman ethically may modify existing retainer agreements to include an arbitration clause that provides for arbitration of fee disputes. Under Franklin Rule of Professional Conduct (FRPC) 1.8, where a lawyer is entering into a business transaction with a client, the transaction must be fair and reasonable to the client. Additionally, the transaction and terms must be fully disclosed and in writing to the client in a manner that can be reasonably understood by the client. F.R.P.C. 1.8(a)(1). The client must also be advised, in writing, that it is desirable to seek independent counsel and should be given a reasonable opportunity to do so. Id. at (a)(2). As the court in Lawrence v. Walker held, the client must be made explicitly aware of the existence of the agreement, which includes notification and explanation. Once the lawyer has complied with the notification requirements, the client must give informed consent, in a signed writing that includes the terms of the transaction and the lawyer's role in the transaction. Id. at (a)(3). The Franklin Supreme Court has held that the modification of a retainer agreement with existing clients is considered a business transaction and is covered by FRPC 1.8. Rice v. Gravier Co. (Fr. Sup. Ct. 1992). However, in modifying the retainer agreement, a lawyer may not prospectively limit their liability to a client for malpractice unless the client was independently represented in the making of the agreement. F.R.C.P. 1.8(h)(1).

The Columbia State Bar Ethics Committee issued an ethics opinion in 2011 voicing their concern regarding modifying an existing client's retainer agreement to include a provision requiring binding arbitration of a future malpractice claim. The Committee prohibited against the addition of arbitrating these types of claims, fearing the client would not understand the full implications of such an agreement, that lawyers would be unable to uphold their fiduciary duties, and that they may want to arbitrate future malpractice claims to avoid misconduct investigations. However, the Olympia Supreme Court held in 2009, that an arbitration agreement that contained a binding arbitration clause for attorney malpractice claims was permissible. The Court stated that because the attorney complied with the ethical requirements set forth in Olympia Rule of Professional Conduct 1.8, the modification was permissible and that the lawyer was not prospectively limiting their liability or attempting to prevent the client from filing a charge with their respective Board of Attorney Discipline. Sloane v. Davis (Oly. Sup. Ct. 2009). The requirements followed by the attorney in Olympia included having a fair business transaction, making a full disclosure in writing and explaining arbitration fully, as well as obtaining a signed waiver after recommending the seeking of independent counsel. Id. See also Sloane v. Davis (following similar steps, sending written information with full disclosure and receiving written consent by the client). The Court found that such an arbitration agreement, requiring arbitration of malpractice claims, does not give up the right of the client to sue, it just shifts the forum in which they obtain relief.

Based on the rules set forth by Franklin in their code of ethics, Ms. Struckman, in modifying her retainer agreements with existing clients, would fall squarely within the realm covered by Rule 1.8. Rule 1.8 only covers business transactions, of which includes modification of an existing client's retainer agreement. Because this falls within the purview of the rule, Ms. Struckman must comply with the FRPC in so modifying. As the Court in Olympia held, so long as she complies with the requirements set forth in FRCP 1.8, she will satisfy the ethical requirement. Ms. Struckman

must first make sure that the terms are fair and reasonable. The terms "any claim or controversy" is vague. However, the Franklin Court of Appeal upheld similar language in Lawrence v. Walker (Fr. Ct. App. 2006). There, the court found that such language included malpractice claims. While the Columbia Ethics Committee was concerned about requiring arbitration of such claims, the Olympia Supreme Court held otherwise. It appears that arbitrating future malpractice claims would be permissible in the State of Franklin. However, if Ms. Struckman merely wants to provide arbitration for future fee disputes, she may consider revising her arbitration clause to specifically state as such and limit her arbitration clause to such claims. Second, Ms. Struckman must provide these terms to her clients in writing and recommend to them to seek independent counsel. It is recommended that she submit to her clients some informational document informing the client of what arbitration is, what results from agreeing to arbitration, including the loss of a right to a jury trial, as well as what arbitration offers such as discovery and awards. After notifying them of these potential revisions, the clients must send her a signed writing including the essential terms of the transaction and her role in the transaction. If Ms. Struckman complies with these requirements, she should meet the ethical requirements set forth by Franklin.

2. Legally Enforceable Arbitration Agreements

Ms. Struckman should add additional language or provisions in her arbitration agreement in order to have a legally enforceable arbitration agreement. In order to have legally enforceable arbitration agreement, the agreement must: (1) provide for a neutral arbitrator, (2) provide for more than minimal discovery, (3) require a written, reasoned decision, (4) provide for all of the types of relief that would otherwise be available in court, and (5) not require the party agreeing to arbitration to pay unreasonable fees or costs as a condition of access to the arbitration forum. Johnson v. LM Corp. (Fr. Ct. App. 2004). This five part test was originally formulated for employment contracts where the employee must agree to binding arbitration as a condition of their employment. Id. citing Lafayette v. Armstrong (Fr. Sup. Ct. 1999). The Court's reasoning in Lafayette for such a test was that employees "as a class are particularly dependent on, and vulnerable to, their employers" and "deserve safeguards to protect their interests." Lafayette. The Court of Appeals in Lawrence v. Walker found that attorney-client relationships are analogous to the employer-employee relationship set forth in Lafayette, stating that "clients as a class are particularly dependent on, and vulnerable to, their attorneys and therefore deserve safeguards to protect their interests." Lawrence. If an arbitration agreement complies with the five requirements set forth in Lafayette and again in Johnson, the agreement is legally enforceable.

First, the agreement must provide for a neutral arbitrator. To be neutral, the arbitrator must disclose any potential conflicts that may arise that could result in a conflict between their interests and the interests of the parties. Johnson v. LM Corp. In Johnson, the agreement called for the use of the Franklin Arbitration Association to provide the arbitrator because it required all arbitrators to disclose conflicts of interest that could compromise their neutrality. The court in Lawrence stressed the importance of selecting the arbitrator due to the limited review of their decision by the court. So long as the arbitrators provide enough information regarding potential conflicts, they satisfy the neutral arbitrator requirement. Second, there needs to be more than minimal discovery. However, this does not mean the same amount of discovery as required for judicial proceedings. Johnson. It is permissible to limit such things as the number of depositions in an arbitration agreement. Id. So long as there is sufficient discovery available this will be permissible. Third, the arbitrator must issue a written and reasoned opinion. Johnson; Lake v. Whiteside (Fr. Sup. Ct. 1994). This allows for the client to ascertain whether the arbitrator was compliant with the laws and an understanding of how they reached their award. Fourth, the arbitration agreement cannot limit the types of relief beyond what is permissible in court. A benefit of arbitration is the wide open possibilities for remedy. So long as they have at least the same remedies as would be available in court this requirement is satisfied. Finally, the agreement must be clear in the fee structure to ensure the client is not paying an unreasonable fee as a condition of access to the arbitration forum. Johnson.

Because the court in Lawrence v. Walker held that the language of the arbitration agreement should be construed against the party who created the agreement and the uncertainty, Ms. Struckman should add to her existing draft of the arbitration agreement to comply with the requirements for a legally enforceable arbitration agreement. Currently, Ms. Struckman's arbitration agreement solely provides for binding arbitration with regard to "any claim or controversy arising out of, or relating to, Lawyer's representation." In order to comply with the legality requirements, Ms.

Struckman should add provisions to cover the five requirements set forth by Lafayette. She first must provide for a neutral arbitrator. She could rely on the Franklin Arbitration Association, as was used in Johnson, as this would satisfy the requirement. Second, she must set forth the discovery that would be permissible. Third, she needs a provision requiring the arbitrator to issue a reasoned written opinion. She also should set forth the types of relief available, or some blanket statement permitting full forms of relief available in court. Finally, there is no provision currently regarding who bears the costs of getting to arbitration. She should ensure that some fee arrangement is in the provision. This provision cannot require her clients to bear the majority of the costs to get into the arbitration forum or else she risks the fee being unreasonable.

Should Ms. Struckman comply with the ethical and legal requirements set herein, she should be permitted to modify her existing retainer agreements to include the arbitration provision.

MPT 2

IN RE LINDA DURAM

Examinees' law firm represents Linda Duram, whose request for leave under the Family and Medical Leave Act (FMLA) was denied by her employer, Signs Inc. Duram had requested five days' leave to accompany her grandmother, who suffers from severe health issues, to an out-of-town funeral. Signs Inc. denied the request, asserting that the FMLA did not entitle an employee to leave to care for a grandparent; applied only to caring for someone in the person's home or a hospital, not to travel; did not apply to funeral leave; and required 30 days' notice. When Duram returned from the funeral, Signs Inc. told her that it would dock her pay for the unauthorized leave and that any future unapproved absences would result in termination. Examinees' task is to draft a demand letter to Signs Inc. persuading it to reverse its denial of leave and retract the threat of termination. In doing so, examinees must set forth the case for why Duram was entitled to FMLA leave and address Signs Inc. 's specific objections. The File contains the instructional memorandum, the firm's guidelines for drafting demand letters, email correspondence between Duram and Signs Inc., an affidavit by Duram, and a letter from the physician treating her grandmother. The Library contains excerpts from the FMLA, excerpts from the Code of Federal Regulations, and two cases.

A

BURTON AND FINES LLC
Attorneys at Law
963 N. Oak Street
Swansea, Franklin 33594

Mr. Steve Glenn
Vice President of Human Resources
Sign, Inc.

Dear Mr. Glenn,

My name is Henry Fines and I am a partner at the law firm of Burton and Fines, LLC. My client, Linda Duram, is an employee of Signs, Inc. Ms. Duram has retained Burton and Fines to represent her in a matter pertaining to her request for leave under the Family and Medical Leave Act (hereinafter FMLA) in July of 2014. Please direct all future communication regarding this matter to my law firm at my attention.

The purpose of this letter is to advise you that Ms. Duram has obtained legal counsel, and to explain why we feel that Signs, Inc. erroneously denied Ms. Duram's request for leave under the FMLA.

As you know, Ms. Duram is a full-time employee of Signs, Inc. Ms. Duram works as a graphic designer for your organization. On July 7, 2014 at 9:15 AM, Ms. Duram contacted the human resources department of Signs, Inc. via electronic mail in order to request five days leave under the FMLA. Ms. Duram explained in her letter that she needed to accompany her grandmother to the funeral of her sister because Ms. Duram's grandmother is unable to travel by herself. Ms. Duram explained that she needs to provide her grandmother with medication and therapies as she suffers from heart disease and medications. Ms. Duram further explained that she had only learned of her great-aunt's death the day before (July 6, 2014), and that she would need to leave the next day (July 8, 2014).

You responded to Ms. Duram's request for FMLA leave on July 7, 2014, at 3:30 p.m. You stated that you were denying Ms. Duram's request for the following four reasons:

- [FMLA] does not apply to care for grandparents
- [FMLA] only applies to care provided in a home, hospital, or similar facility, not to travel
- [FMLA] does not apply to funerals
- Ms. Duram did not provide Signs, Inc with 30 days' notice of her need to take FMLA leave.

You then went on to state that Ms. Duram may take two days of vacation time, and that absence without approved vacation time or other leave is grounds for discipline up to and including discharge. As you know, Ms. Duram attended the funeral of her great-aunt, resulting in five days absence from her position at Signs, Inc. On July 16, 2014, you sent Ms. Duram an e-mail reminding her that you previously denied her request for FMLA leave. As such, two vacation days were credited to Ms. Duram, and the other three days were unpaid as there was no approval for leave on these days. You also stated that Ms. Duram was placed on probation in accordance with Employee Policy 12.7, and any future unapproved absences would be grounds for immediate termination.

As I'm sure you know, Congress enacted the FMLA to balance the demands of the workplace with the needs of families, to promote stability and economic security of families, to promote national interests in preserving family integrity, and to entitle employees to take reasonable leave to care for the serious health conditions of specified family members. See 29 USC 2601(b) and Shaw v. B.G. Enterprises. As such, the FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons, such as the care of a child, spouse, or parent who has a serious health condition. Id. § 2612.

It is our contention that Ms. Duram's request for FMLA leave fell within the statutory requirements of entitlement to FMLA leave. As such, I will address each of the four contentions contained in your e-mail dated July 7, 2014 and explain why Ms. Duram is entitled to the requested leave.

1. FMLA DOES NOT APPLY TO CARE FOR GRANDPARENTS

Ms. Duram is not contending that the FMLA applies to care for grandparents. Instead, Ms. Duram's grandmother, Emma Baston, stood in loco parentis to Ms. Duram, thereby qualifying her as a "parent" for purposes of the FMLA.

The FMLA provides that employers covered by FMLA are required to grant leave to eligible employees to care for, inter alia, a parent with a serious health condition. 29 USC §825.112(a)(3). For the purpose of FMLA, a "parent" is defined as "the biological parent of an employee or an individual who stood in loco parentis to an employee...." (emphasis added). Federal courts have interpreted the term "in loco parentis" according to state law. See Carson v. Houser Manufacturing Inc. In Franklin, the term "in loco parentis" refers to a person who intends to and does put herself in the situation of a lawful parent by assuming the obligations incident to a parental relationship without going through the formalities of legal process (such as guardianship, custody, or adoption). When considering whether someone stood in loco parentis to a child, the court may consider the child's age, the child's degree of dependence, or the amount of support by the person claiming to be in loco parentis.

In Phillips v. Franklin City park District (Fr. Ct. App. 2006), the court found that the plaintiff stood in loco parentis to her grandchild where the child lived in the grandmother's home from age 4; the grandmother enrolled the child in school; took him to medical appointments; provided day-to-day financial support; was involved in school activities, etc. The court found that this was sufficient proof to meet the in loco parentis standard.

Ms. Duram, much like the child in Phillips, was raised almost exclusively by her grandparents. As Ms. Duram attested to in a sworn affidavit, her grandparents raised her for "many years" from age six onward. Ms. Duram spends extended periods of time in the home of her grandmother, including living almost exclusively in the home of her grandmother in junior high school and high school. Ms. Duram was never adopted by the Bastons, but this was only due to her parents' fear that giving custody to Ms. Duram's grandparents would complicate already-existing legal problems. As Ms. Duram explains in her affidavit, her grandparents took care of her, fed her, clothed her, gave her gifts at holidays and birthdays, took her to school and the doctor, et cetera. Even when Ms. Duram's biological parents were involved in her life, which was rare and inconsistent, her grandparents provided her care, including providing food and ensuring that she got to school, et cetera. Her grandparents paid for her extracurricular activities and gave her money to obtain a car in college.

Clearly, under Franklin law and the Phillips standard, Emma Baston, Ms. Duram's grandmother, stood in loco parentis to Ms. Duram. Therefore, Emma Baston qualifies as a "parent" for purposes of the FMLA. Therefore, the FMLA applies.

2. FMLA APPLIES ONLY TO CARE PROVIDED IN A HOME, HOSPITAL, OR SIMILAR FACILITY, NOT TO TRAVEL

The FMLA entitles an eligible employee to a total of 12 workweeks of leave in order to care for, inter alia, a parent's serious health condition. Ms. Duram's grandmother has a serious health condition as defined by the FMLA. Pursuant to 29 USC § 2611, a serious health condition means an illness, injury, impairment, or physical or mental condition that involves either inpatient care in a hospital, hospice, or residential medical care facility or continuing treatment by a health care provider. "Continuing treatment" (29 USC 825.115) includes chronic conditions. A chronic serious health condition is one which: requires periodic visits (at least twice a year) for treatment by a health care provider; continues over an extended period of time; and may cause episodic rather than a continuing period of incapacity. The plain language of FMLA applies to anyone who has a serious health condition that requires continuing treatment, even if that person is not in inpatient care in a hospital, hospice, or residential facility. Nor does the FMLA require that the individual be at home. Ms. Baston's medical issues, including cardiac disease/heart

failure and depression, have required treatment by a medical doctor for the last ten years. Ms. Baston requires around-the-clock care from a professional staff of home health service aides and Ms. Duram. Therefore, it is clear that the FMLA applies to Ms. Baston's chronic condition, which requires continuing treatment by a health care provider.

Ms. Duram requested FMLA leave so that she might care for her grandmother while traveling. The term "to care for" as used in 29 U.S.C. § 2612 is not defined under the FMLA or in the Code of Federal Regulations. In that regard, the court in Shaw v. B.G. Enterprises analyzed what it meant for an employee to "care for" a family member. The Shaw court noted that the term "care for" encompasses the need for the employee seeking leave to be in close and continuing proximity to the person being cared for, and to offer some actual care to the person with the serious health condition. Ms. Duram meets both of these elements. By traveling alongside her grandmother to the funeral, she is in close and continuing proximity to her grandmother (the person being cared for). There is nothing to suggest that, at any point over Ms. Duram's five day absence, she was not in close proximity to her grandmother. Furthermore, Ms. Duram and Dr. Maria Oliver, Ms. Baston's doctor, will both attest that Ms. Duram provides actual care to Ms. Baston in the form of transporting Ms. Baston into and out of her wheelchair; administering oxygen; operating her heart pump; administering her medications; and providing Ms. Baston's personal care. Therefore, Ms. Duram meets both prongs of the test articulated in Shaw, proving that Ms. Duram was caring for her grandmother while traveling. Contrast this with the case of Roberts v. Ten Pen Bowl (12th Cir, 2006) in which the court found that mere relocation of an individual with a health condition (in that case, a child) was in no way analogous to treatment for a serious health condition. In this case, Ms. Duram is not simply travelling alongside Ms. Baston or helping her to relocate. Ms. Duram is providing Ms. Baston with daily, intensive treatment for her serious health conditions of depression and congestive heart failure. As such, the FMLA applies.

3. FMLA DOES NOT APPLY TO FUNERALS

While you are correct in your assertion that the FMLA does not apply to funerals, you have misconstrued Ms. Duram's email of July 7, 2014. In her request for FMLA leave, Ms. Duram stated, "My grandmother... cannot travel by herself. She needs me to care for her and to give her medication and therapies. She has been depressed because of her health, and now with losing her only sister, she is very distraught." It is clear from Ms. Duram's e-mail that the purpose of her request for FMLA leave is to provide care for her grandmother, not to attend the funeral of her grandmother's sister. While it is true that Ms. Duram attended the funeral, she needed/requested the leave because Ms. Baston requires constant, around-the-clock care. Dr. Oliver, Ms. Baston's doctor, asserted that Ms. Baston cannot walk, bathe herself, take her medications, feed herself, dress, or perform similar functions of daily life without assistance. As established under the second item above, the FMLA applies to an employee who is "caring for" a parent. In this case, the purpose of Ms. Duram's FMLA leave request was to care for Ms. Baston, not to attend the funeral of Ms. Baston's sister. As established above, Ms. Duram meets the elements of being in close and continuing proximity to Ms. Baston during the funeral and to offering her actual care in the form of administering oxygen and medications, helping her in and out of her wheelchair, helping her dress and bathe, etc. For these reasons, FMLA applies.

4. MS. DURAM DID NOT PROVIDE SIGNS, INC WITH 30 DAYS NOTICE OF HER NEED TO TAKE LEAVE.

Pursuant to 29 USC § 825.302 of the Code of Federal Regulations, "an employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for leave is foreseeable based on an expected birth, placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or family member.... If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable" (emphases added). According to the plain language of the FMLA, 30 days is only required when the medical treatment is planned or foreseeable. In Ms. Duram's case, such 30 day notice was not practicable. Ms. Duram was not aware in advance that she would need to provide care for Ms. Baston on her five day journey to her sister's funeral. Ms. Duram has been routinely providing care for Ms. Baston in her home for some time, but the need to travel was an unforeseeable change in circumstances. Therefore, Ms. Duram could not have provided 30 days notice of her need to take FMLA leave.

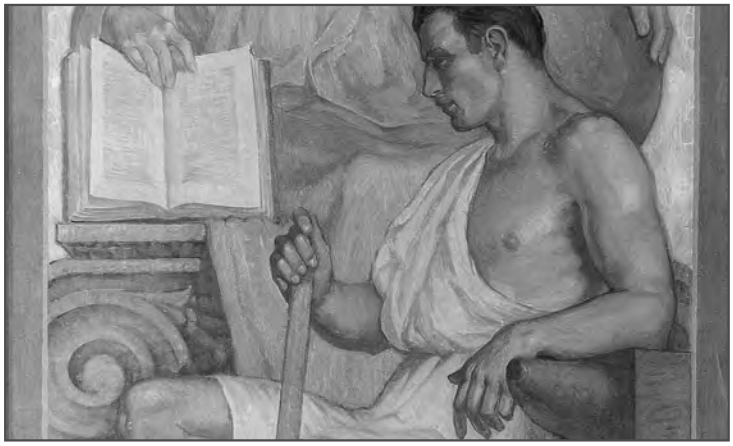
In accordance with the above provision, Ms. Duram did provide notice as soon as practicable. Ms. Duram e-mailed human resources first thing in the morning on July 7, 2014 to request FMLA leave. She clearly defined when she would need to leave and the amount of leave to be taken. She also clearly stated that the need to travel only arose the day before, as Ms. Baston's sister had only died the day prior and Ms. Duram had "just learned of her sister's death yesterday." Therefore, in accordance with § 825.302, Ms. Duram provided Signs, Inc. with notice of her need to take leave as soon as practicable, and the FMLA applies.

Having addressed all of your concerns regarding the FMLA in turn and provided an explanation for why the FMLA indeed applies to Ms. Duram, I request that you reverse your decision to deny Ms. Duram's request for FMLA leave. Accordingly, Ms. Duram's two (2) accrued vacation days should be reinstated to her. Ms. Duram should also be removed from probation in accordance with your employment policy, and the possibility of termination on Ms. Duram's next absence should be retracted. If Signs, Inc. is not in agreement with these measures, we will be forced to take further legal action, which may include a lawsuit for interference with FMLA leave.

Should you have any questions regarding this matter, please contact my office.

Cordially,

Henry Fines, Esq.
Partner
Burton and Fines LLC



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

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