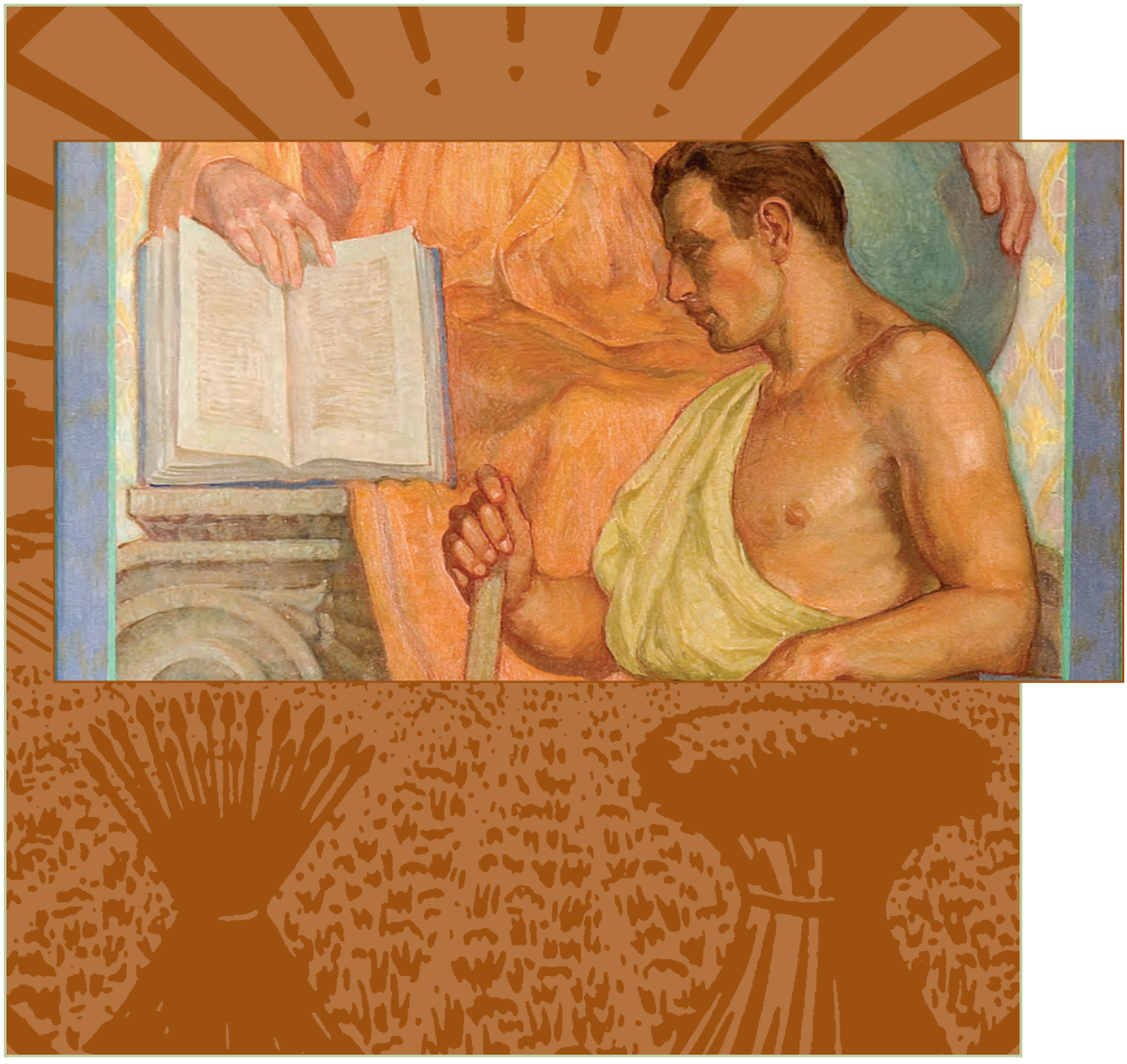
THE SUPREME COURT *of* OHIO

July 2012 Ohio Bar Examination

Essay Questions & Selected Answers

Multistate Performance Test Summaries & Selected Answers



On the cover:

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

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JULY 2012 OHIO BAR EXAMINATION

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OHIO BAR EXAMINATION

July 2012
Essay Questions and Selected Answers
MPT Summaries and Selected Answers

This booklet is a compilation of the 12 essay questions from the July 2012 Ohio Bar Examination, along with National Conference of Bar Examiners (NCBE's) summaries of the two Multistate Performance Test (MPT) items given on the exam. This booklet also contains actual applicant answers to the essay and MPT questions.

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

The 12 essay questions on the July 2012 exam were presented to the applicants in sets of two. Applicants were given one hour to answer both questions in a set.

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

Copies of the complete July 2012 MPTs and their corresponding point sheets are available from NCBE. Check NCBE's website at www.ncbex.org for information about ordering.

QUESTION 1

Homeowner, who owns a two-story house in Anytown, Ohio, recently purchased a new bedroom set and enlisted Friend to help her move the furniture into her home. While Homeowner and Friend were carrying a piece of the furniture up the interior stairway to her second-floor bedroom, Friend caught his foot in a tear in the carpeting, lost his balance, and fell down the stairs, sustaining serious injuries to his head, back, arm, and shoulder. Friend had not seen the carpet tear, which Homeowner had recently glued down and covered with carpet tape.

Homeowner helped Friend get to her car so she could drive him to the hospital emergency room. They left in such a hurry that Homeowner did not think to close the door and forgot that Friend had left a cigarette burning in an ashtray on an end table near the door.

Homeowner also failed to notice that the gas tank in her car was almost empty. Consequently, the car ran out of gas on the way to the hospital. Homeowner left Friend in the car while she walked to a nearby gas station to get a can of gas. Due to the delay, Friend did not reach the hospital until several hours later and his injuries were aggravated as a result.

Meanwhile, shortly after Homeowner and Friend had left the house, Neighbor arrived, responding to Homeowner's invitation several days earlier that she stop by for a cup of coffee "sometime." Neighbor popped her head in the open door and called, "Hello, Homeowner." Because she assumed that Homeowner was home, Neighbor decided to walk in and look for her. As Neighbor walked through the door, her purse inadvertently bumped into the table near the door and caused Friend's cigarette to roll onto a couch. After several minutes of unsuccessfully looking for Homeowner, Neighbor realized that Homeowner was not there. She decided, however, that as long as she was alone in the house, to go upstairs to the bedroom to try on Homeowner's clothes and jewelry, which she had often admired.

As Neighbor was busy rummaging through Homeowner's belongings upstairs, a fire was smoldering in the couch downstairs, and smoke was beginning to fill the first floor. When Neighbor realized that Homeowner's house was on fire, she ran down the stairs to escape, caught her foot in the carpet tear, fell down the stairs, and sustained injuries from the fall and smoke inhalation from the fire.

A bystander who had seen smoke called for emergency assistance. Firefighter and his crew arrived moments later and were able to rescue Neighbor and extinguish the fire. Firefighter suffered smoke inhalation and a back injury in the course of rescuing Neighbor.

Friend, Neighbor, and Firefighter have each filed a negligence action against Homeowner. What duties, if any, did Homeowner have to protect each injured party from injury, and was any such duty breached? Explain your answers fully.

Do not discuss contributory or comparative negligence by the injured parties.

Friend, Neighbor, and Firefighter have all brought claims of negligence against Homeowner. In order to prevail in a negligence action, a plaintiff must prove a duty, breach, causation, and damages. The duty that a person owes to another depends on which standard of care applies to the situation. The general rule is that a person owes a duty to others to act as a reasonable person would under like circumstances. However, owners of property owe differing duties to those who enter onto their land. A breach occurs when a person does not meet the standard of care applicable.

Friend. Homeowner owed a duty of care to Friend and this duty was breached. The duty owed to Friend depends on Friend's status. When a person is an invitee on an owner's land, the owner owes the invitee a duty of reasonable care as to activities conducted on the land and a duty to either warn of or make safe concealed artificial and natural conditions that the owner either knew of or should have known due to an inspection. The owner must inspect the premises to discover any defects. An invitee is someone who was invited onto the land for the owner's benefit. A licensee, by comparison, enters onto the land for his own purposes, whether he is a social guest or doing business. Friend was an invitee. Homeowner had "enlisted" Friend to help her move furniture into her home. Thus, Homeowner owed Friend a duty to warn of or make safe all concealed natural and artificial conditions that she knew of or could have discovered by inspection. Homeowner knew of the carpet tear which Friend tripped on. She had recently glued down and covered the tear with carpet tape. However, Homeowner failed to make safe or warn of the condition. The carpet tear was not discovered by Friend and it caused him to lose his balance and fall down the stairs. Thus, Homeowner breached the duty of care she owed to Friend.

Homeowner also owed a duty of care to Friend because she created Friend's peril and also assumed a duty of care, and this duty of care was breached. Normally, a person does not owe others an affirmative duty to act. However, there are exceptions. One is when the defendant creates the peril. Another is if a defendant assumes a duty of care. Homeowner created the peril in this case since she failed to make the tear in the carpet safe. She also assumed a duty of care because she offered to drive Friend to the hospital emergency room. Homeowner did not act as a reasonable person would under like circumstances because she left Friend in the car for several hours while she got gas to fill her empty gas tank. Thus, Homeowner breached her duty of care to Friend.

Neighbor. Homeowner did not owe a duty of care to Neighbor. When someone enters another's land as an unknown trespasser, no duty of care is owed to him or her. Neighbor was an unknown trespasser. Although Homeowner had invited her over for coffee sometime, this was not an invitation to enter into Homeowner's home when she was not home. Neighbor was thus not an invitee. Even if she was initially, she exceeded the scope of her invitation when she knew Homeowner was not home, but went upstairs to try on jewelry anyway. Because Neighbor was an undiscovered trespasser, Homeowner owed no duty to her.

Firefighter. Homeowner did not owe Firefighter a duty of care. A licensee is owed a duty of care by an owner. This duty is a duty of reasonable care as to activities on the property and a duty to make safe dangerous and concealed natural and artificial conditions on the property. In Ohio, only social guests are considered licensees. Firefighters and police are considered trespassers. Thus, owners do not have a duty of reasonable care with regard to firefighters. However, owners do have a duty not to act in a wanton manner in order to increase the risks faced by firefighters. Homeowner did not act in such a manner.

QUESTION 2

Adam, who was married to Builder's daughter, owned a building supply company in Anytown, Ohio. Fifteen years ago, Adam loaned Builder $100,000 as working capital for Builder's construction business. Builder had agreed to pay it back within five years, but had never paid back any amount. Adam had been reluctant to sue his father-in-law, and the statute of limitations had long since run on any collection action. However, Adam believed that Builder's repeated assurances over the years that he would pay kept the debt alive.

In 2010, Adam contracted with Builder to build an addition to Adam's house for $50,000, payable on completion. When Builder finished the work, Adam was not pleased with the result, claiming that Builder had departed substantially from the specifications. Adam threatened to sue Builder for breach of contract.

Builder, on the other hand, maintained that he had complied in all respects with the specifications and threatened to sue Adam for breach of contract.

Builder had always felt that Adam did not support Builder's daughter and his three grandchildren in a proper manner. Although Builder had no legal obligation to support the grandchildren, Builder wrote a letter in 2010 to his daughter volunteering that he would see to it that his grandchildren received proper educations and that he would pay all their college expenses.

In anticipation of completion of the addition to his house, Adam had purchased furnishings and appliances from Carl for $75,000, but had not paid as agreed. Carl threatened to file suit to collect the debt.

In the meantime, Adam's building supply business was losing money, and the debts exceeded the business's assets. Adam put the business up for sale and Builder offered to buy it. Builder and Adam entered into a written contract, which contained the following terms of the sale:

- Builder agrees to pay Adam $1.00;
- Adam agrees not to sue Builder for the $100,000 he had loaned Builder fifteen years ago;
- Adam agrees not to sue Builder for breach of the house-addition contract;
- Builder agrees not to sue Adam for breach of the house-addition contract;
- Builder agrees to honor the 2010 letter in which he stated he would pay for the grandchildren's college expenses; and
- Builder agrees to pay the $75,000 Adam owes Carl.

Does each of the sale terms listed above independently constitute valid consideration for the contract? Explain your answers fully.

In order to create a valid contract under Ohio law, a manifestation of mutual assent is necessary (offer and acceptance) as well as valid consideration. At issue is consideration, which is defined as the bargained for exchange of some detriment to the promisee or benefit to the promisor. A benefit is some right, profit, or interest; and a detriment is some loss, forbearance, or responsibility.

1. The $1.00 payment to Adam is proper consideration. Here, there is a bargained for exchange of the interest and ownership of the supply business (albeit failing), and the $1.00 profit paid to Adam. Under Ohio contract law, where there is bargained for exchange, an Ohio court will not inquire as to the perceived adequacy of consideration; instead letting the parties determine the relevant merit. As such, the $1.00 is an enforceable bargained for exchange.

2. This agreement by Adam not to pursue the 100,000 debt is not enforceable consideration. The statute of limitations has run on the debt to be collected, and, as such, Adam has no legal right with which to bargain with Builder. Under Ohio law, a written agreement to pay a debt that exceeded the statute of limitations is enforceable as a moral exception to the general consideration rule. Here, however, there is not a promise by Builder to repay the debt, but a promise by Adam not to pursue the debt. Despite his reliance on assurances, because the statute of limitations has long run, Adam has no right to collect this debt, and, as such, this is not enforceable independent consideration.

3. The agreement by Adam not to sue Builder is not enforceable consideration. A forbearance not to bring suit is enforceable so long as there is a reasonable belief of a valid claim. In Ohio under the common law, a contract that has been substantially performed to specifications must be paid for the substantial benefit, with any deductions later coming from the result of minor breaches. Under construction contracts and not matters inherently subjective, like art, the standard is whether a reasonable person would consider that substantial performance had been made. Here, Builder appears to have made substantial performance according to specifications agreed beforehand. Because this is not an inherently subjective matter such as art, Adam has no reasonable claim and this does not constitute consideration.

4. The agreement not to sue is enforceable consideration. As discussed above under point 3, Builder substantially performed as he was required under the contract, only to have Adam express displeasure with the result. Because a reasonable third person would conclude that the completion of construction according to specifications, as Builder likely did since the addition is complete, was substantial performance, this agreement not to sue is valid independent consideration.

5. This term would not constitute enforceable consideration, but may be enforceable under a promissory estoppel theory. Here, Builder's promise to pay for the grandchildren's college expenses was a gratuitous promise, not bargained for in exchange for any benefit or burden to him. However, recovery under promissory estoppel for a 1) promise, 2) reliance by the grandchildren that is reasonable, foreseeable, and detrimental, and 3) injustice as a result, may be possible.

6. The agreement by Builder to pay Carl is valid consideration. Here, Builder and Adam have bargained for the detriment of paying the debt (by Builder) in exchange for the benefit of acquiring the business (given by Adam). Although an amount due and undisputed paid by Adam directly to Carl would not be enforceable consideration, because Builder is acquiring a new and different detriment of payment that he did not previously have in exchange for the benefit of the supply business, this constitutes valid consideration.

QUESTION 3

John was in his car stopped at a red light at a street in Anytown, Ohio, when his car was struck from behind by a car driven by Tim. John and Tim were both injured in the collision and were treated in the emergency room of the local hospital.

In anticipation of filing suit against Tim in compliance with Civ.R. 27, John took depositions to preserve the testimony of Tim; Doctor, the emergency room physician who treated John; and Janet, a witness to the collision. The pre-filing depositions were taken because John was concerned that, for one reason or another, these persons would be unavailable to appear at the trial.

John then filed suit against Tim, alleging negligence and seeking damages for personal injuries. Tim timely answered the complaint, denying the allegations and asserting the affirmative defenses of comparative negligence and failure to mitigate damages. Tim also asserted a counterclaim alleging negligence by John and seeking to recover for his personal injuries. John answered the counterclaim, denying the allegations.

During pretrial discovery, John and Tim exchanged identical discovery requests in which they sought discovery of the following information:

a) A copy of each one's automobile insurance policy;
b) Copies of any written or recorded statements of witnesses to the collision taken by each party or his attorney, including any statements of John and Tim;
c) Documents relating to any illness or injury each one had within the past 10 years;
d) Whether each one had consumed any alcohol within 24 hours of the collision;
e) Each one's driving history regarding all traffic citations or accidents each one had ever experienced; and
f) Disclosure of all arrests each one had experienced for any reason.

John and Tim both refused to respond to these discovery requests and reciprocally filed motions to compel production of the information.

At the trial, John sought to use the deposition testimony he had obtained in the pre-filing depositions of Tim, Janet, and Doctor in lieu of live testimony. Tim was present at the trial. Both Janet and Doctor were within the subpoena powers of the court, but John had not attempted to subpoena them. Tim objected to the use of any of the deposition testimony.

1. How should the court have ruled on the reciprocal motions of John and Tim to produce each of the items sought in pretrial discovery? Explain your answers fully.

2. How should the court rule on Tim's objection to the use at trial of the deposition testimony of Tim, Janet, and Doctor? Explain your answers fully.

As this is a car crash case falling under state law and there is no indication of diversity, this case falls under the Ohio Rules of Civil Procedure. In Ohio, evidence is discoverable if it is relevant or could lead to relevant evidence. It does not have to be admissible evidence to be relevant or discoverable.

1. Cross Motions: Prior to submitting to the court a motion to compel discovery, a party should show that he or she made reasonable attempts to get the opposing party to cooperate. Here, both John and Tim refused to answer any of the requests made by the opposing party. The court should compel John and Tim to disclose some information requested in the discovery requests, but not all.

A. The court should compel both sides to turn over copies of their automobile insurance policies. While recovery from insurance will not limit damages, it is relevant in a car accident case because automobile insurance is required by law. This evidence is not admissible to show liability; however, it can be used for proof of other issues, such as bias, and could therefore be relevant. In federal court, this would be required in the initial disclosures.

B. The court should not compel the disclosure of the copies of written or recorded statements of witnesses to the collision taken by each party or his attorney. These statements are the work product of the attorney: any document procured by the attorney or at the attorney's request in preparation of litigation. Work product is not discoverable unless there is a case of extreme need. Cost does not qualify as extreme need. Here, both John and Tim's attorneys appear from the facts to have had access to the witnesses of the collision. As such, there is no need apparent. Furthermore, the statements of John and Tim to their attorneys are protected by the attorney-client privilege, which protects confidential communications between a client and his attorney regarding representation. John and Tim's statements about the accident to their attorneys are therefore privileged and undiscoverable.

C. As both Tim and John have made their personal injuries an issue in the litigation, the court should compel disclosure of this request. This request, however, is unduly broad and each party should ask for clarification as compiling documents from any sickness, which could be as minor as a cold, as it is not indicated what types of sickness each party is looking for, could be unreasonably burdensome on a party.

D. The court should compel disclosure of whether either Tim or John had consumed alcohol within the last 24 hours as it could lead to admissible evidence regarding the negligence of each driver during the accident.

E. As each driver's negligent driving is at issue, the court should compel disclosure of this information. Again, like in (C), this request is unnecessarily broad as it reaches all the way back to one's juvenile record.

F. The court should not compel disclosure of all arrests Tim and John have experienced because arrests are not relevant information. Past convictions may be relevant, but arrests do not indicate bad conduct and therefore neither party should be forced to disclose such information.

2. Deposition Testimony: Depositions in Ohio can be taken after the defendant has filed his Answer to plaintiff's Complaint. These depositions must be attended by a court reporter, be under oath, and limited in time allowed. As such, John's pre-filing depositions were contrary to Ohio Rules of Civil Procedure. Furthermore, John's primary concern and reason for taking these depositions – that the witnesses would be unavailable – is not the reality in this case. Here, Tim was present at the trial. Notably, his deposition could be used against him as a party admission. Furthermore, Janet and Doctor were both within the subpoena powers of the court, but John did not attempt to subpoena them.

QUESTION 4

Bank, located in Anywhere, Ohio, entered into the following transactions with borrowers, each of whom defaulted on their loans from Bank. Assume in each case, that Bank had a valid, properly perfected and enforceable security interest in the collateral described. Also, assume that the Ohio Retail Installment Act does not apply to any of the following cases.

1. Bank loaned money to Acme Lawn Service and took a security interest in Acme's accounts receivable. When Acme defaulted on its loan, Bank instructed all of Acme's customers to forward their payments on their accounts directly to Bank, instead of to Acme. Harry, a long-time customer of Acme, received the Bank's instruction, but thinking it made no difference, sent his check for $1,000 to Acme in payment of his account in full, as he always had done. Acme is now insolvent and Bank demands $1,000 from Harry, even though Harry has a cancelled check showing that he paid Acme.

2. Bank loaned $10,000 to Jones and took a security interest in a 300-year-old painting by a European master, which was purchased by Jones' business where it was displayed. When Jones defaulted, Bank took possession of the painting, and Bank gave 48-hour public notice that it was going to put the painting up for sale at a private auction. The notice stated that Bank intended to keep the painting if no offers were made at the private auction. When no one appeared at the auction, Bank's President decided that the painting was "probably worth about $10,000 anyway," so he cancelled the debt in exchange for the painting. He hung the painting in the Bank's boardroom. Jones objected, demanded that Bank return the painting, and tendered to Bank cash in the amount necessary to repay the $10,000 loan in full. Bank refused the tender.

3. Bank loaned money to Smith for his business and took a security interest in all "inventory, equipment, and supplies." When Smith defaulted on his note, Bank hired a professional repossession expert named "Mad Dog" to recover its collateral. Mad Dog's real name is Marvin Strange. He appears on TV regularly in a series called "Mad Dog–the Crazy Re-Po Man." Mad Dog is about 6'8" tall, weighs over 300 pounds and is covered with tattoos depicting satanic characters. Mad Dog is always extremely effective in recovering collateral. Afraid of Mad Dog, at the sight of him entering his business, Smith cowered in the corner like a frightened child while Mad Dog leisurely removed all of the collateral. Smith never said a word and definitely did not object in any way to Mad Dog's actions. Smith is now in bankruptcy and the bankruptcy Trustee demands the Bank return the collateral as having been improperly repossessed.

4. Bank loaned Farmer $10,000 secured by a combine (a valuable piece of farming equipment needed by Farmer in his business). When Farmer defaulted on the loan and refused to allow Bank onto his property to take possession of the combine, Bank began a civil action to obtain a judgment, but seized the combine prior to the issuance of the judgment and right before harvesting season, when Farmer needed the machine to harvest his crops. The combine was parked within a public right-of-way on a country road when Bank seized it. Farmer demands the return of his combine.

1. Is Bank entitled to recover $1,000 from Harry?
2. Is Jones entitled to get his painting back from Bank?
3. Is Trustee entitled to recover the collateral repossessed by Bank?
4. Is Farmer entitled to regain possession of his combine?

Explain your answers fully.

Secured transactions are governed by Article 9 of the Uniform Commercial Code, so Article 9 governs all of the transactions here.

1. Bank can recover $1,000 from Harry. Under Article 9, when a secured party gives notice to a debtor's customers to pay it rather than the debtor because the debtor is in default, the customers must pay the secured party instead of the debtor. Here, Harry had notice that Acme was in default of Bank's loan. Although he was instructed to pay Bank the balance on his account, he did not, and therefore he will be liable to Bank for the account balance.

2. Jones is entitled to get his painting back, or alternatively, get actual damages. Under Article 9, a secured party may use self-help repossession as a remedy upon default, and the secured party is entitled to sell the collateral to satisfy the debtor's obligation. All aspects of the collateral sale must be commercially reasonable, and the debtor and any other secured parties are entitled to notice of the sale. For notice to be reasonable, it generally must be at least 10 days before the sale of the collateral. Here, Bank only gave Jones 48 hours of notice, which does not satisfy the notice requirement. Further, while a secured party can take the collateral in full satisfaction of the debt, it cannot do so if the debtor objects. The debtor can force the secured party to sell the collateral. Also, Bank could not hold a private auction because it is not a product that has a widely recognized market because it is a rare antique painting. Finally, under Article 9, a debtor has the right of redemption, which means a debtor can keep the collateral if he tenders the full obligation to the secured party before sale of the collateral. Here, Jones tendered to the Bank cash in the amount necessary to repay the loan in full before the painting had been sold, but Bank wrongfully rejected Jones's redemption.

When the secured party does not comply with re-sale requirements, the secured party is liable for actual damages to the debtor plus 10% of the value of the collateral. Therefore, Bank will be liable to Jones for actual damages plus 10% of the value of the painting, or it may be forced to return the painting for wrongfully denying Jones his redemption right.

3. Trustee may get damages but probably cannot get the collateral back. Under Article 9, a secured party may not breach the peace in self-help repossession of collateral. A breach of the peace is anything that is likely to incite violence, including entering a closed garage or taking the collateral over the debtor's objection. Further, the secured party may not use violence or the threat of violence to repossess. Here, Bank hired a professional repossession expert to get the collateral from Smith. A court may determine that Bank, by using Mad Dog as an agent, breached the peace by the threat of force. Mad Dog is huge and frightening, and Smith's fear of him is evidenced by him cowering in the corner like a frightened child while Mad Dog removed the collateral. Because Bank attempted to scare Smith into compliance with the repossession, and Smith was in fact frightened into silence, it is likely that a court will determine Bank breached the peace. A presumption arises that the value of the collateral exceeds the price it is sold for, so the secured party cannot get a deficiency judgment. Therefore, Trustee can recover actual damages, plus 10% of the collateral value, but not the collateral itself.

4. Farmer is not entitled to his combine. Here, the combine was parked in a public place, and there is no evidence that Bank took it over the objection of Farmer at that time. Although he has previously objected, it is likely not a breach of the peace when Bank took the combine from the public place on a country road. Therefore, Farmer is not entitled to the combine or damages.

QUESTION 5

Sarah, a resident of Anytown, Ohio, suffers from schizophrenia, a mental disorder that makes it difficult for her to tell the difference between real and unreal experiences. Sarah's condition is controlled by medication and treatment by Doctor. TJ is Sarah's supervisor at work and, over the past year, they have had an affair. At her last doctor's visit, Doctor told Sarah she needed to end her extra-marital relationship. The stress made her mental condition worse. The next morning, Sarah told TJ that their relationship was over.

That night shots were fired from a slow moving vehicle through a window of Sarah's apartment, killing her husband (Husband). Sarah told the police that she immediately looked out the window and recognized TJ driving his car. Police began an investigation of Husband's murder. TJ is a suspect.

TJ consulted Lawyer. TJ told Lawyer that Husband was a scumbag drug dealer and no one will miss him. TJ also told Lawyer that he intended to pay Sarah's Doctor to write in Sarah's records that Sarah lies half of the time. TJ gave Lawyer his pistol, saying that he didn't want a gun around his kids at home. In preparation for trial, Lawyer sketched the scene of the murder and made notes for cross-examination of Sarah. In a second meeting with Lawyer, TJ's brother was present. TJ said that he loved Sarah and Husband didn't deserve her.

Later, TJ e-mailed his wife (Wife) from his office computer. They had been living apart for two years, but had not divorced. In the e-mail, TJ asked Wife to take him back and stated that if anyone asked, she should say he was with her the night of the shooting.

Prosecutor has convened a Grand Jury investigation and subpoenaed the following:

1. Lawyer, to testify about all communications between Lawyer and TJ and all documents and objects in Lawyer's possession; and
2. Wife's computer containing evidence of any communications from TJ after the shooting.

Lawyer and Wife objected and moved to quash the subpoenas on the basis of privilege.

After the Grand Jury indicted TJ for murder, Lawyer subpoenaed Doctor for trial and Doctor's medical records relating to Sarah. Lawyer intends to elicit testimony from Doctor on Sarah's mental condition and all conversations with Sarah. Doctor's counsel moved to quash the subpoenas on the basis of privilege.

Assume the Ohio Rules of Evidence apply and answer the following questions based solely on the basis of privilege.

1. Was the Prosecutor entitled to all documents and objects in TJ's case file and all communications between Lawyer and TJ?
2. Was Prosecutor entitled to the e-mail from TJ on Wife's computer?
3. How should the Trial Judge rule on whether Lawyer may obtain Doctor's medical records and elicit testimony from Doctor on all conversations with Sarah?

Explain your answers fully.

DO NOT address any issues of admissibility based on hearsay, relevance, competency, or ethics.

1) The prosecution was not entitled to all the files and communications because the attorney-client privilege covered only statements and materials. The attorney-client privilege is invoked when a party solicits a lawyer and provides confidential communications for the purpose of legal advice. The client is the holder of the privilege, but the lawyer can assert it on behalf of the client. There are exceptions to the privilege such as when a third party is present who is not vital to the lawyer's performance of providing legal assistance there is no confidential communications. This privilege applies during grand jury proceedings. Lawyer and TJ had an attorney-client relationship because TJ consulted Lawyer about his legal troubles surrounding the death of Husband. The statements regarding Husband being a scum bag and that no one will miss him are privileged as they relate to the legal service sought. The statements regarding the bribery of Doctor are not privileged because TJ is discussing future crimes, which are not protected, whereas any discussion of past crimes is protected (ethical issue). The statements made when TJ's brother was present are not privileged because the presence of a 3rd party who is not necessary to the legal advice/service destroys any privilege. The gun is not a confidential communication, but physical evidence, which is not protected by the privilege. The lawyer can be compelled to turn over the gun. The sketch and cross examination notes are protected under the work product doctrine and will not have to be disclosed. Thus, the prosecution was not entitled to all communications, documents and objects in lawyer's control.

2) The prosecutor was not entitled to the email on the wife's computer. There are two types of spousal privilege: (1) testimonial and (2) confidential communications. Testimonial provides that a spouse cannot be forced to testify against the defendant-spouse in a criminal trial. The non-defendant spouse holds this privilege. Confidential communications cover all actions or communications before or during the marriage and survive divorce. This covers communications, conduct, and assertions made by either spouse conducted in a confidential manner--e.g. no 3rd party present. This privilege belongs to both spouses and requires both of them to waive it--i.e. it cannot be waived by one spouse alone. Here, TJ and the wife were separated, but not divorced so the privilege was still intact. The separation has no effect on the validity of the privilege. Even though TJ is asking his wife to lie for him, the email is still protected as a confidential communication between husband and wife. Even if the wife wants to disclose it, the privilege belongs to both of them and TJ can prevent disclosure. Thus, the prosecution was not entitled to the email from TJ to the wife because it was a confidential communication protected by the privilege.

3) The trial judge should rule that Sarah's medical records and conversations with her doctor are privileged. The doctor-patient privilege is similar to the attorney-client privilege. The communications must be made when seeking medical treatment from a doctor and with the intent that they be confidential. The patient is the holder of the privilege, but the doctor can assert it on the patient's behalf. An exception to the privilege is if a party or defendant raises their personal mental or physical health as an issue at trial. This privilege applies during grand jury proceedings. Here, the communications and medical records will be privileged because Sarah was under the doctor's treatment for schizophrenia. As part of that treatment Sarah disclosed the affair with TJ because it related to her mental condition getting worse. Thus, the prosecution is not entitled to the medical records, nor can they force the doctor to testify.

QUESTION 6

Lawyer was assigned by Judge to represent Client who was charged with domestic violence against Girlfriend in Anytown, Ohio Municipal Court.

In the course of the representation, Lawyer engaged in the following conduct:

1. After learning from Client that Girlfriend is employed in the adult entertainment industry and has a history of drug arrests, but no convictions, Lawyer went to Girlfriend's place of employment, where he engaged her in conversation. Lawyer identified himself and advised Girlfriend that unless she hid herself and made herself unavailable for trial, he would be ethically compelled to cross-examine her about her sex life and drug use.

2. During pre-trial proceedings, Lawyer filed motions demanding that Prosecutor and Judge recuse themselves. In the motions, he accused Prosecutor of bias and prejudice against Client and he accused Judge of being unqualified to sit in judgment over a heterosexual male (Client), because of her own sexual orientation. Lawyer had no factual basis on which to make either accusation.

3. Also prior to the trial, Lawyer held a press conference repeating the same accusations against Prosecutor and Judge. He explained to Client that he made the accusations in order to meet his duty to "zealously represent him," and also because he was certain that the local press would pick up the story, which would then reach the jury pool and help neutralize the normal bias of jurors in favor of the police and Prosecutor.

4. Just before the trial, Lawyer learned that Girlfriend would appear as a witness and testify about Lawyer's efforts to dissuade her from testifying. Lawyer then listed himself as a witness for the defense to refute Girlfriend's anticipated testimony. Prosecutor filed a pre-trial motion to preclude Lawyer from either being a witness or continuing to represent Client. During the pre-trial hearing on the motion, Lawyer took the stand and testified as to what he intended to testify to at trial. Judge reserved a ruling whether Lawyer should be disqualified until such time as Lawyer actually tried to take the stand at the trial.

5. When the case was concluded, Lawyer, as was his customary practice, sent a letter to Judge thanking her for the assignment and enclosing two tickets, valued at $75.00 each, for an upcoming athletic event.

Does the conduct listed above violate the Ohio Rules of Professional Conduct? Explain your answers fully. You need not cite the Rules by number and section.

The issues in this question are governed by the Ohio Rules of Professional Conduct.

1. Lawyer has a duty to zealously represent his client, and that includes reasonable investigation of witnesses and facts. Ex parte communications with witnesses are usually OK, especially prior to trial. In this case, Lawyer also fulfilled his duty to identify himself. Lawyer ran afoul of the Rules in a number of ways, however. First, Lawyer is required to engage in honest behavior that is consistent with his role as an attorney all the time, even when he is not in court. Here, he engaged in behavior that could be considered intimidating and threatening to Girlfriend. He also suggests that Girlfriend participate in a fraud on the court by "hiding" so that she is unavailable for trial. The Rules prohibit Lawyer from suggesting this sort of deception on the court. Lawyer also lies to Girlfriend by saying that he would be ethically compelled to cross-examine her about her sex life and drug use - this would be irrelevant and not the proper subject of cross-examination. Lawyer's lying and attempted fraud reflect poorly on his status as an attorney and run afoul of the Rules.

2. A motion to recuse is not against the Rules, and in fact may be required in certain circumstances in order to zealously represent a client. Here, however, Lawyer violates the rules by making unsubstantiated accusations and filing a motion that has no basis in fact. The motion is frivolous and a waste of judicial resources, and Lawyer is aware of this fact. Moreover, because he has no factual basis, Lawyer's accusations amount to misrepresentations to the court, which is explicitly prohibited by the Rules.

3. An attorney is allowed to make public statements regarding a client if it is consistent with zealous representation. However, there is a balance between zealous representation and a Lawyer's ethical duty and duty to the court. Here, even apart from the fact (discussed above) that Lawyer's accusations have no basis in fact, Lawyer's conduct is likely prohibited by the Rules. Public statements, during trial, cannot be made for the purpose of affecting an ongoing proceeding. Although these statements were prior to the trial, Lawyer still explicitly had the purpose of affecting possible jurors' outlooks on the case. The statements were thus prohibited by the Rules both because they were unsubstantiated and because they were meant to sway a potential jury.

4. When Prosecutor filed his motion, Lawyer should have stepped down and suspended his representation of client. While Lawyer's testifying, in and of itself, is not prohibited, at this point a serious conflict exists in Lawyer's representation because he is being accused of unprofessional and possibly criminal conduct. Some conflicts can be addressed by informed, written consent of the client, but here the conflict is probably too serious. Lawyer's ability to adequately represent Client has been compromised to a point that the Rules require him to ask the court for permission to end the representation.

5. Lawyer violated the Rules by sending Judge the tickets, although a simple thank you letter is probably OK. An attorney is prohibited from doing anything improper or trying to influence an official to affect the outcome of a proceeding or matter. Here, although the trial has ended, Lawyer apparently practices often before Judge, and a gift could influence future proceedings. Even if the Lawyer's purpose was not to influence Judge, the appearance of impropriety is enough to prohibit the gift. Under the Rules, Judge is required to return the tickets and report the conduct of the lawyer in giving the gift.

QUESTION 7

In recent years, the State of Ohio has faced a crisis caused by the invasion of tree destroying insects from a state to the north. The "Buckeye Borer" attacks and destroys only buckeye trees. Without action, all of the state's buckeye trees will eventually perish.

In response to this threat, the Ohio General Assembly passed the following legislation:

1. A bill establishing regional state-operated processing stations in the northern half of the state where the problem is most serious. The law requires all infected trees harvested in northern Ohio to be processed at these regional facilities. Infected trees are brought to the stations by private operators who pay a fee per tree for processing. The trees are stored in warehouses kept at a temperature of 120 degrees, which kills the insects. The trees are then returned to the private operators who sell them as firewood or for other uses.

2. A bill allowing private operators to develop processing stations in the southern half of the state, where the problem is less serious. The law requires private operations to be located in the State of Ohio, so that they can be licensed and inspected by the state.

3. A bill enacting a five cent per mile road maintenance tax on trucks that transport the heavy loads of buckeye wood either to the processing stations, or to markets for sale as firewood. The tax is assessed only on miles driven on roads within Ohio.

Company, based in an adjacent state, operates tree processing plants in that state, which experienced the borer problem before Ohio did. Company also has a trucking operation and has trucked trees harvested in Ohio to and from processing plants in Ohio. Company claims it would have lower expenses, and thus more profit, if it could take Ohio trees to the processing plants in its home state. Company also objects to paying the additional road tax in Ohio, which it is not subject to in its home state.

Company has brought a lawsuit challenging the constitutionality of all three Ohio statutes. In each case, Company claims the statutes place an undue burden on interstate commerce.

You may assume the lawsuit is proper in all procedural aspects, and that state action is present in all three situations.

How should the court rule on the constitutionality of each of the statutes? Explain your answers fully. Limit your discussion to the validity or invalidity of the statutes under the Interstate Commerce Clause of the United States Constitution.

1) 1st Statute - The Dormant Commerce Clause states that when Congress is silent on a matter, states may regulate interstate commerce as long as they 1) do not discriminate against out-of-state individuals and entities, 2) do not unduly burden interstate commerce, and 3) do not regulate purely out-of-state activity. In addition, a state may discriminate to the extent that a private individual can when they are acting as a market participant. The state may only discriminate if they can show the existence of an important state interest and that there are no less discriminatory means available. Whether the state regulation poses an undue burden is determined by balancing the substantial state interest and the effect on interstate commerce. Furthermore, a state is allowed to favor government entities, not private entities when performing a traditional government function. Here, the first statute involves the state acting as a market participant because the station is operated by the state. However, even if they are acting as a market participant, the regulation cannot pose an undue burden on interstate commerce. The state does have a substantial interest involved in the preservation of Buckeye trees, which will completely perish if no action is taken. Also, this problem is more serious in the northern half of Ohio. Furthermore, the burden on interstate commerce does not outweigh the state interest because the facts show that only one company will face increased expenses. Thus, the first statute does not pose an undue burden on interstate commerce because of the state's substantial interest in preserving its local trees.

2) 2nd Statute - As mentioned above, the statute can discriminate against interstate commerce only if they can show the existence of an important state interest and that there are no less discriminatory means available. Here, the state is not acting as a market participant because the station is owned by private operators and the statute favors in-state entities on its face by only allowing the trees to be brought to in-state operators. In addition, it is likely that since the problem is less serious in the southern half of the state, the state's interest is outweighed by its burden on interstate commerce. Furthermore, there are less discriminatory means available because there are no facts indicating that an operator in an adjacent state cannot provide the same service. The second statute poses an undue burden on interstate commerce and discriminates against out-of-state entities.

3) 3rd Statute - To determine whether a state tax on interstate commerce is allowed under the Dormant Commerce Clause, the court will look at the following four part test: 1) substantial nexus between the activity being taxed and the state, which must be more than minimal contacts; 2) fair apportionment, which means that the state cannot tax interstate commerce more than local; 3) non-discriminatory, which means that the state does not give a direct commercial advantage to or have the effect of favoring in-state individuals and entities; 4) fair relation to the services being taxed, which requires that the activity being taxed fairly relate to the services provided in the state. Here, there is a substantial nexus and a fair relation because the transport of buckeye wood in Ohio constitutes more than minimal contact and the tax relates to the transport of wood to facilities in Ohio. Also, the statute is presumably fairly apportioned because the tax is assessed based on the miles driven within Ohio. The tax is not discriminatory because it applies to all trucks, regardless of whether they are in-state or not. Thus, the 3rd statute does not violate the dormant commerce clause.

QUESTION 8

Ace, Inc. (Ace) is an Ohio corporation. At the time of formation, it had 4 shareholders, 3 of whom are full-time employees, namely Smith, Jones and Carr, and one is an investor (Investor). The 3 full-time employees each own 17% of all of the issued and outstanding stock of Ace, for an aggregate of 51%, and Investor owns 49%. At the first meeting of shareholders, Investor nominated Brilliant and Green to serve with the three other shareholders as members of the Board of Directors. Smith, Jones, Carr, Brilliant and Green were unanimously elected to the Board at that meeting. At the same shareholder meeting, the shareholders unanimously adopted Code of Regulations, which included a provision requiring Ace to indemnify its directors and officers against any expense or damages they may suffer should a shareholder of Ace sue them.

During the 12 months following the date of the initial shareholders' meeting, the Directors took the following actions at meetings attended by the Directors, and all notices and formalities regarding the meetings were properly waived.

- Director Meeting One: elected: (a) Smith's wife as Chairman of the Board; and (b) Smith as President, Jones as Treasurer, and Carr as Secretary. No Vice President was elected.
- Director Meeting Two: (a) authorized Ace to repurchase Jones' stock for $100,000; and (b) authorized the resale of an equal number of Jones' stock to Smith and Carr, each at the same price paid, so that the employee group maintained a 51% ownership interest.
- Director Meeting Three: Smith reported that Ace borrowed funds from the Bank and granted the Bank a security interest in all of Ace's assets. Smith stated that the Bank loan was necessary since Ace had a negative net worth and did not have sufficient funds to pay for Jones' stock. Before Brilliant voted to approve Smith's actions at the Board meeting, he engaged a lawyer who was an expert in corporate law to advise him as to whether or not he should vote as a Director to ratify Smith's actions with the Bank. The attorney advised Brilliant to vote for ratification. Based upon that opinion, at the Board meeting, Brilliant voted to ratify Smith's actions. The 3 employees/Directors did not consult with counsel, but voted to ratify. Green did not consult with counsel and abstained from voting for ratification. Green did not inform the Board of the reasons he abstained, which were due to the fact that he owned a share of the Bank and was Smith's friend.

Investor learned of the above activities 36 months after the initial shareholders' meeting. He filed suit against the Directors and the President claiming that their actions were unlawful.

At a meeting of the Board with all Directors attending, Smith, Jones and Carr demanded indemnification. Brilliant and Green did not seek indemnification. Smith reported that he had received an opinion from a corporate lawyer that Ace was obligated to provide indemnification. Smith, Jones, Carr and Green voted in favor of the indemnification, and Brilliant voted against it. Smith declared the action was approved.

1. Will Investor prevail in the suit against the Directors and/or the President and, if so, describe the nature of the suit to be filed, the claims which he may assert, and the remedies available.

2. Will Investor prevail in his claims against all or any of the Directors for any or all of the actions taken by them? What defenses are available to the Directors?

3. Will Investor prevail in his claim against Smith as President and what remedies are available? What defenses does Smith have against the claims?

4. Is Ace required to expend funds to indemnify the Directors and/or the President?

State the reasons for each response. Explain your answers fully.

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

(a) Investor will partially prevail in his suit regarding the actions at Director Meeting One. The suit overall will be a derivative action in which Investor will assert the claims on behalf of the Corporation and bring the suit in the Corporation's name after either requesting that the directors bring the suit or determining that such a request would be futile. The Board of Directors may elect its own Chairman and the officers of the Corporation. Officers need not also be directors, but the Chairman must be a director, too. Therefore, election of Smith's wife as Chairman was improper because she was not a director, and a court will enjoin that action. Election of the others as officers (President, Treasurer, and Secretary) was proper because they are also directors.

(b) Investor will prevail in his suit against the directors regarding the actions at Director Meeting Two. This will also be a derivative suit. The Board has authority to repurchase shares generally and to determine the price for repurchase. However, a repurchase of shares is a distribution to shareholders, and distributions may not be made if the Corporation is insolvent, which it is here because it has a negative net worth and lacked sufficient funds without borrowing.

(c) Borrowing money is within the discretion of the Board of Directors even if a security interest is granted that encumbers assets of the Corporation. Therefore, the Board's approval of the President's actions would have been proper had the money not been used to make an improper distribution via the purchase.

Brilliant is protected from liability because he was entitled to rely on the advice he received from the lawyer.

Green is not protected merely by abstaining. Had he dissented and stated his reason as his belief that the actions were improper, he would have been protected.

Smith is liable because he did not have authority to borrow.

The indemnification clause is too broad in that it indemnifies directors and officers in all circumstances. Where there has been wrongdoing, indemnification may not be proper under Ohio law.

Because Investor will prevail against Smith, who will not be able to be indemnified because of his wrongdoing, the Corporation will recover from Smith the amount paid out in the improper distribution and any damages resulting from the related load.

However, the thirty-six (36) months that elapsed will have to be checked against the appropriate statute of limitations. Investor will not prevail in any action initiated after the statute has run unless the defendants fail to assert this defense.

QUESTION 9

On February 1, Tenant leased an apartment in Anytown, Ohio, from Landlord for a term of six months at $600 per month. The written lease agreement required Landlord to provide and pay for all utilities and prohibited pets in the apartment. Tenant paid the first month's rent and a security deposit of $1,200. Soon after he moved in, he acquired a puppy and, over time, the puppy's paws scratched the hardwood floors.

On March 3, the apartment's electrical panel burned out and left Tenant without electric power. The furnace and all other appliances, except the gas cooking stove, operated on electricity. Tenant immediately informed Landlord by phone about the burned-out panel and expressed concern about not having heat in the cold weather and the risk that the food in the refrigerator would spoil. By March 5, the Landlord had done nothing, so Tenant hand-delivered a written notice to Landlord expressing the same concerns and requesting immediate repairs. By March 7, the water pipes had frozen and $200 worth of food in Tenant's refrigerator had spoiled.

On March 8, Tenant filed a complaint with the proper municipal housing code enforcement department. Within hours, a code officer came to the apartment and determined that the conditions constituted a health hazard for Tenant. On the same day, the code officer hand-delivered a citation to Landlord ordering him to replace the panel within twenty-four hours.

On March 9, without prior notice to Tenant, Landlord used his passkey to enter the apartment, where he found Tenant sitting on the couch with the puppy. When Tenant objected to the unannounced entry, Landlord said angrily, "I don't take kindly to people turning me in to code enforcement. I want you out of my apartment by tomorrow or I will evict you. Besides, what is that puppy doing here? Both of you get out of my apartment." Tenant stated he would not leave, whereupon Landlord stormed out. Before he left the building, he turned off the gas and screamed, "Both of you be out by tomorrow! Now you don't have gas or electricity."

Landlord never replaced the electrical panel or turned the gas back on. For the duration of his occupancy, Tenant used kerosene lamps for light and kerosene heaters for heat, at a cost of $300. Tenant cooked and bathed at friends' homes. Commencing with April's rent, Tenant timely deposited the next four months' rent ($2,400) with the Clerk of the appropriate municipal court.

When Tenant moved out of the apartment on July 31, the date the Lease expired, he left his forwarding address with Landlord and instructed Landlord to forward his security deposit to him. Except for the scratches on the hardwood floors, Tenant left the apartment in clean and excellent condition.

Tenant timely received a letter from Landlord declining to return his $1,200 security deposit. Also, Landlord sent Tenant an invoice itemizing deductions of $600 to repair the scratches on the hardwood floors and $600 to clean the apartment and charging $2,400 for the four months' rent.

Tenant did not dispute the $600 charged to repair the floors, but disputed the $600 cleaning charge and that he owed any rent whatsoever.

Landlord filed suit against Tenant seeking to recover $2,400 from the rent deposited with the Clerk. Tenant filed a counterclaim seeking a return of his security deposit, the rent money deposited with the Clerk, $300 for the cost of kerosene, and $200 for the spoiled food.

In analyzing the opposing claims, state:

1. What duties, if any, did Landlord owe to Tenant before entering the apartment on March 9?

2. What duties, if any, did Landlord owe Tenant to replace the electric panel and continue to provide gas to the apartment?

3. What is the likely outcome of Tenant's claims against Landlord for shutting off the gas and threatening to evict him, and why?

4. As between Tenant and Landlord, who has a right to the $2,400 in rent payments that Tenant deposited with the Clerk?

5. What is the likely outcome of Tenant's claim for the return of his security deposit and his claims for the cost of the kerosene and the spoiled food, and why?

Explain your answers fully.

1. A landlord is required to give a tenant at least twenty four hours notice prior to entry of an apartment unless there is an emergency requiring immediate entrance. Landlord should have given Tenant notice that he would be entering the apartment on March 9 after receiving the hand-delivered citation ordering replacement of the panel within twenty-four hours. Since the panel had to be replaced within twenty four hours, Landlord could not have given at least twenty-four hours notice, but he should have immediately notified Tenant that he would be coming into the apartment on March 9 to replace the panels.

2. Landlord had a duty to replace the electric panels and continue to provide gas to the apartment. In addition to the lease agreement which stated that Landlord would provide and pay for utilities, Landlord was obligated to provide electricity and gas to ensure that the apartment was suitable for residential living. There is an implied warranty of habitability in all residential leases. An apartment without electricity or gas – especially during the cold winter – is not suitable for residential living. Tenant cannot live without electricity to store food or see or gas to stay warm and keep pipes from freezing. Landlord breached this warranty by not taking steps to replace the electrical panel and by not keeping the gas on.

3. Tenant will be successful in a claim against Landlord for shutting off the gas and threatening to evict him. Landlords are not allowed to take retaliatory actions for a Tenant's complaint. Landlord cannot retaliate for Tenant's proper notification of the proper municipal housing code enforcement department. Thus, turning off the gas and threatening eviction was an illegal act by Landlord.

4. Technically, Landlord has a right to the $2,400 in rent payments because Tenant continued to occupy the apartment and therefore failed to take actions towards a constructive eviction. However, it would be entirely unjust to require Tenant to pay the full value of rent when he occupied a premise with a significantly diminished rental value because of a lack of electricity and gas. Tennant should retain a large chunk of that rent out of pure fairness.

5. Tenant will prevail on his suit seeking return of his security deposit (less $600 to repair scratches on the hardwood floors) as well as the $300 for kerosene and $200 for the cost of food. Tenant failed to take proper steps to constitute a constructive eviction, he will not get the remaining $2,400 for the four month's rent. If an apartment is not habitable for residential purposes a tenant has a constructive eviction action and should place the rent money in escrow and vacate the premises in a timely manner. Here, Tenant did timely place his rent with the Clerk of the appropriate municipal court, but he failed to vacate the premises. Tenant continued to live in the apartment for the duration of the lease. Thus, Tenant's actions did not follow the proper steps for constructive eviction. However Tenant should not be responsible for additional costs incurred for kerosene or spoiled food resulting from Landlord's inaction to make the residence habitable. Furthermore, Landlord cannot take $600 out of Tenant's security deposit for cleaning when Tenant left the apartment in a clean and excellent condition. Landlords are responsible for routine repair of ordinary wear and tear between tenants. The security deposit is only meant for cleaning or fixing the apartment if damage is beyond ordinary wear and tear. Here the scratches on the floor from the puppy (which was a breach of a term in the lease) are beyond wear and tear but the remainder of the apartment is clean and no funds from the security deposit should be used for cleaning.

QUESTION 10

In January 2011, Fred, a resident of Central County, Ohio, purchased a new car from a retail car lot located in Northern County, Ohio. The car was manufactured by Car Company, a Michigan corporation with its principal place of business in Michigan. However, Car Company operates several retail locations outside of Michigan, including the car lot in Ohio located in Northern County, where Fred bought the car. The car was equipped with state-of-the-art air bags that were designed and manufactured by Part Supply Company, a company based in Europe. Part Supply Company ships the parts to Car Company, its only U.S. customer, and the air bags are installed at Car Company's manufacturing facility in Michigan.

In February 2011, Fred was driving his new car when he was involved in an automobile collision with a car driven by Ethel. The accident occurred in Southern County, Ohio, where Ethel resides. In the accident, Fred's air bags failed to deploy, and Fred sustained personal injuries when his head hit the windshield.

In July 2011, Fred filed three lawsuits in the Common Pleas Court of Central County, Ohio. In the first suit, Fred sued Ethel for the negligent operation of her vehicle. Fred's second lawsuit alleged a product liability claim against Car Company. Fred's third lawsuit, against Part Supply Company, alleged that the air bags failed to comply with the requirements of a recently enacted federal statute governing the minimum safety specifications for automobile air bags.

Summonses and complaints in the actions were served on the respective defendants as follows:

1) On Ethel, by service on her part-time babysitter, a high school student who resided next door;

2) On Car Company, by service on a duly authorized corporate representative at Car Company's principal place of business. Service was actually made by a college student employed at Fred's counsel's law firm, who happened to be going home to Michigan for the weekend and offered, on the spur of the moment, to deliver the summons and complaint; and

3) On Part Supply Company, by International Mail Delivery Service, an international courier service. Receipt of the summons and complaint was signed for by a company official at Part Supply Company's European headquarters.

The returns of service were all properly filed with the Court.

In each lawsuit, on what grounds, if any, might the defendants challenge the court's jurisdiction, service of process, and/or venue? Explain your answers fully.

1. Fred v. Ethel: Ethel may challenge service of process and venue. Standard service of process in Ohio is certified mail. Process may be served other ways, for example it can be served on the person. When service is done on the person, it must be hand delivered to the person, or it must be left at the person's residence with someone who is of competent age and who lives there. Here service was served on Ethel's next door part-time baby sitter and thus it was improper.

Ethel may also challenge venue. In Ohio, venue is proper where the defendant resides, where the defendant has a principal place of business or where the action occurred. Only if none of these are in Ohio is venue proper where plaintiff resides. Here Ethel resides in Southern County Ohio, where the accident occurred, thus venue is proper there. Ethel cannot challenge jurisdiction because she is domiciled in the state.

2. Fred v. Car Company: Car Company can challenge service of process and venue. Service of process may be made on a company to a registered agent or representative at the principal place of business, but service must be made by an individual 18 or older who is not a party. Here, service was made at the business, but made by Fred who worked at the law firm, thus it was improper.

Venue was improper because the defendant has a business in Northern County Ohio and the accident occurred in Southern County Ohio. Thus the suit should have been brought in Northern or Southern, not Central.

Car Company cannot challenge jurisdiction. It has sufficient minimum contacts because it has a car lot in Ohio. Thus, it has purposefully availed itself of the laws and benefits of Ohio.

3. Fred v. Part Supply Co.: Part Supply Co. can challenge jurisdiction. In order for an Ohio court to have personal jurisdiction over an individual certain things must be satisfied. Ohio courts have personal jurisdiction over residents who are domiciled in Ohio (present with an intent to remain), who were present and served, who have consented, and companies incorporated in Ohio. If none of these fit, Ohio courts can still gain personal jurisdiction over out of state defendants if they fall within the Long Arm Statute. The Long Arm Statute provides jurisdiction over a party who performs an activity outside Ohio but causes a tortuous injury in Ohio, as well as other situations. If the Long Arm Statute applies, the court must then decide if the defendant has sufficient contacts with the state where personal jurisdiction will not offend traditional notions of fair play and substantial justice. The U.S. Supreme Court is split over whether placing an item in the stream of commerce, without more, is enough to avail a party jurisdiction. The prevailing view seems to be that you need only place the item in the stream of commerce.

Here Part Supply Co. is not domiciled in Ohio. It is domiciled in Europe and it has not consented. It fits within the Long Arm Statute because Part Supply Co. made an airbag that caused an injury in Ohio. Part Supply Co. may argue that simply placing the product in the stream of commerce is not enough and that it has not purposefully availed itself of the benefits of Ohio.

Part Supply Co. has no claim for improper venue because if defendant is out of state the plaintiff's residence is proper. Also service was proper because international service must be done according to agreement or, if no agreement exists, in a reasonable manner. Here it was served on a company official in Europe by international mail delivery service. Thus, Parts Supply Co. may have a defense of lack of personal jurisdiction.

QUESTION 11

Husband resides with his wife (Wife) in Anytown, Ohio, in one unit of a duplex apartment building they own together. They rented the other half of their building to Boxer, a professional boxer. The two units in Husband's duplex are on opposite ends of the building and share a common gathering area in the center of the structure.

Boxer began to bring drunken friends home after the taverns in the neighborhood closed and used the gathering area of the duplex to continue drinking with his friends. After a few weeks of this practice, Wife asked Boxer not to come home drunk and not to bring his drunken friends home with him anymore.

Boxer brought his drunken friends home with him the following Friday night, but had them wait outside while he went to speak to Husband. Boxer awoke Husband and asked him if Boxer could host his friends in the gathering area of the duplex, but Husband refused. Angered by Husband's refusal, Boxer threatened to knock Husband and Wife out, which prompted Husband to run for his gun, and Boxer to pursue him. Boxer tackled Husband in the bedroom and continued to threaten Husband while the two men were engaged in a physical struggle.

During the struggle, Husband managed to grab his revolver from the nightstand next to his bed. Husband fired what he intended to be a warning shot into the air, away from Boxer. Somehow, that shot actually struck Boxer in the head and caused Boxer's death. Wife was the only witness to the events that occurred inside the house, inasmuch as Boxer's friends remained outside until they heard the gunshot. They immediately entered the duplex and observed Boxer lying dead on the floor of Husband's bedroom. Wife looked at Boxer's friends and exclaimed, "It was an accident!"

Husband was arrested and charged with the murder of Boxer. At trial, the prosecutor established that Boxer's death was caused by a single gunshot wound to the head and that the weapon used to inflict the wound was Husband's revolver. Over Husband's objection, the state called Wife as a witness, and the court allowed her to testify that Husband had shot Boxer. On cross-examination by Husband's lawyer, Wife testified that, "it was an accident!"

In the presentation of the defense, Husband described the events that occurred in his apartment and testified that the shooting of Boxer was accidental, but that the act was done in self-defense. At the end of the testimony, Husband requested that the jury be instructed on the defenses of both accident and self-defense.

1. Was the court correct to allow Wife to testify for the prosecution over Husband's objection?

2. What are the elements necessary to establish the defenses of self-defense and accident, and would it be proper for the court in this case to instruct the jury on both defenses?

Explain your answers fully.

1) The court was correct in allowing Wife to prosecute over Husband's objections. There are two types of marital confidences recognized by courts: spousal privilege and confidential marriage communications made during marriage in reliance on the sanctity of the marriage. These facts are not a confidential marriage communication, since any communication between the two was made in the presence of others (Boxer/his friends). If it was confidential marriage communication, then Husband could assert the privilege and prevent wife from testifying. However, otherwise, the testifying spouse holds the spousal privilege, and while the court cannot force one spouse to testify against their spouse against their will, a spouse can waive this privilege and agree to testify. This is what wife is doing under these facts, so it is allowed.

2) To establish self-defense, it first depends on whether the person was in their home or not. Ohio takes the minority view that victims first have the duty to retreat if it can be done safely before using deadly force. However, this is not the rule for an attack in one's home; there is no duty to retreat within the home. This brawl took place in the bedroom of Husband's home. It does not matter that it is a duplex. Next, self-defense can be used when the victim reasonably believes that they are in imminent danger of bodily harm. However, they cannot use deadly force to escalate the situation and must only use force that is proportional to the imminent harm. Under these facts, Husband and Wife (under the law self-defense transfers and Husband can use self-defense on behalf of Wife if she in danger of imminent harm, essentially putting himself in Wife's shoes) were threatened to be "knocked out"; Husband was tackled, involved in a struggle, and continued to receive threats of harm. The standard of proof for bringing forth a defense in Ohio is propensity of the evidence. There seems to be enough evidence here to suggest that Husband was justified in use of even deadly self-defense, since as a professional boxer Boxer is very strong and capable of fighting, would not stop physically harming Husband in his own home, and Husband could have reasonably believed that Boxer could kill him with just one blow. Thus, it is proper for Judge to instruct the jury on self-defense, since the preponderance of the evidence standard can reasonably be found to have been met by the jury if they return the verdict based on self-defense. Such a verdict may not pass a beyond a reasonable doubt standard, but that is not the proper standard for defenses.

Instructions for both defenses can be given. An accident means that the act either lacked the proper mens rea to be intentional murder or that the act was not done criminally negligently or recklessly or with a reckless abandon toward the value of human life (depraved heart murder). These facts can be construed that Boxer grabbed the revolver in order to defend himself from a violent attack or to merely intimidate the attacker to get him to cease, but that the gun went off either faultily or in the struggle as an "accident." After receiving the instructions for accident, it is then up to the jury to determine if these facts fulfill the preponderance of the evidence standard to find for accident. However, the jury must be instructed that they can find for either defense, but not both. Either the gun was shot off intentionally, which would qualify as self defense, or it went off due to no actus or mens rea of Husband, which would be an accident. The two cannot co-exist. The grey area in between is that the gun was shot off not in self-defense, but either 1) criminally negligently or recklessly or 2) with no regard to risk of injury to Boxer or Wife, which could possibly satisfy the requirements for either 1) involuntary manslaughter or 2) depraved heart murder.

QUESTION 12

Ted, a widower, lived in Franklin, Ohio. He had two adult children, a son, Ben, and a daughter, Diane. Ted also had one granddaughter, Gina, who was Diane's only child. In 2005, Ted drafted an instrument that provided as follows:

I, Ted, hereby create this Last Will and Testament. I give one-half of my property to my son, Ben, if he survives me. I give the other one-half of my property to my daughter, Diane, if she survives me. If either or both of my children do not survive me, then I give their share of my property to the Holistic Church. I appoint my son, Ben, as executor.

Ted signed and dated the instrument on July 15, 2005 (2005 Instrument). No one witnessed Ted sign the 2005 Instrument. Ted placed the 2005 Instrument in the top drawer of his desk at his home.

In late 2011, Ted's son, Ben, had been called for National Guard service and was stationed in Afghanistan. Because Ben was out of the country, Ted decided to prepare a new will. Ted created a new instrument that provided as follows:

Since my son, Ben, is now living outside of the country, I name my daughter, Diane, as executor. In regard to the disposition of my property, I incorporate the provisions of my prior Will dated July 15, 2005, which Will is located in the top drawer of my desk.

This time, Ted signed and acknowledged the instrument on December 15, 2011 (2011 Instrument) in the presence of two neighbors, both of whom were over the age of 18. Both witnesses signed below Ted's signature.

Ted was admitted into the hospital in February 2012 for a surgical procedure. Complications arose, and, due to surgical complications, Ted lost his sight, but was otherwise fully competent.

While Ted was hospitalized, his daughter, Diane, passed away unexpectedly. Ted was subsequently released to his home, and a niece, Nellie, agreed to provide care for Ted. After realizing that Ted had significant assets, Nellie devised a plan in which she would tell Ted that she needed to have him sign a health care power of attorney. Instead of preparing a health care power of attorney for Ted, Nellie created an instrument (2012 Instrument) that provided as follows:

I, Ted, revoke all prior Wills that I may have executed. I give all of my property to my niece, Nellie.

Nellie contacted the same two neighbors who had witnessed Ted's 2011 Instrument and asked them to come to Ted's house. Nellie did not let either witness read the document. In the presence of the witnesses, Nellie told Ted that he was executing a health care power of attorney. Not realizing what he was signing, Ted acknowledged and signed the 2012 Instrument in the presence of the two neighbors. Both neighbors then signed as witnesses.

Approximately one month later, Ted passed away. Upon Ben's return from Afghanistan, Ben located the 2005 Instrument and the 2011 Instrument in the top drawer of Ted's desk. Nellie had already filed the 2012 Instrument with the Probate Court. Ben timely filed a Will Contest Action challenging the validity of the 2012 Instrument and submitted both the 2005 and 2011 Instruments to the Probate Court. The two witnesses to the 2012 Instrument both testified that when Ted signed the 2012 Instrument, Ted had been told by Nellie that he was simply executing a health care power of attorney. Nellie was subpoenaed to the hearing; however, she failed to appear.

Ted is survived by Ben, his granddaughter Gina, and Nellie. The Holistic Church is also still in existence.

1. Is each of the three Instruments effective as a valid will?

2. What share of Ted's property, if any, do Ben, Gina, Nellie, and Holistic Church each have a right to receive?

Explain your answers fully.

The 2005 Instrument is not valid. The will was executed without the required will execution formalities. In order to create a valid will in Ohio, the testator must be (1) at least 18, (2) of sound mind (testamentary capacity), (3) not under restraint (undue influence), (4) the will must be signed at the bottom by the testator, and (4) witnessed by at least two competent witnesses. Here, all of the above execution requirements appear to have been satisfied with respect to the 2005 Instrument except the attestation requirement. Ohio does not recognize holographic (unattested) wills. Because no one witnessed Ted's 2005 Instrument, it is invalid.

The 2011 Instrument is valid. The instruction complies with all of the above-mentioned execution formalities. The will was signed and acknowledged by Ted, and was attested to and witnessed by two competent witnesses. Thus, the 2011 Instrument is valid.

It should be noted that the 2005 Instrument, although invalid standing on its own, is incorporated by reference into the 2011 Instrument. A document can be incorporated by reference into a valid will if: (1) a separate writing is in existence at the time the will is executed; (2) the will refers to that writing as being in existence; (3) the will expresses an intent to incorporate the document into the will; (4) the will describes the document with sufficient accuracy; (5) the document conforms to that description. Here, Ted's 2011 Instrument refers to the prior document (the invalid 2005 Instrument), that document was already in existence when Ted executed the 2011 Instrument, the 2011 Instrument expresses an intent to incorporate the document, the 2011 Instrument describes the document with sufficient accuracy (located in the top drawer of Ted's desk), and the document conforms to that description. Therefore, the 2005 Instrument is incorporated into the 2011 Instrument even though the 2005 instrument is invalid on its own.

The 2012 Instrument is not valid as being the product of fraud. Fraud is mental coercion that overcomes the will of the testator plus willful deceit. The test for finding fraud is whether the testator would have executed, not executed, or revoked a will in the absence of the intentional misrepresentation. If a will or portions thereof are the product of fraud, the will or those portions are invalid. Here, Nellie's actions were fraudulent because they were the product of willful deceit. She intentionally misrepresented the contents of the 2012 Instrument to Ted. Nellie misled Ted to believe that he was signing a health care power of attorney, when in actuality he was signing a will giving all of Ted's property to Nellie. Without Nellie's intentional misrepresentation, Ted would not have signed the health care power of attorney. The 2012 will is invalid as the product of fraud on the part of Nellie.

Shares of Property

The 2011 Instrument (which incorporates the 2005 Instrument) controls the disposition of Ted's property. The two instruments will be construed as consistent with each other to the extent possible. Thus, because the 2011 Instrument is newer in time, Diane, rather than Ben, is the executor of Ted's estate. However, because Diane is now deceased, the court may choose to appoint Ben or some other suitable person as executor. Ben receives one-half of Ted's estate as per the incorporated 2005 Instrument. Diane does not receive anything because she predeceased Ted. If a will provides for the contingency that a beneficiary may predecease the testator, that provision in the will, not the anti-lapse statute, controls. Thus, because Diane predeceased Ted, her one-half share will pass to the Holistic Church as per the incorporated 2005 Instrument. Diane's share will not pass to Gina because the anti-lapse statute does not save the gift for her. Nellie receives nothing.

MPT 1

State of Franklin v. Soper

In this performance test, examinees are law clerks for the trial court judge assigned to the homicide prosecution of Daniel Soper, who is charged in the shooting death of Vincent Pike. The defense has filed a motion to exclude, on state law hearsay and federal constitutional grounds, statements made by Pike after the shooting during a 911 call and later at the hospital shortly before he died. Examinees' task is to draft a bench memorandum that will help prepare the judge for the evidentiary hearing. The File contains the judge's instructional memo, a "format memo," the defendant's Motion to Exclude Evidence, the 911 call transcript, and the police report. The Library contains excerpts from the Franklin Rules of Evidence (identical to the restyled Federal Rules of Evidence), a state case discussing the applicable hearsay exceptions, and a heavily edited version of Michigan v. Bryant (U.S. 2011) setting forth the test for determining whether statements are "testimonial" for purposes of the Confrontation Clause.

A

State of Franklin
District Court of Palomas County

MEMORANDUM

From: Examinee
To: Judge Leonard Sand
Re: State of Franklin v. Soper, Bench Memorandum on Defendant's Pretrial Motion to Exclude Evidence
Date: July 24, 2012

I. Statement of Issues

A. Whether Pike's statements during a 911 telephone call are admissible under the excited utterance or dying declaration exception to the rule against hearsay.

B. Whether Pike's statements in response to questioning by Officer Holden are admissible under the excited utterance or dying declaration exception to the rule against hearsay.

C. Whether Pike's statements during a 911 telephone call are testimonial in violation of the Confrontation Clause.

D. Whether Pike's statements in response to questioning by Officer Holden are testimonial in violation of the Confrontation Clause.

II. Analysis

A. Evidentiary Issues - Hearsay

Hearsay is a statement that the declarant does not make while testifying at the current trial or hearing, and a party offers in evidence to prove the truth of the matter asserted in the statement. FRE 801(c). Hearsay is not admissible unless provided otherwise in a Franklin statute, these rules, or other rules prescribed the Supreme Court. FRE 802. Two of these exceptions include the excited utterance exception, and the dying declaration exception.

For a statement to qualify as an excited utterance under Rule 803(2) of the Franklin Rules of Evidence (FRE), the statement must relate to a startling event or condition and the person making the statement (declarant) must be under the stress of the excitement caused by the event or condition. Friedman. While the statement need not occur at the same time as the event to which it relates, it must be made while the declarant still feels the stress of the startling event and has had no time for reflection. Cabras. Whether a declarant speaks under the stress of the startling event also depends on the declarant's physical and mental condition, his observable distress, the character of the event, and the subject of the statements. Friedman. The stress and lack of time to reflect assures the reliability of such statements because there is no time to contrive or misrepresent facts. Friedman.

Under FRE 804(b)(2), there is a dying declaration exception to the rule against hearsay if: (1) the declarant is dead by the time of trial, (2) the statement is offered in a homicide prosecution or civil case, (3) the statement concerns the causes or circumstances of the declarant's death, and (4) the declarant made the statement while believing that death was imminent. Friedman. Belief of imminent death may be proven by the declarant's express language, the severity of his wounds, his conduct, or by any other circumstance which might shed light on the state of the declarant's mind. Friedman. The policy behind this rule is that a person who knows that death is imminent will be truthful because the cost of dying with a lie on one's lips is too great to risk. Donn. In addition, the imminence of death encourages the truth as strongly as any oath. Leon.

1. 911 Call Transcript

Pike's statements during the 911 call are being admitted to prove the truth of the matter asserted therein identifying the defendant as the shooter and the vehicle he drove. However, the statement qualifies as an excited utterance. The startling event in this case involves a shooting. Pike was shot in the torso and was bleeding profusely. He was also speaking while under the stress of the event because he stated that he didn't feel so good. At times, he had difficulty responding to the operator's questions. He also had been unable to move from his vehicle and was still in his vehicle where he was shot when his neighbor Snow found him. This evidence suffices to establish that Pike spoke while under the stress of a startling condition.

Pike's statements are unlikely to qualify under the dying declaration exception however. While he is unavailable for trial because he is dead, and the statement is being offered in a homicide prosecution by the state, and the statement concerns the causes or circumstances of his death because he is referring to the person who shot him and he died of that wound, the last factor is lacking. Here, there is no indication that Pike spoke while believing that death was imminent. He never referred to the fact that he thought he was dying. Instead, he simply stated that he didn't feel so good. None of the people around him also gave him the belief that he was going to died. In fact, his neighbor Snow continuously reassured Pike that he was going to be OK and help was coming. The Operator also reassured him that help was on the way. Thus, his statements would not qualify under the dying declaration exception.

2. Police Report

Pike's statements in the police report are being admitted to prove the truth of the matter asserted therein by identifying the shooter as Dan, his girlfriend's ex. The statement does not qualify as an excited utterance. The startling event that occurred was the shooting around 6:00pm. However, Pike was no longer making his statements while under the stress of the excitement. He was transported from his vehicle to a hospital and asked questions approximately two and a half hours later. While his physical condition was not good, he had regained consciousness, and he did not exhibit signs of being agitated or distressed. Thus, this would not qualify as an excited utterance exception.

However, this statement is admissible under the dying declaration exception. Pike was dead by the time of trial and in fact died at 8:45pm in the hospital. The statement is being offered in a homicide prosecution by the state. The statement concerns the causes or circumstances of Pike's death because his died as a result of his gunshot wound and his statement concerned the shooter. In addition, Pike made the statement while believing that death was imminent because Officer Holden told him that he needed to hang in there and that he was fading fast, implying that he was dying and that he needed the information before he passed because no one else could supply the information. Thus, the statements are admissible under the dying declaration exception to the rule against hearsay.

B. Constitutional Issues - Confrontation Clause of the Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. Bryant. "Witnesses" include those who bear testimony, i.e., a solemn declaration or affirmation made for the purpose of establishing or proving some fact. Crawford. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. Davis. If a statement is testimonial, the Confrontation Clause requires that the declarant be unavailable, and that there had been a prior opportunity for cross-examination. Crawford. At a minimum, it includes prior testimony at a preliminary hearing, before a grand jury, at a former trial, and police interrogations. Crawford.

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. Davis. The existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on ending a threatening situation, rather than proving past events potentially relevant to later criminal prosecution. Davis. Whether an emergency exists and is ongoing is a highly context-dependent inquiry, which looks beyond whether the threat as to the first victim has been neutralized because the threat to the public may continue. Bryant. First, the duration and scope of an emergency may depend in part on the type of weapon employed. Bryant. Second, the medical condition of the victim sheds light on his ability to conform his responses to a testimonial statement, and the existence and magnitude of the threat to the public. Bryant. Third, the informality of the encounter between the victim and police suggests whether there is an emergency or lack thereof. Bryant. Lastly, the statements and actions of the declarant and interrogators provides objective evidence of the primary purpose of the interrogation by looking at the content of the questions and answers. Bryant.

However, there are certain exceptions permitting testimonial hearsay against an accused in criminal case that existed in 1791 (the year the Sixth Amendment was adopted), which may have survived adoption of the Sixth Amendment. Crawford. The dying declaration exception has been considered one such exception according to the Supreme Court, and according to the states of Columbia and Olympia. Crawford; Karoff; Wirth. However, these sources are not binding authorities because the Supreme Court stated this in dicta, and the states of Columbia and Olympia are simply persuasive authorities.

1. 911 Call Transcript

Pike is a witness because he bears testimony for the purpose of establishing or proving that Soper was the shooter and defendant in this case. The 911 statements are nontestimonial, however, because they were made with the primary purpose to enable police assistance to meet an ongoing emergency. First, while Pike had already been shot and the threat as to him arguably neutralized, Soper was still on the loose with a gun and potentially going after his ex-girlfriend next, which meant that the threat to the public was still ongoing. Second, Pike was speaking while he was bleeding out in his car, with little chance to formulate a thought as to whether he was speaking for the purpose of trial. His inability to speak at times also suggests that his mental processes were not at full performance and it was unlikely that he could do more than simply respond to the questions posed. Third, the encounter was informal. Pike was not speaking after Soper had been caught in a formal setting with Pike responding calmly to questions by the operator. Instead, he was speaking about his wounds and the identity of the shooter so that the operator could gather information in order to stop his shooter on the loose. Last, the questions were not posed in a way to suggest that they would be used for trial. The operator

was simply asking generally what had happened, and who shot him. When the operator learned that the shooter was still at large, then the operator began gathering more information about the shooter's identity. Because the statements were non-testimonial, there is no Confrontation Clause issue.

2. Police Report

The statements contained in the police report are testimonial because there is no ongoing emergency and the primary purpose of the interrogation is to prove past events potentially relevant for trial. Here, the primary focus was to prove past events, rather than end a threatening situation. The police had already gained the shooter's identity and vehicle description earlier. Here, Pike was stabilized in the hospital bed. The encounter was much more formal because Pike was no longer at the scene of the crime, but in the hospital, and was admitted upon the doctor's allowance. In addition, Officer Holden characterized his question to suggest that the response he was eliciting was for trial by stating "you need to help us. We need to put this guy away." There, Officer Holden was specifically referring to the fact that there would be a criminal prosecution and that he needed Pike's information so that it could be used against the defendant at trial. Thus, the statement was testimonial.

However, when the Sixth Amendment was adopted in 1791, the dying declaration already existed and the Supreme Court has stated in dicta and neighboring states have held that a statement will not be barred by the Confrontation Clause if it is admissible as a dying declaration. While there is no binding legal authority on point, the modern trend of sister states and higher authorities suggest that this will soon become binding legal authority. Thus, the statements will likely not violate the Confrontation Clause.

III. Recommendations

A. Pike's statements during the 911 call are admissible under the excited utterance exception to the rule against hearsay.

B. Pike's statements in response to Officer's Holden's questions are admissible under the dying declaration exception to the rule against hearsay.

C. Pike's statements during the 911 call are non-testimonial, and do not violate the Confrontation Clause.

D. Pike's statements in response to Officer's Holden's questions are testimonial, but do not violate the Confrontation Clause because they are admissible as a dying declaration.

MPT 2

Ashton v. Indigo Construction Co.

Examinees' law firm represents Margaret Ashton, a homeowner, in her dispute with Indigo Construction Co. A few months ago, Indigo bought a vacant lot behind Ashton's home and began storing dirt on the lot to use later in its construction and landscaping business. Although Indigo's use of the vacant lot is in compliance with the relevant zoning ordinances, its activities have negatively affected Mrs. Ashton—she is disturbed by noise from the trucks going to and from the vacant lot, and the huge dirt pile has caused substantial amounts of dust and mud to accumulate in her yard. Examinees are asked to draft the argument section of the brief in support of a preliminary injunction against Indigo. The File contains a memorandum from a firm partner asking the examinee to prepare the legal argument, a "format memo" that lays out the format for persuasive writing of trial briefs, two affidavits (from Margaret Ashton and from a firm investigator), and an article about the dirt pile from a local newspaper. The Library contains two cases from the Franklin Supreme Court: Parker v. Blue Ridge Farms, Inc. (dealing with the elements of the common law action of private nuisance) and Timo Corp. v. Josie's Disco Inc. (dealing with the standards for granting injunctive relief for a private nuisance).

I. Argument

A. Legal Standard

When requesting injunctive relief from the court, a plaintiff must show the following: "(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) that the balance of equities tips in the plaintiff's favor." Timo Corp. v. Josie's Disco, Inc., Frankling Supreme Court, citing Otto Records Inc. v. Nelson (Fr. Sup. Ct. 1984). Plaintiff respectfully submits to the court that all three prongs of the Otto Records test can be adequately shown to the court and that therefore preliminary injunctive relief should be granted.

B. Plaintiff can establish a likelihood of success on the merits, as Defendant's continued dumping from 6 a.m. to 8 p.m. is the proximate cause of extreme noise, extensive blowing of dust, and extensive runoff of mud that unreasonably interferes with Plaintiff's use and enjoyment of her land.

To prevail on the first prong of the Otto Records test for preliminary injunctive relief, Plaintiff must satisfy the court that it can prevail on the merits of its private nuisance claim. To recover damages in a private nuisance cause of action, a plaintiff must prove: (1) the defendant's conduct was the proximate cause; (2) of an unreasonable interference with the plaintiff's use and enjoyment of her property; and (3) the interference was intentional or negligent. Parker v. Blue Ridge Farms, citing 4 Restatement (Second) of Torts Sec. 822. Here, Plaintiff can show that Defendant's constant use of its trucks results in unreasonably loud, insistent noises, and that the 20-foot-high pile of dirt that Defendant has created behind Plaintiff's house has caused an increase in dust and particles being blown onto her property, in addition to a mud runoff when it rains. Aff. Margaret J. Ashton at 6, 7, 9-11. This is no doubt a substantial interference with the use and enjoyment of Plaintiff's land, as she is no longer able to garden, read outside, or entertain guests. Id. at 7. Moreover, Plaintiff has had to spend additional sums of money to clean the outside of her house due to the dirt and mud runoff. Id. at 10.

As for establishing intentional or negligent conduct, even if Plaintiff cannot establish that Defendants intended to cause discomfort for, or interference with, Plaintiff, she can nonetheless show that Defendant was aware of said discomfort and interference, but nonetheless continued its actions. Plaintiff has contacted Defendant specifically and requested that it stop its activities, but it nonetheless continues. Id. at 13. Where a plaintiff cannot show a defendant's specific intent to cause discomfort or interference, but nonetheless shows that a defendant was aware that his conduct was the cause of said discomfort, the requisite mental state can be inferred, and the third prong of the private nuisance test can therefore be satisfied. See Timo Corp.

Therefore, in order to satisfy all of the elements in the three-pronged private nuisance test, the most difficult element for Plaintiff to establish will be the unreasonableness of the interference. However, the Franklin Supreme Court in Parker issued an opinion that contains a critical distinction between the unreasonableness of the interference and the reasonableness of the defendant's conduct. Simply put, "A defendant's use of his property may be reasonable, legal, and even desirable. But it may still constitute a common-law private nuisance because it unreasonably interferes with the use of property by another person." Parker. Therefore, even if Defendant were to argue to the court that its conduct was entirely reasonable, or even desirable, this would be inconsequential to the court's initial, threshold analysis of whether Plaintiff would likely ultimately succeed on the merits of her private nuisance claim. The crux of a private nuisance claim is the reasonableness of the interference, not the use that is causing that interference.

In looking at the reasonableness of interference, the fact finder can consider a wide spectrum of things, such as the nature of the use and enjoyment invaded; the nature, extent, and duration of the interference; or whether the defendant is taking all feasible precautions to avoid unnecessary interference. See Parker. Plaintiff will be able to show the court that she has essentially lost all use and enjoyment of the outside of her property from 6 a.m. until 8 p.m. See Aff. Margaret J. Ashton. She is no longer able to read outside, garden outside, or entertain guests outside. Id. at 7. Moreover, the value of her property has diminished and she has been forced to have her home's exterior cleaned more often, resulting in economic damages as well. Id. at 10, 12. As for Defendant's use of all feasible precautions, Plaintiff can show that Defendant has chosen to do all of this work right next to a residential area despite owning an undeveloped 50-acre tract just outside the city limits. Aff. William Porter at 3(d). This shows that Defendant has clearly not taken all feasible precautions to mitigate the damages it has brought on Plaintiff and her surrounding neighbors; Defendant could simply move its work elsewhere in order to avoid the harm caused altogether.

When the court considers the totality of the circumstances, it will be able to come to one logical conclusion: Plaintiff can clearly establish a likelihood of success on the merits for the private nuisance claim. Defendant's conduct is no doubt the proximate cause of an interference with Plaintiff's use and enjoyment of her property, and its awareness of Plaintiff's complaints provides it with the requisite mental state. The fact finder will also likely find that said interference is unreasonable, as Defendant has certainly not taken all feasible precautions to mitigate or avoid the harm, and Plaintiff has been stripped of all use and enjoyment of the outside portion of her property.

C. Plaintiff can establish an irreparable injury if provisional relief is withheld, as the daily dumping of dirt continues to prevent her from the use and enjoyment of her property, continues to decrease the value of her property, and continues to afford her additional economic hardship.

In order to prevail on her preliminary injunction request, once Plaintiff has established her likelihood of success on the merits, she must then persuade the court that an irreparable injury will result if provisional relief is withheld. In Timo, the plaintiff was found to have established an irreparable injury where it was shown that nightly intrusions of noise from a neighboring bar created a harm "for which the law provides no adequate remedy." There, the plaintiff was an apartment complex owner who put on evidence that loud, pounding noise would come from the bar until 3 a.m., and that said noise degraded his tenants' quality of life and diminished the value of his complex. The Franklin Supreme Court found this evidence sufficient enough to hold that said conduct would result in a continuing, irreparable injury should provisional relief be withheld.

The factual situation in Timo is no doubt highly analagous to the facts sub judice. Here, if a preliminary injunction is withheld, Plaintiff will continue to suffer the daily intrusions of highly offensive noise from 6 a.m. until 8 p.m. Moreover, she will be forced into more economic hardship by continuing to pay for the cleaning of the outside of her house due to the increase in dust from the dirt pile, and the value of her property will no doubt stay in a diminished state as well. Because the Court in Timo found the excessive noise and diminution in value enough to constitute an irreparable injury, so to should this court find the same.

D. Plaintiff can establish that, in balancing the equities, the Court should rule in its favor, as Defendant's choice of this lot for its business endeavors over its undeveloped lot is highly unreasonable, and the social value of maintaining the integrity of both Plaintiff's home and the neighborhood she lives in greatly outweigh the benefits of Defendant's conduct.

Finally, a plaintiff in a preliminary injunction action must persuade the court that the balance of equities tips in her favor. Otto Records. This is admittedly a significant hurdle for a plaintiff to overcome, particularly if the defendant's actions are of an important social utility or value. Unlike the merits of a private nuisance, where the reasonableness of a defendant's activity causing the nuisance is not given any weight whatsoever in the court's determination, the exact opposite is true here: the court must weigh the social utility of the activity that the defendant is engaging in versus the interest or hardships of both the plaintiff specifically and the general public. See Timo Corp.

In Timo, the Franklin Supreme Court found that the trial court had not abused its discretion in denying the plaintiff's motion for a preliminary injunction after considering the "reasonableness of the defendant's use in light of all relevant factors." Timo. The trial court had rested its decision primarily on the fact that the City had never found the bar to be in violation of a noise ordinance, nor could it find any precedent for granting relief for the "entirely reasonable" conduct of operating a bar. Id. Finally, the trial court feared that, if said relief was granted, it would "upset the status quo and potentially hurt the bar's business." Id.

While Plaintiff is no doubt mindful of the legal framework laid down in Timo, it is respectfully submitted to the Court that the facts in Timo must be distinguished from those sub judice. The Court is given broad discretion in weighing the reasonableness of Defendant's use, including the following factors: (1) the respective hardships to each party from granting or denying the motion; (2) good faith or intentional misconduct of Defendant; (3) interest of the general public in continuing said activity; and (4) the degree to which Defendant's activity comports with applicable law. Id. The hardships that Plaintiff has suffered, is suffering, and will continue to suffer without this preliminary relief have been well established in this Memorandum. Essentially, she will continue to be denied all use and all enjoyment of her yard, garden, and outside living area that she has enjoyed for the past 32 years unless said injunction is granted. Moreover, the Court should look disfavorably on Defendant's decision to conduct this business on a lot that abuts a large, residential community, when it currently owns an undeveloped 50-acre tract of land just outside of Appling. Aff. William Porter. Should Defendant try to argue that it would be an undue hardship for Defendant to continue its business on this land, the Court should not be persuaded; not only is the land just outside city limits, but there are also paved roads that provide ingress and egress for all of Defendant's dumping needs. Id. at 3(d).

Plaintiff is no doubt mindful of the social benefits that Defendant's company provides. The Court in Timo found a legitimate business purpose for the continued operation of the bar, and noted that a preliminary injunction would go beyond an added cost of doing business, and would in fact stifle the legitimate business activity entirely. But it is at this very juncture that the facts before the Court today must be distinguished; a preliminary injunction will not stifle the business activities of Defendant whatsoever. Rather, Defendant will be compelled to continue its operations at the lot that it currently owns on the outskirts of town. While there may be some added costs of doing business by conducting this activity on the undeveloped tract Defendant owns, these costs must be considered de minimis compared to the peace, quiet, and enjoyment that will be restored to not only Plaintiff individually, but to her entire neighborhood as well.

IV. Conclusion

Plaintiff's request to the Court is simple: the only way to adequately ensure that her rights as a property owner are protected is to grant the motion for preliminary injunction. The test, provided in Timo, provides an excellent roadmap for the Court to follow, but the ultimate factual issue reached in Timo must be distinguished from what the Court should find here. Not only can Plaintiff show a likelihood of success on the merits of the private nuisance action along with an irreparable injury absent said provisional relief, but, when the equities are balanced, it is clear that they should tip in Plaintiff's favor.

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