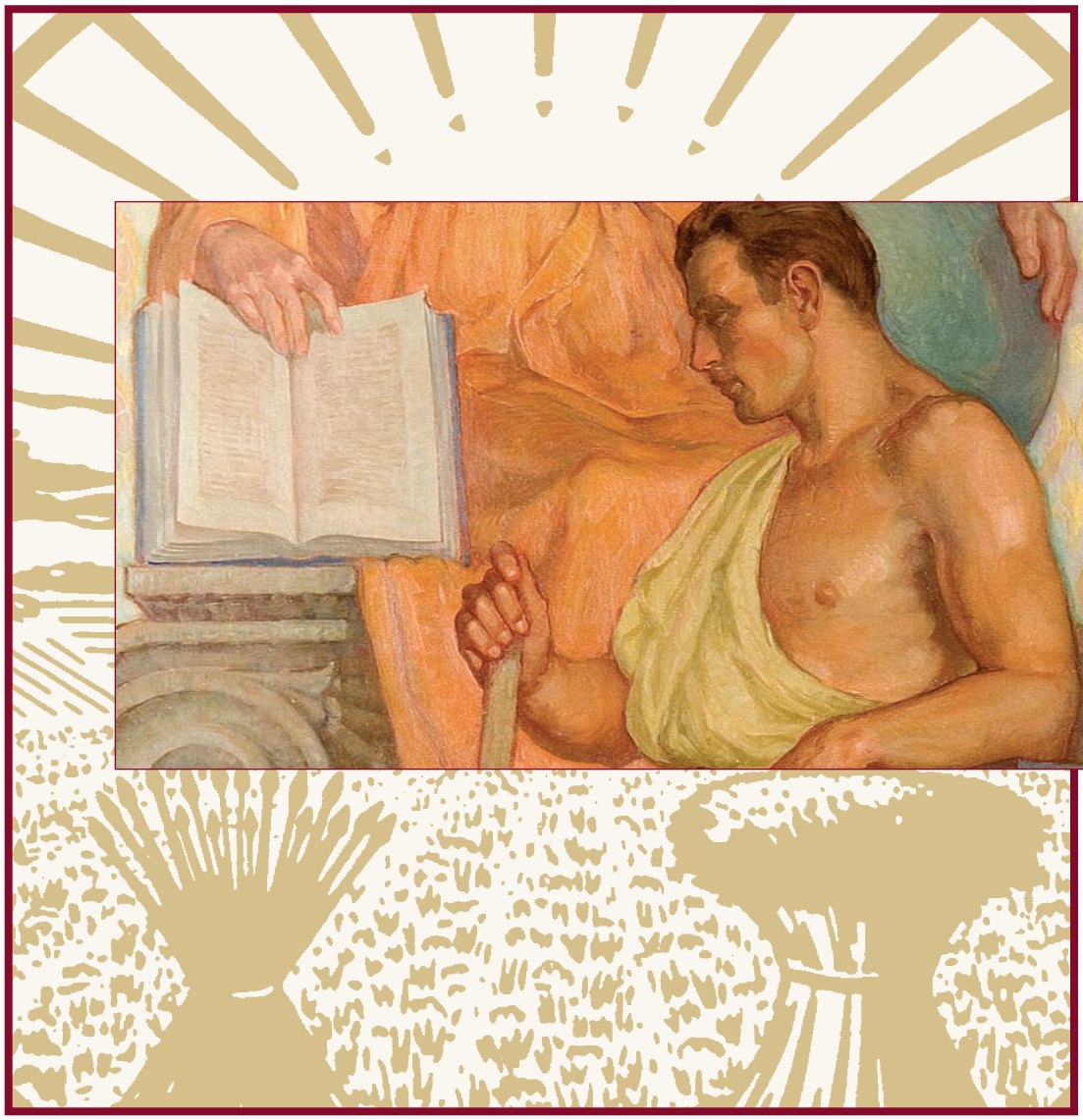
THE SUPREME COURT *of* OHIO

# July 2018 Ohio Bar Examination

## Essay Questions & Selected Answers

## Multistate Performance Test Summaries & Selected Answers



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Essay Questions & Selected Answers

Multistate Performance Test Summaries & Selected Answers



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# OHIO BAR EXAMINATION

**JULY 2018 OHIO BAR EXAMINATION**

Essay Questions and Selected Answers

MPT Summaries and Selected Answers

The July 2018 Ohio Bar Examination contained 12 essay questions, presented to the applicants in sets of two. Applicants were given one hour to answer both questions in a set. The length of each answer was restricted to the front and back of an answer sheet.

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

The following pages contain the essay questions given during the July 2018 exam, along with the NCBE's summaries of the two 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 have consented to the publication of their answers. See Gov.Bar R. I 5(C). The answers selected for publication have been transcribed as written by the applicants. To facilitate review of the answers, the bar examiners may have made minor changes in spelling, punctuation, and grammar to some answers.

Copies of the complete July 2018 MPTs and their corresponding point sheets are available from the NCBE. Check the NCBE's website at www.ncbex.org for information about ordering.

# QUESTION 1

Mother, a widowed mother of two children, was driving through an intersection in Anytown, Ohio, when Driver, the driver of another vehicle, ran a red light and struck Mother's vehicle. At the time of the collision, Driver was driving 30 miles per hour over the posted speed limit, was texting on his cell phone, and did not notice that the light was red as he drove through the intersection. Driver did not dispute that he was the sole cause of the collision.

Mother sustained serious physical injuries in the collision and her vehicle was considered a total loss. Mother was treated in the hospital for several weeks, during which time she incurred extensive medical bills and was in considerable pain. She succumbed to her injuries and died approximately one month after the collision.

At the time of the collision, Mother had been employed as a full-time nurse for 10 years and was providing financial support to her children, ages 19 and 20, both of whom are full-time college students. Mother was able to use sick days to cover the income that she would have lost while she was in the hospital. Mother also had medical insurance to cover many of her losses and had a $200,000 life insurance policy that named her children as beneficiaries.

The executor of Mother's estate has filed a negligence action and a wrongful death action against Driver in an Ohio court to recover for the injuries sustained by Mother and the children.

1. **What damages should be recoverable in the negligence action, what are the components of recovery that will be considered, and how should the damages be measured?**
2. **What damages should be recoverable in the wrongful death action, what are the components of recovery that will be considered, and how should the damages be measured?**

Explain each answer fully.

A

Typically, damages are a question of fact and left to the jury to determine. A judge may only weigh in if there are later claims of inadequacy or if the amount is so high that it "shocks the conscience."

1. Regarding the negligence action, Mother should recover the value of her totaled vehicle, the medical bills, the value of her lost wages, and the value determined by a jury for her pain and suffering. Additionally, if a jury were to determine that Driver's actions were wanton and willful, punitive damages may be applied. In Ohio, there is a general principal to make the injured party whole upon proof of the injuring party's negligence. Not at issue in this case are any considerations for contributory or comparative negligence. Driver has admitted sole responsibility and thus any level of negligence by Mother is not factored in.

Compensatory damages are included as a direct result from the harm caused by a defendant. They are only subject to caps that would "shock the conscience" of the judge and are not reasonably calculated. They are designed to make the plaintiff whole again, or to compensate them for their loss. Consequential damages are included as damages that are foreseeable as a result of negligence or tort and are only subject to limits of reasonableness and foreseeability. Punitive damages arise from wanton and willful harm done by a defendant as these damages are designed to deter and punish rather than make the plaintiff whole.

In valuing the damages for the negligence action, the jury should consider the totaling of Mother's vehicle as a compensatory damage. This was a total and clear loss that was a direct result of Driver's actions. Next, Mother's medical bills should be considered and applied as compensatory damages, also resulting directly from the negligent action. Mother's pain and suffering should be calculated as consequential damages as harm related to, but not derived specifically from, the accident caused by Driver. Mother's lost wages prior to her death should also be included as consequential damages. They are reasonably calculable and a result of the harm caused by driver. Despite the fact that she used sick days to cover them, she suffered the loss of not having those sick days in the future.

As previously stated, Driver may also be subject to punitive damages for his wanton and reckless behavior, i.e., the egregious speed limit, texting while driving, and failing to be aware of red lights. In Ohio, punitive damages are capped and the jury may not surpass the cap.

Medical insurance may not be used to negate the damages. Insurance is inadmissible at trial and cannot be used to lessen the burden on a defendant found guilty of negligence. Public policy prohibits this as it would effectively license and ratify negligent and wrongful behavior.

2. Wrongful death actions look beyond the immediate harm of the tort or negligence harm and consider the lasting effect of the harm done to the plaintiff's family. Specifically, the jury should consider Mother's lifetime of lost wages, based on her 10 years and expected continuation of her work as a nurse, adjusted for inflation and raises with increases in experience. Further, the jury will need to consider the loss of emotional support and love that her family no longer has because of her death. This is a question of fact left to the jury and is subject only to statutory damages caps. Presumably this would include the college tuition and whatever value the jury found for the rest of Mother's life to the remainder of her family emotionally and spiritually.

The insurance policy may not be considered when evaluating damages, it is inadmissible at trial, and may not be valued by the jury in determining damages. Again, it is against public policy because it would be effectively giving a license to negligent and wrongful behavior.

# QUESTION 2

Q

Artist has decided to move from Big City to Small Town, both in Ohio, and become a farmer. Artist hired Real Estate Broker (Broker) to list Artist's residence for sale with a listing price of $1,000,000. Broker obtained a buyer (Buyer) and Broker entered into a written contract with Buyer for the sale of the residence for $1,000,000 in cash. Artist then refused to complete the sale. Buyer has sued Artist to enforce the contract.

Artist engaged Dealer to sell 12 of Artist's paintings, including one of Artist's most important paintings, which was a different style painted by Artist while living near the ocean, and was entitled "The Ocean." The written agreement between Artist and Dealer provided that no painting could be sold to Big Museum and no painting could be sold for less than $1,000 since Artist wanted at least $12,000 before expenses from the sales.

Dealer took possession of the paintings and displayed them at Dealer's gallery. Each painting was marked as consigned by Artist. Dealer then contacted Curator of Big Museum and told him that he was in a position to sell "The Ocean" to Big Museum. Curator knew that there was a long-standing feud between Artist and Big Museum and that Artist would never sell any painting directly to Big Museum. Nonetheless, Big Museum purchased "The Ocean" for $7,000 through Dealer. Dealer then sold the remaining eleven paintings to Interior Designer, who had no knowledge of the terms of the agreement between Artist and Dealer, for a total of $4,000. Artist has sued Big Museum for the return of "The Ocean" and has sued Interior Designer for the return of the other eleven paintings.

Artist has engaged Money Manager to manage Artist's portfolio of stocks. Money Manager was authorized to buy and sell stock for Artist and to account to Artist once a year for profits and losses. At the end of the year, upon receipt of Money Manager's accounting, Artist noticed that Money Manager had purchased bonds and partnership interests in the account, and, as a result thereof, Artist had lost money for the year. Artist has sued Money Manager for the loss.

Artist found a farm in Small Town, Ohio, that Artist wished to purchase. Artist contacted Owner, and Owner told Artist to see Owner's Attorney. Owner told Attorney that Attorney has full authority to sell the farm to anyone at any fair price. Attorney thereafter entered into a contract with Artist for the purchase of the farm for $500,000, its fair market value. Owner then decided not to sell the farm, and Artist has sued Owner to enforce the sales contract.

Artist contacted Insurance Agent, an employee of General Insurance Agency, to purchase a health care insurance policy from an insurance company (Company) represented by General Insurance Agency. Artist completed the application, which stated that issuance of the policy was subject to approval of the application by Company. Artist paid Insurance Agent for the first year's premium. Insurance Agent told Artist that the policy was in effect immediately, but it usually took a month for the policy documents to be mailed to Artist by Company. The next day, Artist was injured and submitted a claim for medical expenses, which Company refused to pay, stating that the application had not yet been approved. Artist sued Company for the amount of the claim.

1. **Should Buyer succeed in Buyer's lawsuit against Artist for the purchase of the residence?**
2. **Should Artist succeed in Artist's lawsuit for the return of "The Ocean" from Big Museum?**
3. **Should Artist succeed in Artist's lawsuit for the return of the paintings from Interior Designer?**
4. **Should Artist succeed in Artist's lawsuit against Money Manager to recover the losses?**
5. **Should Artist succeed in Artist's lawsuit against Owner to enforce the sales contract for the farm?**
6. **Should Artist succeed in Artist's lawsuit against Company for the amount of the medical claim?**

Explain each answer fully.

A

Under agency law, a party may give another party power to bind him to certain agreements. The party giving the power is the principal, and the party that receives the party is an agent. There is no requirement to create a written contract for an agency relationship to exist, unless agency is specifically for more than a year, thereby placing it under the statute of frauds. The party must intend through their words or conduct for an agreement to exist. The agent must be given power to act on behalf of the principal, and the agent must be under the principal's control. An agent may be paid or gratuitous, and regardless, has duties of care, loyalty, and obedience. The agent may have actual authority, which exists if the principal expressly gives the agent power to do something, or impliedly through conduct. An agent may also have apparent authority, which in certain circumstances may also bind the principal.

1. Buyer v. Artist- Buyer should succeed in his lawsuit against Artist. Here Artist hired Real Estate Broker to list his residence for sale for the price of 1 million dollars in cash. This created an agency relationship in which Artist was the principal and Broker was the agent. The agreement gave express actual authority to sell Artist's house. Broker found a buyer and signed a written contract for the sale of the residence for 1 million dollars in cash. Artist is bound to this contract because he gave broker actual authority to enter into it.

2. Artist v. Big Museum- Artist should prevail against Big Museum. An agent does not have actual authority for transactions outside the scope of his authority. Here, Dealer was hired to sell 12 of the paintings for $1,000 each, and not to sell any to Big Museum. He went beyond the scope of his authority by selling Big Ocean to Big Museum's Curator for $7,000. If a Principal holds a person out as being his agent and an innocent good-faith third party relies on that agency without knowledge of a limitation or lack of authority, then the Principal may be bound. Artist may have held Dealer out as his agent by giving dealer possession of the paintings and marking them consigned, but Curator was aware that Artist would never sell the paintings to Big Museum. This may constitute notice and, therefore, Big Museum would not be a good-faith third party.

3. Artist v. Interior Designer- Under the same analysis from (2), this will depend on whether Artist held Dealer out as his agent with the authority, and whether a third party relied on that authority and bought the painting in good faith without knowledge of the limitation. Here, Interior Designer had no knowledge of the agreement between Dealer and Buyer, and bought the paintings in reliance. Therefore Artist cannot recover from her.

4. Money Manager was engaged to manage Artist's stocks, and was authorized to buy and sell stock, creating an agency relationship. He exceeded his authority when he purchased bonds and partnerships interests. Since he exceeded his scope, he violated his fiduciary duty of obedience to Artist. Therefore, Artist can recover because he exceeded his authority.

5. Owner gave Attorney actual authority to sell his farm, and showed that actual authority existed by sending Artist to Attorney to buy his farm. Attorney had actual authority to sell it to anyone for a fair price and he contracted to sell it to Artist for its fair-market value. Owner is bound by the contract his agent created and must sell the farm to Artist.

6. Here, Insurance Agent was the agent of general insurance agency, and arguably of the other company. This would give him authority to bind on the basis of it being inherent authority. However, the contract said subject to company's approval. Therefore, Artist had notice that the company had to approve, and that the agent's authority was limited. Therefore, Artist will not succeed against company.

# QUESTION 3

Q

Mary is a resident of Anywhere, Ohio, where she also maintains a veterinary practice, of which she is the president and sole owner, which operates under the name of Pets R Us, L.L.C. (Pets R Us). Bank A has attached a security interest in all of the "accounts receivable, equipment, and supplies" of Pets R Us, which security interest it properly perfected by filing a financing statement with the Ohio Secretary of State on February 1, 2017.

1. On January 10, 2017, Mary found a sofa that she liked at Store, and she initially decided to purchase the sofa for her home. Mary agreed to pay Store for the sofa in six equal monthly installments, and she signed a security agreement giving Store a security interest in the sofa, until it was paid for in full. At the time Mary purchased the sofa, she told the Store clerk that: "It will look great in my living room." However, before the sofa was delivered, Mary changed her mind and had Store deliver the sofa to the offices of Pets R Us, instead of to her home. Store did not file a financing statement with the Ohio Secretary of State.

2. Pharma agreed to sell $5,000 worth of pet medication to Pets R Us. Because Pets R Us did not have the cash to pay for the medication "up front," Mary, as president, signed a Consignment Agreement (Agreement) with Pharma on December 30, 2016. The Agreement allowed Pets R Us to take possession of the medication, but it did not have to pay for them until they were actually used. The Agreement clearly stated that Pharma would retain all title to (and ownership of) the medication while in inventory at Pets R Us until they were actually used by Pets R Us. The medication was delivered to Pets R Us on December 31, 2016, and they were retained in inventory thereafter.

3. On January 2, 2017, Mary decided to borrow $10,000 from Bank B for Pets R Us' general operations. Mary gave Bank B a security interest in a copy machine used by Pets R Us as collateral to secure the loan. The security agreement properly described the copy machine specifically by serial number and make. Bank B filed a financing statement on January 2, 2017, covering the copy machine, but it did not actually release the funds to Mary until March 1, 2017.

4. On January 15, 2017, Pets R Us borrowed money from Lender and signed a security agreement giving Lender a security interest in a panel truck owned by Pets R Us. Lender took possession of the actual certificate of title to the panel truck, which it placed in its safe at Lender's headquarters.

**It is now December 2017, and Pets R Us has defaulted on its loan from Bank A. Explain fully which party should prevail with respect to the following claims, and why:**

1. **Bank A v. Store for the sofa;**
2. **Bank A v. Pharma for the medication remaining in inventory;**
3. **Bank A v. Bank B for the copy machine; and**
4. **Bank A v. Lender for the panel truck.**

Explain your answers fully.

A

In order for a lender to beat another lender on an interest in collateral, he must first attach and then perfect their interest in the goods. Attachment requires the execution of a security agreement, value must be given by the lender, and the debtor must have rights in the collateral. Perfection occurs once attachment has occurred and one of several methods of perfection occurs.

1. Store will prevail on the sofa against Bank A. A purchase money security interest occurs when a lender loans the debtor the money to purchase the collateral and then takes a security interest in that specific collateral for the debt owed. A purchase money security interest in consumer goods, those used primarily for household purposes, is perfected automatically and will take priority over all other liens on the collateral. The designation of the collateral as to which type occurs at the time of its purchase and is not effected by its later-changed use by the debtor. Here, Mary purchased the sofa as a consumer good to be used in her home and the store took a purchase money security interest in the sofa as a consumer good making it automatically perfected with no additional steps needed. It is not relevant that she later used the sofa in her office, because it was purchased as a consumer good. Therefore, Store has a priority interest over Bank A in the sofa due to its purchase money security interest.

2. Bank A will prevail on the medication in inventory. When a seller is not known to sell the goods of others, the person whose goods they are selling must file on the goods as if they have taken a security interest in the goods to put the world on notice. If, however, the person is known to sell the goods of others, no action is required by the owner of the goods because the world is said to be on notice that a security interest in the goods exists. Here, Pets R Us is not known to sell the goods of others (a consignment shop) and therefore, Pharma was required to file on the medication so as to put the world and other creditors on notice of their interest in the medication. Pharma failed to do so and the agreement between Pharma and Pets R Us will not be enough to prevent Bank A from taking the medication based on their perfected interest in all of Pets R Us' accounts receivables, equipment, and supplies. This medication would likely be considered supplies (or inventory) and Bank A would have a priority interest in it as opposed to Pharma.

3. Bank B will get the copy machine over Bank A. Under the rules of priority, the first to file or perfect wins. As stated, perfection requires both attachment and one method of perfection. If a lender files and then fails to attach until sometime later, his date of perfection will be retroactive to the date of filing when in competition with another lender that attached and perfected in the time between when the first lenders filed and ultimately perfected. Here, Bank B filed on January 2, but did not perfect until March 1 because that is when it released the funds (gave value to debtor). Bank B's date of perfection will be retroactive to the date of filing (January 2). Bank A attached and perfected on February 2. Therefore, Bank B, although ultimately perfected after Bank A, will have priority over the copy machine.

4. Lender will prevail on the truck. A security interest in a car or truck can only be perfected by notation of lien on the title. Here, neither Lender nor Bank A noted a lien on the title of the truck and, therefore, neither have perfected. In a fight between two unperfected lenders, the first to attach wins. Attachment requires a security agreement, value given, and debtor's rights in collateral. Bank A executed a security agreement and gave value to debtor's rightful collateral, including equipment, on February 1st. Lender executed a security agreement on January 15, so they attached before A and they win.

# QUESTION 4

Defendant was indicted for rape in the Common Pleas Court of Anytown, Ohio. Because Defendant is indigent, Defense counsel (Defense) was appointed by the court to represent him. As required by the local rules of court of Anytown, Prosecutor provided full discovery to Defense in advance of the pretrial. The local rules of court also require all prosecutors and defendants with counsel to engage in plea negotiations at the pretrial in an effort to resolve each case without a trial.

At the pretrial of this case, the lawyers discussed the evidence against Defendant, which included the victim's statement that the perpetrator was wearing a red bandana during the commission of the rape. Defendant suddenly blurted out that the bandana was not red, it was orange! Prosecutor told Defendant that he would be using Defendant's statement against him at trial to prove that he was the perpetrator.

Prosecutor then offered to recommend a five-year sentence if Defendant agreed to waive his trial rights and plead guilty as charged. After discussing Prosecutor's offer with Defense and the fact that the sentence for rape could be as much as 11 years, Defendant proclaimed his innocence and refused Prosecutor's offer.

When Judge was informed that no deal was made at pretrial, she called Defendant and both lawyers into her chambers. Judge reviewed Prosecutor's evidence against Defendant and the statement about the bandana made by Defendant at pretrial. Judge told both lawyers and Defendant that the statement Defendant made at pretrial would be admissible at trial. Judge then personally addressed Defendant and informed him that the evidence against him would likely result in a finding of guilty by the jury and that Defendant's sentence could be as much as 11 years despite the Prosecutor's recommendation of five years.

Defendant agreed to take the deal. Defendant then asked whether he could plead "no contest," but Judge told him she would not allow a no-contest plea. Defendant then entered a plea of guilty to the charge and sentencing was set for the next day.

At the sentencing hearing, Victim appeared and gave a horrifying account of the crime against her. She begged the court to impose the maximum sentence. Prosecutor then joined in Victim's request and asked for the maximum sentence of 11 years. Defense objected to Prosecutor's changed recommendation, but Judge overruled the objection, stating that sentencing is within the court's discretion and that she is not bound to follow Prosecutor's recommendation. Judge then sentenced Defendant to 11 years in the penitentiary.

**Did Judge err by:**

1. **Opining that the statement Defendant made at pretrial about the bandana would be admissible as evidence at trial?**
2. **Personally addressing Defendant at pretrial and telling him he would likely be convicted and his sentence could be as much as 11 years?**
3. **Refusing to accept a no-contest plea from Defendant?**
4. **Allowing Prosecutor to change his recommended sentence from five years to 11 years at the time of sentencing?**
5. **Sentencing Defendant to 11 years instead of the five-year recommendation negotiated in the plea agreement?**

Explain each answer fully.

A

1) The statement that Defendant made during the plea bargain was not admissible at trial and the judge erred. Statements made during plea negotiations are inadmissible at the subsequent trial as a matter of public policy because encouraging plea bargaining and reducing the amount of trials is something that society encourages. Here the statement made regarding the color of the bandana was blurted out by the Defendant in the course of the plea bargaining. Since this statement was made during plea bargaining it cannot be used in the subsequent trial. Therefore, Judge erred by finding that the statement was admissible at trial.

2) Judge's personal address to the Defendant was improper. Generally, the judge should not express an opinion on the merits of a criminal case as that is the job for the jury. The jury is to make the findings of fact and the judge is to make findings of law. The jury also finds the verdict and the judge will make the sentencing. Here when Judge addressed the Defendant personally and told the Defendant that "the evidence against him would likely result in a finding of guilty by the jury" this was improper and may have coerced the defendant into taking the plea deal. Therefore, Judge's actions were improper.

3) Judge was within his discretion to reject the "no-contest" plea. In Ohio, pleas can be entered in open court and during arraignment. At arraignment the defendant may plead guilty, not guilty or not guilty by reason of insanity (which must be submitted in writing) and a plea of no contest can be entered with leave of the court. Since a plea of no contest is with leave of the court, here Judge was within her discretion to not allow the defendant to not enter this plea.

4) Judge was incorrect in allowing the Prosecutor to change the recommended sentencing. Ohio takes a contract view of plea bargaining under which either party may retract the plea agreement if the other party does not hold up their end of the bargain and before the plea is accepted by the court. Here, when the Defendant entered the plea of guilty both parties were then restricted from taking back the agreement because of the contract theory applied in Ohio. Therefore, the Prosecutor was bound by the agreement that he made with the Defendant at the time the guilty plea was accepted by the Court.

5) Judge was within her discretion to sentence defendant to 11 years instead of 5. Generally, though the court should take the prosecutor's recommendation of the sentencing recommendation, the judge is not bound by this and enters the sentence. Here, based on the testimony of the victim, who gave a "horrifying" account of the crime, Judge was free to increase the sentencing. Therefore, the imposition of the 11 year sentence was not improper by Judge.

# QUESTION 5

Owner owned the real property (Property), which consists of a lot with a house, located at 234 Maple Street, Anytown, Ohio, in fee simple. Over the years, Owner granted the following property rights to the following parties:

1. Owner granted Farmer an easement over Property allowing Farmer to store a dumpster on Property. The easement, though properly executed, was never recorded;

2. Owner orally granted Cousin a right to use Property for gardening each year, May through November. Cousin has planted a garden each year since Owner gave him permission to do so;

3. Owner and his Uncle entered into a written lease granting Uncle the right to live at Property each year, January through April, until Uncle's death in exchange for $250 a month rent. Uncle has exercised this right for several years. Although properly executed, the lease was never recorded.

Owner then sold Property, sight unseen, to Buyer for $50,000. Owner never disclosed Farmer's unrecorded easement, Cousin's yearly gardening rights, or Uncle's unrecorded lifetime lease to Buyer prior to sale.

Owner prepared and signed a general warranty deed that was properly executed before a notary public that stated as follows:

**GENERAL WARRANTY DEED**

OWNER, single and never married, of Anycounty, Ohio, for valuable consideration paid, grants, with general warranty covenants, to Buyer, whose tax-mailing address is 234 Maple Street, Anytown, Ohio, the following real property: Situated in the City of Anytown and County of Anycounty and State of Ohio:

Proper Legal Description Included
234 Maple Street
Anytown, Ohio

Subject however to any due and unpaid taxes, which are an exception.

Prior Instrument Reference: Volume 16, Page 24.
Executed this 29th day of April 2018.

/s/ OWNER

SIGNATURE

Buyer (who lives in Florida) authorized Sister (who lives in Ohio) to attend and represent him at the closing for Property. During the closing, held on June 1, 2018, Sister received, read, and approved the deed. After approving the deed, Sister returned the deed to Owner who then recorded the deed with the proper county recorder. Buyer was never in possession of the original executed deed and never even saw it until after a recorded copy had been mailed to Buyer by the recorder.

After the sale, Buyer learned of Farmer's unrecorded dumpster easement, Cousin's use of Property for gardening, and Uncle's lifetime lease. Also, Buyer received a delinquent property tax bill in the amount of $1,000, which is a lien on Property for unpaid taxes for 2016 and 2017. Owner never disclosed that the property taxes were delinquent.

Buyer now wants to sue Owner regarding Farmer's easement, Cousin's gardening, Uncle's lease, and the delinquent taxes.

1. **Was the deed sufficient to convey Property from Owner to Buyer, and, if so, when was it effective?**
2. **Assuming that the Property was legally conveyed from Owner to Buyer:**
   a. **What are the covenants of title, if any, that were included in the deed from Owner?**
   b. **Which, if any, covenants were breached by Owner and what is the nature of any breach relative to the rights that he granted to Farmer, Cousin, and Uncle? What damages, if any, might be recovered by Buyer?**
   c. **Who is responsible for paying the delinquent $1,000.00 in back property taxes?**

Do not discuss the Statute of Frauds. Explain each answer fully.

A

1. Yes, the deed was sufficient to convey Property from Owner to Buyer. Under Ohio Property law, a deed to convey property must contain the names of the parties, a description of the land, the type of deed being transferred and any conditions attached to the deed. Here, the deed contained the names of both parties, the property in question, a reference to where you can find the previous deed for the property and the signature of the person conveying the deed, along with a condition that the property is subject to any due and unpaid taxes. Therefore, a proper deed was conveyed.

For a conveyance to be effective, the deed must be delivered. Here, Buyer appointed his Sister to act on his behalf and indicated his intentions to do so to Owner. Owner and Sister met on June 1, 2018 and Sister possessed the deed, examined it and accepted the deed on behalf of Buyer. She then properly recorded the deed on behalf of Buyer. The deed will be deemed to have been delivered to Buyer's agent, Sister, on June 1, 2018. Therefore, delivery of the deed was effective on June 1, 2018.

2a. Under Ohio Property law, a general warranty deed contains six covenants of title. The six covenants of title are: covenant of seisn, covenant against encumbrances, covenant of quiet use and enjoyment of the property, covenant of warranty, covenant of the right to convey, and I can't remember the last one. Here, Owner conveyed a general warranty deed to Buyer. Therefore, the deed contained the six covenants of title provided under Ohio law.

b. Owner's deed to Buyer breached the covenant against encumbrances and the covenant for quiet use and enjoyment of the property. Under Ohio law, a covenant against encumbrances is a covenant that there are no encumbrances (mortgages, liens, easements, etc.) against the property. Ohio law also provides that the covenant for quiet use and enjoyment of the property provides that there are no other third parties who can claim an interest (lease, ownership, license, etc.) in the property. Here,

Farmer has an easement (unrecorded) to keep a dumpster on the land, which is an encumbrance against the property. Cousin and Uncle both have rights that interfere with Buyer's quiet use and enjoyment of the property - Uncle has a life estate leasehold and Cousin a license to garden on property (license because he was only given oral permission, nothing in writing!). Buyer may recover damages for the reduction in the property value for the dumpster easement and the loss of use of part of his property to the garden. He may also bring suit to enjoin Cousin's gardening and to abolish Farmer's easement.

c. Under Ohio law, a land sale contract is said to merge with the deed at time of closure, under the Merger Doctrine. That is, all items contained in the sale agreement are said to merge into the deed at time of closing and the deed then controls. Here, the deed contained a specific provision that provided that the property was subject to any due and unpaid taxes, which are an exception to the general warranty deed. Buyer, through his agent, Sister, accepted the deed on June 1, 2018. Therefore, as of June 1, 2018, Buyer is responsible for the $1,000 delinquent back property taxes.

# QUESTION 6

Senior is the managing partner of Law Firm (Firm). He discovered that an associate attorney in his office, Allison Associate (Associate), has been spending a great deal of time after office hours meeting with Firm Client (Client) whom Associate is representing together with Firm Partner (Partner) in his divorce from an extremely wealthy wife (Wife). Senior also learned that Associate and a member of Firm's support staff, Paul Paralegal (Paralegal), have been romantically involved for some time, and that Paralegal, who has access to Client's personal and financial information in the client file, has been stalking Associate and Client. Paralegal is now threatening to reveal Associate and Client's affair to Partner, and provide information about the affair and Client's file to Wife's attorney.

Firm is seeking Client's attorney fees from Wife, and has devoted several hundred thousand dollars of billable time to discover Wife's extensive assets. Associate is on track to soon be elevated to partner because of her outstanding performance in court and proven ability to attract high-net-worth clients with significant legal problems that justify very large legal fees. Associate has admitted to Senior that she is having consensual sexual activity with Client. She has threatened to leave Firm and take Client and his case to a new firm if Senior does not immediately fire Paralegal for stalking Client and Associate, and for threatening to disclose personal information about her.

Paralegal is a veteran staffer who has had consistent outstanding annual reviews, but is not irreplaceable. He insists that Associate is taking advantage of a highly vulnerable Client, and has disclosed to other staff members that since Associate began working on Client's case she has discontinued her regular and frequent sexual activity with Paralegal.

**Is Senior likely to violate any Rules of Professional Conduct if he takes the following actions?**

1. **Fires Paralegal.**
2. **Agrees to Associate's demands and permits her to continue representing Client.**
3. **Fires Associate before Client obtains his divorce.**
4. **Does nothing.**

Explain each answer fully.

A

Generally, Ohio lawyers may be vicariously liable for other attorney's professional rule violations if he has control or authority over them and knowledge of the violations at a time when he may repair or limit the violation, and thereafter fails to do so. Further, attorneys have a duty to report other attorneys' conduct that calls their fitness to practice law into question.

(1) Senior is not likely to violate any rules of professional conduct if he fires Paralegal. Paralegal has engaged in unprofessional conduct by stalking Associate and has threatened to violate the rules of professional conduct by disclosing client's file to client's wife's attorney, in violation of the attorney-client privilege. Although Paralegal could argue that his firing was in response to Associate's demand that he be fired, his stalking and threat to release confidential information are sufficient cause to fire him. In fact, Senior could be liable for any breach of attorney-client privilege effected by the Paralegal moving forward if he does not take remedial action. Termination of Paralegal is consistent with Senior's duties to protect confidential client information and govern an ethical law firm.

(2) Yes, Senior may be subject to rules violations for agreeing to Associate's demand and permitting her to continue representing client. Attorneys may not engage in a romantic or sexual relationships with clients unless their relation existed prior to representation. Here, there is no indication that Associate's relationship with Client began prior to representation. Such a personal relationship creates a conflict of interest between Associate, Client, and Firm. Further, Associate's demand that Senior fire Paralegal or she will leave Firm and take Client to a new firm qualifies as blackmail, certainly unprofessional conduct putting Senior's personal conflict with Paralegal in conflict with Client's interest in competent and efficient legal representation. Although Senior may fire Paralegal as described above, he may not allow Associate to continue representing Client, since it is a violation of Ohio and the model rules of professional conduct. Further, her indiscretion in beginning a relationship with Client may warrant reporting as indication that Associate, despite her outstanding in-court performances and ability to attract valuable clients, has violated a rule calling her moral and ethical decision-making into question. Outstanding ability and revenue generation are not grounds for Senior to overlook Associate's unprofessional and unethical conduct.

(3) Senior is not likely to violate any rules of professional conduct by firing Associate before Client obtains his divorce. Lawyers are required to put clients' interests ahead of their own and provide competent legal representation. Lawyers are only permitted to withdraw from a case after the court has approved their withdrawal or they have good cause under the rules of professional conduct. Here, even if Senior fires Associate, he may continue to competently represent Client, since he is already engaged in joint representation. Client's representation would not be professionally impacted by Associate's firing.

(4) Senior is likely to violate Ohio's rules of professional conduct if he fails to take any action. Here, Senior has authority over both Paralegal and Associate and has discovered their misconduct at a time when he can take remedial measures. Senior could take action to prevent Paralegal from disclosing Client's information in violation of a privilege and could take action to limit Associate's conflict of interest created by her personal relationship with Client. Also, Associate's romantic involvement with Client could constitute misconduct calling the Associate's ethical and moral fitness to practice law into question, and, therefore, Senior would be required to disclose such a violation.

# QUESTION 7

Mitch had two children, Dena and Scott, who were born in 1984 and 1986, respectively. His wife and their mother had passed away in 1990. In 2013, Mitch married Wendy. At that time, Wendy had one child from a previous marriage, Annie.

After their marriage, Wendy demanded that Mitch create an estate plan to provide for Annie and herself. In 2013, Mitch executed a valid Ohio will (2013 Will), which provided as follows:

1. I give $20,000 and my 2007 Toyota to my daughter, Dena;
2. I give $30,000 to my son, Scott;
3. I give $5,000 to my stepdaughter, Annie; and
4. I give the rest and residue of my estate to my wife, Wendy. I also appoint Wendy as my executor.

During Mitch's marriage to Wendy, Mitch gave $2,500 to Annie as a down payment on a vehicle. Mitch wrote a note to himself about the payment and clipped it to his 2013 Will. He never provided a copy of the note to Annie. Mitch also named Wendy as the beneficiary on his personal IRA Account.

In early 2016, Wendy had an extramarital affair. Mitch learned of the affair and filed for divorce, which was finalized in late 2016. Shortly after the divorce, Mitch drafted a valid 2016 Codicil that provided as follows:

1. I revoke Item 4 of my 2013 Will;
2. I appoint Dena as my Executor; and
3. I reaffirm all of the other provisions of my 2013 Will.

In late 2016, Mitch also changed the beneficiary designation on his IRA Account, deleting Wendy as a beneficiary and designating Scott and Dena as co-beneficiaries.

After Wendy's affair ended in early December 2017, Wendy immediately contacted Mitch and convinced him to fly with her to Las Vegas, where they were re-married at a chapel on December 31, 2017.

In the spring of 2018, Mitch and Scott rented a sailboat that they took out on Lake Erie. A storm quickly developed, and both Mitch and Scott were tossed overboard. Mitch's body was recovered later that same day. Scott was pulled alive from the water two days later, but he died the following day.

At the time of his death, Mitch was survived by Wendy, Scott, Dena, his stepdaughter, Annie, and Scott's wife, Linda. Scott and Linda had no children. Linda has been appointed as the executor of her husband Scott's estate.

At his death, Mitch's assets consisted of:

- The IRA Account totaling $100,000;
- The 2007 Toyota valued at $10,000; and
- $195,000 at Bank First, titled in Mitch's name.

Upon the filing of Mitch's 2013 Will and 2016 Codicil by Dena as his executor, Wendy realized she had been disinherited. She also realized she was not the beneficiary on the IRA. Wendy is demanding she receive all funds she is entitled to receive under Ohio law and is also requesting the 2007 Toyota.

**In regard to Mitch's assets, identify what, if anything, each of the following individuals are entitled to receive under Ohio law:**

**A. Wendy;**

**B. Dena;**

**C. Annie; and**

**D. Linda.**

Explain each answer fully.

A

1. Wendy will be entitled to take under the elective share statute, but she must file her election with the proper probate court. Under Ohio law, there is no pretermitted spouse statute, like there is for pretermitted children. In other words, a will in existence before one's marriage is not automatically altered to give a devise to the spouse. Here, Mitch executed a valid Codicil in 2016, which removed Wendy from his will. When Wendy and Mitch remarried on December 31, 2017, the will was not changed because of the marriage. As a result, and under the spousal elective share, Wendy will be entitled to remain in the mansion house for 1 year, receive $40,000 for support, and ordinarily take one or more vehicles that do not total over $65,000. However, Wendy will not be entitled to take the 2007 Toyota in this situation because there was a specific devise for the vehicle made to Dena, and Wendy and Mitch were not co-owners of the vehicle (therefore it does not pass automatically).

2. Dena will take the 2007 Toyota, as well as the $100,000 IRA account, and the $20,000 as provided in the 2013 will republished by codicil in 2016. Under Ohio law, the 2007 Toyota to Dena constituted a specific devise, and thus, the devise will trump Wendy's entitlement to the vehicle under the spousal elective share statute. Additionally, Dena will take the $100,000 IRA account in its entirety. While Dena and Scott were named beneficiaries of the IRA together, Scott's devise lapsed (see discussion in #4 below) and, therefore, his rights in the IRA account will pass to Dena. Furthermore, Dena will take the $20,000 as promised in the 2013 will republished by codicil. This is a general devise, and, therefore, can be taken from any source. Here, the $20,000 will come from Mitch's account at Bank First.

Wendy and Dena will also take from the residue of the estate. The residue will consist of the $195,000 from Mitch's Bank Account at Bank First, less Dena's $20,000 devise, less Annie's devise. The residue will provide $60,000 to Wendy first (as Dena is the only living child) and 1/2 of the remainder. The rest of the residue will go to Dena.

3. Annie will take $2,500. Under Ohio law, a divorce will nullify devises made to an ex-spouse, but it will not nullify devises made to family members of the ex-spouse. Here, Annie's devise for the $5,000 remains despite Mitch and Wendy's 2016 divorce. Further, Mitch republished this devise in his 2016 codicil for the $5,000 devise; however, Mitch appeared to have made an advancement to Annie. Annie may argue that Mitch writing a note to himself about the $2,500 payment made to Annie did not constitute an advancement. Under Ohio law, advancements are not presumed, and an inter vivos gift is only considered an advancement if, at the time it was made, there was a contemporaneous writing. Here, the facts indicate that Mitch wrote a note to himself about the payment and clipped it to his will. A court will examine the contents of Mitch's note to himself, as well as see if there is a signature, to determine whether or not this was deemed an advancement. Thus, if there is evidence to indicate Mitch intended this to be an advancement, Annie will take $2,500. If this was not an advancement, Annie will take $5,000. If this is not considered an advancement, Annie will remain despite Mitch and Wendy's 2016 divorce. Further, Mitch republished this devise in his 2016 codicil for the $5,000 devise; however, Mitch appeared to have made an advancement to Annie.

4. Linda will not take anything from Mitch's estate. Under Ohio law, in order to take a devise, a beneficiary must survive the testator for at least 5 days (120 hours). Here, Scott died less than 48 hours after his father, Mitch. Therefore, Scott is considered as predeceasing Mitch. Consequently, Scott's devise lapses, and Scott's estate (by way of Scott) takes nothing.

# QUESTION 8

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

2. Manufacturing Company (Company) operates in the State of Franklin. It has 150 employees and a company-sponsored pension plan. Under the plan, employees are eligible to receive a pension at the age of 65 that is calculated using a formula that takes into account how long the employee has worked at Company and the employee's annual compensation. Any employee who leaves Company before the age of 65 loses all pension benefits, unless the employee has worked at Company for at least 10 years and is 55 years or older at the time of separation. The pension plan has been in place since 2005. On June 1, 2016, Company announced that, as a result of customer losses and declining revenue, Company has decided to shut down its operations effective January 1, 2017. Consequently, many of Company's employees will not be eligible to receive a pension benefit. On July 1, 2016, the Franklin Legislature passed a law under which a private employer with 100 employees or more that provided pension benefits is subject to a "pension funding charge" if the business terminated the plan or closed an office in Franklin. The charge was assessed if the pension funds were insufficient to cover full pensions for all employees who had worked at least seven years. Periods of employment prior to the effective date of the law were to be included in the seven-year employment criterion. The new law will cost Company $500,000 to cover the newly vested pensions. Company challenges the new law on constitutional grounds.

3. As a young adult, Dave was convicted twice of robbery, a felony offense. The crimes occurred in 2008 and 2010. After being convicted of his second offense, Dave served a year in prison. Upon his release, he got a job.

In 2014, the Franklin legislature passed a law providing that robbery carries a prison term of between one and five years, but when an individual has been previously convicted of at least two other felonies, the term shall be between one and 10 years. Dave lost his job and went back to a life of crime. In March 2017, Dave was again arrested for robbery, was tried, convicted, and sentenced to a 10-year prison sentence. Dave challenges the sentencing law as applied to him on constitutional grounds.

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

**A. Residents' challenge of the Franklin Food-Stamp Law?**

**B. Company's challenge of the Franklin Pension Law?**

**C. Dave's challenge of the Franklin Sentencing Law?**

Explain each answer fully. Do not make any Equal Protection arguments.

A

1. The Food Stamp Law is likely unconstitutional. Under the Privileges and Immunities Clause of the 14th amendment, a state may not deny or burden a number of fundamental rights to out-of-state citizens, among these are the right to interstate travel. A law that burdens or denies a fundamental right must pass strict scrutiny to be constitutional. Under strict scrutiny, the law must be narrowly tailored to achieve a compelling government interest such that no less discriminatory alternative is available. Under this test, challenged laws are presumptively invalid. Here, the law discriminates against out-of-state citizens by using a residency requirement to determine eligibility for food-stamp benefits. In doing so, the law creates categories of citizens and disincentives to the right to interstate travel. The stated purpose of the law is to reduce the welfare budget, which may or may not be a compelling interest. There are no facts that indicate an objective is needed to cut the welfare budget, so it is likely not a compelling interest. Assuming, however, that it is, the means used are not the least discriminatory as the state could cut back on its generous plan for all people. Thus, the law is likely invalid.

2. The Pension Plan may be unconstitutional. Under the Contract Clause, neither the state nor local government may make a law that impairs the obligation of contracts. Courts are very skeptical when a legislature attempts to retroactively relieve itself of responsibilities under a public contract. They are less skeptical when the contracts are private in nature. Where a legislative act impairs the obligations of private contracts, it is assessed under intermediate scrutiny. Under intermediate scrutiny, a law must be substantially related to an important government interest. Here, the legislature is seeking to retroactively vest pensions that were not vested by a legislative act. The Company contracted with its employees when they began working in regard to their pension benefits. By legislation, the state is attempting to force the company to take on more of an obligation than it initially contracted for. The government likely has an important interest in protecting those whose pensions had not vested and who would be harmed. However, the means chosen is not narrowly tailored enough to be a substantial fit. The law includes periods of employment prior to the effective date of the law. Depending on a court's assessment of the importance of the interest and the tailoring of the means, this law may be unconstitutional.

3. The Sentencing law is valid. Under the constitution, ex post facto laws, which are laws that increase the criminal punishment, reduce evidence necessary to convict for a crime committed before the effective date of the law, is invalid. Here, this law is not an ex post facto law. The law in question punishes future criminal activity more harshly than it did previously. Punishment of a crime is generally within the powers of the states, as it is traditionally a state function. Dave was convicted of two felonies in 2008 and 2010, served time and was released. In 2014, the legislature passed a valid law increasing the sentence for repeat offenders committing future criminal acts. In 2017, Dave committed another robbery and was convicted for it and properly sentenced to 10 years under the law. Thus, the sentencing law is valid.

# QUESTION 9

Clark has been fired for chronic absenteeism. For many years, he worked as a successful newspaper reporter. After several instances of missing work without receiving prior approval or taking personal leave, his editor, Ed, terminated Clark and ordered him off the premises.

A few hours later, after Clark left, Ed discovered that his most prized possession was missing. A valuable crystal paperweight acquired by Ed during his time as a young reporter had disappeared from Ed's desk. Distraught, Ed asked multiple people whether they had seen his paperweight. One of the employees told Ed that she heard the newspaper's photographer, Paul, say that he had seen Clark steal the paperweight after Ed had fired Clark.

Ed then spoke with Paul, the photographer. Because he was friends with Clark, Paul was reluctant to get involved. However, after some badgering by Ed, Paul eventually said that he had seen Clark pack Ed's paperweight into the same box that Clark was using to clean out his desk and watched Clark leave the newsroom with the box.

After speaking with Paul, Ed called the police. The responding officer spoke with Ed and, after assembling a photo array, asked Paul whether he saw the man who had left with the paperweight among the photographs. A reluctant Paul pointed to the photo of his friend Clark.

The officer also spoke with Alice, another reporter for the newspaper. There had been rumors around the office that Alice and Clark had once dated, but no one knew whether this was true. Alice told the officer, who recorded it in his notes, that she was absolutely certain that Clark did not steal the paperweight because she had helped him pack his belongings and she had walked out of the building with Clark after his termination.

Clark sued the newspaper and Ed for wrongful termination. During a deposition in Clark's civil case, Paul repeated to the newspaper's attorney his statement that he had seen Clark pack Ed's paperweight into his box and leave the newsroom with it.

Clark has been charged with theft. At his criminal trial, there were numerous objections:

1. The prosecuting attorney asked Ed during his testimony how he knew that Clark had stolen the paperweight. When Ed explained that someone in his office had told him that Paul had seen the theft, defense counsel objected.
2. When testifying at trial, Paul said that he had never seen Clark with the paperweight. When the prosecutor asked Paul whether he had ever testified otherwise, defense counsel objected.
3. After Paul also denied that he had identified Clark as the thief to the police officer, the prosecutor sought to introduce evidence of Paul's selection of Clark in the photo array. Once again, defense counsel objected.
4. When the prosecutor rested his case, defense counsel called Alice to the stand. Alice testified that Clark was not the thief, that she had helped Clark pack his belongings, and that she had walked out of the building with him. On cross-examination, Alice admitted to the prosecutor that after he had been fired, Clark had asked Alice out and the two were now dating. When defense counsel sought to introduce Alice's prior statement to the investigating officer, the prosecutor objected.

**How should the court rule on each of the objections identified above?**

Explain each answer fully.

A

1. Ed testimony. Under Ohio law, an out-of-court statement asserted for the truth of the matter is hearsay. It is inadmissible unless it meets a hearsay exception. Here, when the prosecuting attorney asked Ed during his testimony how he knew that Clark had stolen the paperweight, Ed explained that someone in his office had told him that Paul had seen the theft. This statement that someone told Ed that Paul had seen the theft is hearsay. There is no indication in the facts that show that this statement meets a hearsay exception. Therefore, this statement should be excluded.

2. Paul testifying. Under Ohio law, an attorney can impeach and use as substantive evidence a prior inconsistent statement if it meets an exception. To meet the prior inconsistent statement, (1) must have been made at a prior trial, deposition, hearing, or grand jury; (2) the declarant must have been subject to cross-examination by the current party; (3) the prior statement must be inconsistent with the current statement; (4) the declarant must be testifying at current proceeding; and (5) be subject to cross at the current proceeding. To impeach its own witness with its prior inconsistent statement, Ohio requires that the attorney show surprise and affirmative harm, unless the statement meets the prior inconsistent statement. Here, Paul gave an inconsistent statement at a deposition where the parties were Clark and the newspaper, he was subject to cross-examination by Clark, Paul is testifying at the current proceeding, and he is subject to cross-examination. Therefore, this statement is admissible as a prior inconsistent statement and the prosecutor can admit it as one.

3. Paul identifying Clark. Under Ohio law, a prior identification is admissible if (1) the identification of the defendant was made soon after the event occurred; (2) declarant is testifying at the current proceeding; (3) declarant is subject to cross-examination at the current proceeding; and (4) and the identification is trustworthy. Here, Paul identified Clark as the thief when the responding officer assembled a photo array on the day Clark was fired, Paul is testifying at the current proceeding, Paul is subject to cross-examination at the current proceeding, and the identification is trustworthy since Paul was reluctant to identify his friend as the thief. Therefore, this identification statement is admissible.

4. Alice. Under Ohio law, a consistent prior statement is admissible t o rehabilitate the witness after she has been attacked. A consistent prior statement must: (1) must be consistent with the current statement; (2) the statement was spoken before motive to lie arose; (3) the declarant must be testifying at current proceeding; and (4) be subject to cross at the current proceeding. Here, Alice's prior statement stated that Clark did not steal the paperweight which is consistent with her current statement that Clark did not steal the paperweight, she spoke the statement before she was dating Clark, she is testifying at the current proceeding, she is subject to cross at the current proceeding, and she has been attacked by the prosecutor by the fact that she is dating Clark. Therefore, this consistent prior statement is admissible to rehabilitate Alice.

# QUESTION 10

Mediclean is a manufacturer of an industrial-strength liquid detergent used by hospitals to clean various medical instruments prior to surgery and other medical procedures. Hospital purchases this detergent, which is sold in steel drums with the Mediclean logo clearly embossed on the side. The barrels are sold to Hospital by a local medical supply distributor, Middleman. After an order has been placed, Middleman typically will deliver the requested barrels to a locked, fenced-in area near Hospital's loading dock. Hospital typically places empty barrels in the same area so that Middleman can return them to Mediclean to be refilled.

Last year, Hospital had a problem with an elevator shaft. Lift, an elevator repair company, was hired by Hospital to fix the problem. Len, one of Lift's foremen, discovered the elevator was rapidly leaking hydraulic fluid. He found Hal, a Hospital maintenance employee, and asked him to get some containers to catch the fluid. Hal got two empty Mediclean drums from the loading dock and Len filled both drums with the hydraulic fluid, secured the tops, and left them in the hallway, intending to dispose of them the next day.

That evening, another Hospital employee saw the barrels in the hallway. Unaware of what had transpired earlier, he returned the barrels to the usual designated area. The following morning, a driver from Middleman stopped on his usual route and discovered the two barrels. Believing Hospital had used its desired amount of detergent for the month, he returned the barrels that were filled with hydraulic fluid to Middleman's warehouse to be restocked.

The following month, Hospital placed a new order for detergent and the same two barrels containing the hydraulic fluid were reshipped to Hospital for use. Approximately a month later, it was discovered that instruments contaminated by the fluid in the Mediclean tanks had been utilized on patients in a variety of procedures ranging from non-invasive physical exams to open heart surgeries.

Paul, a local personal injury attorney, represents 200 clients who had been patients at Hospital, and who had each been notified by Hospital that contaminated instruments were utilized in their respective procedures. Twenty-five of Paul's clients claimed to have developed serious conditions requiring further medical treatment. Ten clients claimed to have suffered psychological damage as a result of the contamination. All clients seek compensation necessary to monitor their health for a number of years to come.

Paul has filed a class-action lawsuit, naming Hospital and Mediclean as defendants. Hospital and Mediclean have filed a motion to dismiss, raising the defense of failure to join Middleman and Lift as necessary parties to the lawsuit.

1. **Should Paul's action against Hospital and Mediclean be permitted to proceed as a class action? Discuss all requirements governed by Ohio Civil Rule 23.**
2. **How should the court rule on Hospital and Mediclean's motion to dismiss?**

**Answer according to the Ohio Rules of Civil Procedure.**

Explain each answer fully.

A

1. Paul's action should be allowed to proceed as a class action. Class actions must be certified by a court. Class action requirements in Ohio are similar to the federal rules of civil procedure. Class actions are required to have numerosity, commonality, adequacy, and typicality. Numerosity requires a large group of plaintiffs in the class such that joinder is impractical. Commonality requires that the plaintiff class share common questions such that a court ruling would provide answers or relief to all. Adequacy and typicality require that the class representative be a competent representative for the entire class and have claims/injuries that are typical of or similar to the plaintiff class. Additionally, where a class action is seeking damages, notification to all reasonably identifiable plaintiff class members is required. Notification must apprise class members of the class action and their rights, such as opting out of the class.

Here, numerosity is likely satisfied since the plaintiff class includes 200 former patients of Hospital and joinder of 200 separate parties would be impractical since competing interests and coordination would be inefficient. Further, Paul may argue that commonality exists since the same actions of negligent maintenance, supply, or use of hydraulic liquid by Hospital and other defendants led to a personal injury claim for all plaintiffs. Further, even though damages are not uniform across the class, with 25 requiring further medical care and 10 sustaining psychological damage, all plaintiffs are seeking compensation necessary to monitor their health. The facts do not address any notification of class members nor a class representative, but assuming those requirements are met, the court is likely to certify a class action based on commonality and numerosity. Note that even if the court found that disparity of injuries impeded commonality, the court could sever plaintiffs with unique injuries, such as psychological damage and certify the remaining class members' action.

2. The court should grant Paul leave to amend his complaint to join Middleman/Lift. Necessary parties are required to be joined in a suit. Necessary parties are found in Ohio when a party's absence will result in a plaintiff not being able to fully recover, the defendant being subjected to multiple liabilities, and the necessary party's interests being harmed or inadequately represented. Ohio further provides that spouses in loss of consortium claims and employers in claims against workers in the scope of their employment are necessary parties. Here, Paul only sued Hospital and Mediclean. Although Hospital is arguably negligent for the misuse of the hydraulic fluid, Middleman and Lift are also liable. Middleman mistakenly picked up the barrels of hydraulic fluid and redelivered them to Hospital and Lift's employee, Len, filled Mediclean's barrels with hydraulic fluid and left them unattended and unlabeled. Ohio recognizes joint and several liability, under which a plaintiff may recover the full amount of damages from any one defendant (who may then seek contribution from co-defendants). Normally, this would allow Paul to recover all damages from Hospital. But, Ohio modified joint and several liability and contribution to provide that when a defendant is found to be less than 50 percent liable, he will only be liable for his actual percentage of damages. Thus, given Middleman and Lift's (through Len's conduct within the scope of his employment) negligent conduct that would likely reduce Hospital's liability, Hospital may be less than 50% liable and Paul would not be able to fully recover on his claim, rendering Middleman and Lift necessary parties.

Although necessary parties are required to be joined, the court may stay its ruling and grant Paul leave to amend his complaint to include necessary parties. Otherwise, granting the motion is warranted.

# QUESTION 11

1. Three parcels of real estate (Parcels A, B, and C) owned by Susan were being marketed for sale. Ideally, Susan desired to sell all three as a package, but would consider separate offers for each parcel. Allen submitted an offer of $5,000 for only Parcel A. Interested in only Parcels B and C, Bob submitted an offer of $12,000 for those two parcels. Dave submitted an offer of $15,000 for all three parcels.

Bob, worried that he was going to lose out to Dave, went to Allen and suggested that he would submit a new offer for all three parcels and, if successful, Bob would sell Parcel A to Allen for $5,000 and Bob would keep Parcels B and C. Allen orally agreed and withdrew his offer to Susan. Bob then submitted an offer for all three parcels in the amount of $17,000 and eventually executed a written purchase contract with Susan to buy all three parcels. When Allen approached Bob about paying $5,000 in exchange for Parcel A, Bob told him that he changed his mind and he was going to keep all three parcels. Bob further told Allen that if he wanted Parcel A, Allen would have to pay him $10,000.

Allen has sued Bob, claiming that they had a valid contract that provided that Allen had a right to purchase Parcel A for $5,000, and is seeking to enforce that contract.

**A. Does the oral agreement between Allen and Bob constitute a contract? Explain fully.**

**B. Is the agreement between Allen and Bob subject to the Statute of Frauds? Explain fully.**

**C. If a court ruled that the Statute of Frauds did apply to Allen and Bob's agreement, is there an exception to the Statute of Frauds that might exist? Explain fully.**

2. Tom and Mary wanted to own a farm. One Sunday, they drove to the country and randomly drove up to a farmhouse, knocked on the door, and asked the owner, Fred, if he would sell his farm. Fred replied, "Maybe, but I would need $10,000 an acre and $50,000 for the house." Tom produced a check made out to Fred for $10,000 and wrote on the memo line "deposit for purchase of a farm" and gave the check to Fred. At this time, Mary had pulled out her cell phone and was video recording the house and surrounding farm. She inadvertently recorded a conversation between Tom and Fred that outlined the details of the transaction (i.e., number of acres, timing of closing, terms of sale, cash offer, etc.). Three days later, Fred decided he did not want to sell his farm and returned Tom's check. Tom and Mary sued Fred, claiming that they had a valid contract for the sale of the farm and are seeking to enforce that contract.

**A. Does Fred have a viable Statute of Frauds defense to Tom and Mary's lawsuit? Explain fully.**

**B. What impact, if any, might the check with the notation "deposit for purchase of a farm" on the memo line have on Fred's Statute of Frauds defense? Explain fully.**

**C. What impact, if any, might the recorded conversation have on Fred's Statute of Frauds defense?**

Explain fully.

**1A.** The oral agreement between Allen and Bob constitutes a contract. A contract exists when there is a valid offer, an acceptance of that offer, and consideration (no matter how slight) offered by both parties. Consideration may take the form of giving something of value to the other party, or foregoing some legal course of action the party could have otherwise taken. Here, there was an offer by Bob to sell Parcel A to Allen for $5,000 after he acquired it. This was supported by consideration in that Bob did not otherwise *have* to sell the parcel to Allen after acquiring it from Susan. Allen orally agreed to the offer, and supported his acceptance with consideration when he withdrew his offer to Susan to purchase Parcel A. Allen's withdrawal constituted foregoing a legal course of action he could have otherwise taken. As there was an offer, acceptance, and valuable consideration on both sides, a contract was formed.

**1B.** The Statute of Frauds (SoF) prevents the execution of a valid contract if that contract is not in writing and signed by the party to be bound if the contract concerns (1) giving something in consideration for marriage, (2) a services contract that cannot be completed within 1 year, (3) a land sale contract, including leases or easements for more than 1 year, (4) a promise by an executor to personally pay the obligations of an estate, (5) a sale of goods valued at more than $500, and (6) a surety promise, an agreement to stand in and pay the debt of another. This was arguably a land sales contract. However, it does not directly contemplate the sale of real property–Bob isn't signing land over to Allen, he's just promising to do so in the future. Therefore, the contract does not come under this portion of the SoF, nor does it fit within the other enumerated applicable situations. Here, the SoF doesn't apply. The oral promise will therefore be enforceable.

**1C.** If a court ruled that the SoF applies, Allen could argue that he relied on Bob's promise when he withdrew his offer to Susan. Detrimental reliance on a promise made by another evidenced by real conduct or performance by one side (withdrawal of the offer to buy Parcel A) can force the other side to comply with the oral contract through estoppel, even if the SoF applied. Allen may therefore be able to argue that Bob should be forced to perform as he relied to his detriment on Bob's promise.

**2A.** Fred has a SoF defense to Tom and Mary. As stated above, a contract for the sale of real property must be in writing and signed by the party to be bound. Here, there is no showing that a writing existed evidencing Fred's desire to sell, much less one signed by him. He, therefore, has a SoF defense.

**2B.** It is possible that the check notation could constitute a writing evidencing a sale of the farm in compliance with the SoF. The memo line indicates that payment is for the purchase of the farm. If Fred were to indorse the check and cash it, then this might constitute an acceptance of the offer by Tom to purchase the farm in a writing signed by Fred. The check would evidence that the parties intended to sell the farm (seemingly the only one Fred owns), and, by signing the check, Fred would be signing an instrument contemplating the sale of land as the party to be bound.

**2C.** The recorded conversation could harm Fred's SoF defense in showing that he intended to convey the farm as evidenced by the numerous details he discussed with Tom over the sale. Typically, a land sale contract can defeat the SoF if 2 of the 3 following exist: the buyer takes possession of the land, pays partial or full value, or makes improvements to the land. The recorded conversation could serve as extrinsic evidence pointing toward the parties' intent at the time to engage in the sale per the above three factors. However, it seems unlikely the recording alone would be enough to overcome the lack of a writing.

# QUESTION 12

Dan owned a chicken-wing restaurant, Wing Hut, in Anytown, Ohio. After years of success, sales declined after ABC Wings, another chicken-wing restaurant, opened across the street. Dan thought his only hope was to shut down the competition. Dan decided that he would set fire to ABC Wings one night after it closed. Dan asked Amy, his girlfriend, to set fire to ABC Wings and she agreed.

Dan's head chef, Chris, overheard the plans. He worried that Wing Hut might have to close, so he offered to help. Dan asked him to look at the floor plans for ABC Wings to help identify the best place to set the fire. Chris drew a map and directions to lead Amy to the perfect place to start the fire.

Seeing an opportunity to eliminate additional competition, Dan asked his roommate, Bob, to set fire to XYZ Taco, another restaurant located next door to Wing Hut. Bob agreed to help. Unbeknownst to Dan, however, Bob contacted the police and explained the plan.

On the designated day, Dan went to a gas station and bought two gallons of gas, one for Amy to use at ABC Wings and one for Bob to use at XYZ Taco. Amy and Dan waited at Wing Hut until close to midnight when the restaurants were closed. Amy then took the gas can across the street while Dan waited at Wing Hut. As Amy entered ABC Wings, Dan saw several police cars suddenly arrive. Dan called Amy on her cell phone and told her, "I changed my mind. You are on your own. I want nothing to do with your plan." Moments later, police officers burst into both restaurants and arrested Amy and Dan. Bob remained at home, not intending to go through with the plan.

Amy, Chris, Dan, and Bob were indicted in the Anytown County Court of Common Pleas.

**1. Should Amy be convicted of attempted arson?**

**2. Should Chris be convicted of complicity?**

**3. Should Dan be convicted of conspiracy to commit arson with Amy?**

**4. Should Bob be convicted of conspiracy to commit arson with Dan?**

**In each answer, identify any defenses that might reasonably apply and whether they are likely to succeed.**

Explain each answer fully.

Amy - Amy should be convicted of attempted arson. In Ohio, arson is when a person by means of fire or explosion knowingly causes or creates a substantial risk of harm to another's property. Amy setting fire to ABC would be arson. Under fed law and most jurisdictions, attempt requires a substantial step with intent to commit. In Ohio, attempt/substantial step means the defendant took steps that corroborated his criminal purpose. Here, Amy agreed to set fire to ABC. There are two actions that could constitute attempt first, when Amy went to Wing Hut with Dan to wait until close of midnight this constituted an attempt. Second, lying in wait is typically considered a substantial step, and this certainly corroborated Amy's criminal purpose of waiting to set fire. She also took a substantial step/attempted the crime when she took the gas can across the street. Therefore, she can be convicted of attempted arson. She has no defenses because she was in the process of completing it when the police arrived.

Chris - In Ohio, if a person with the culpable state required to commit a crime (1) aids and abets (2) solicits another (3) conspires with others or (4) directs an innocent person to commit a crime, that person will be guilty of complicity, and can also be guilty of the completed crime. Conspiracy is an underlying crime that can give rise to complicity. Conspiracy is when a person with the purpose to commit, facilitate or engage in a crime aids or abets in the planning of the crime or agrees with another that one of them will do an act necessary to facilitate the crime. Here, Chris overheard the plans and offered to help, meaning that he had the specific intent to commit the crime. (Note: specific intent in Ohio means that the defendant had the specific purpose in causing a result or if the gist of the offense is the crime, he had the intent to engage in that conduct). Additionally, he aided and abetted by giving a map. He conspired with others because he had purpose of helping with crime and aided in the planning by giving the map. Therefore, he will be guilty of complicity. He will have no defenses because he did not attempt to withdraw or thwart the conspiracy.

Dan - Please see underlined definition of conspiracy above. Dan can be convicted of conspiracy of arson (arson definition in #1) with Amy. Here, Dan had the purpose to commit the crime and aided and abetted. He is the person who came up with the whole conspiracy. Dan will argue that he withdrew. In Ohio, a person can withdraw from a conspiracy if he thwarts the success of the conspiracy, withdraws and announces this to co-conspirators or timely notifies the police. Here, he did not do any of that.

Although he announced his withdrawal, it was only because he said the police arrived. In Ohio, Defenses, such as attempt, can happen when there is a complete and voluntary renunciation of criminal purpose. Because this was not a voluntary withdrawal, Dan is guilty of conspiracy.

Bob - Bob will probably not be guilty. See conspiracy definition above. Here, Bob agreed to help, and therefore, would be guilty of conspiracy upon the agreement. However, as stated above, there are defenses. Here, Bob both timely notified the police and thwarted the success of the conspiracy.

Additionally, he did not intend to go through with the plan and remained at home. Therefore, he has a valid defense of conspiracy. NOTE: It is possible that Dan did not truly agree to help, and it was a plan to get Dan caught; there could still be a conspiracy charge for Dan because unilateral conspiracies exist in Ohio.

# MPT 1

***State of Franklin v. Hale***

In this performance test, the examinee is an assistant district attorney in the office that prosecuted defendant Henry Hale for the attempted murder of Bobby Trumbull. Hale was convicted following a jury trial. He has now filed a motion for a new trial claiming that the prosecution failed to disclose exculpatory statements by a witness and the victim in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and that the trial court erred in allowing the prosecution to introduce the witness's out-of-court statements, which were made to a detective shortly after the shooting and placed Hale at the scene. The trial court allowed the introduction of this hearsay evidence on the theory that Hale had wrongfully caused the witness, who was his girlfriend at the time of the shooting, to be unavailable by marrying her before trial. The court found that Hale married the witness, at least in part, to prevent her testimony at his trial by asserting Franklin's spousal privilege. The examinee's task is to draft the argument section of the brief opposing Hale's motion for a new trial and persuading the court that no *Brady* violation occurred with respect to either the witness's purported recantation or the victim's statement to the medic in the ambulance, and that the trial court properly admitted the witness's hearsay statements. The File contains the instructional memorandum, the office's guidelines for writing persuasive briefs, the defendant's brief in support of motion for a new trial, excerpts from the trial testimony, and excerpts from the hearing testimony on Hale's motion for a new trial. The Library contains excerpts from Franklin rules of evidence, criminal statutes, and rules of criminal procedure, as well as three Franklin cases.

A

OFFICE MEMORANDUM

To: Julie Packard

From: Examinee

Re: Legal Argument for New Trial in *State v. Hale*

District Attorney Hale, please see the legal argument for why a new trial should be granted in *State v. Hale* below.

**III. Legal Argument**

Hale raises three issues for why a new trial should be granted. They are: (1) a *Brady* violation in regard to statements made by Ms. Reed; (2) a *Brady* violation in regard to statements made by Mr. Trumbull; and (3) a Franklin Rule of Evidence 804(b)(6) violation.

1. Exclusion of Ms. Reed's Second Statement Was Not a Violation of *Brady* Because It Did Not Violate *Brady's* Possession Requirement and Material Requirement.

Exclusion of Ms. Reed's second statement was not a violation of *Brady* because it did not violate *Brady's* possession requirement and material requirement. Under *Brady v. Maryland,* the government's suppression of exculpatory evidence violates the due process clause of the Fifth and Fourteenth Amendments. To find a violation of *Brady*, a Court must find three factors: (i) the evidence is favorable to the defendant; (ii) the government must have suppressed the evidence; and (iii) the evidence must be material, *Haddon*. In *Haddon*, the court noted that evidence favorable to the defendant is "Evidence which will serve to impeach a prosecution witness," *Haddon*. The Franklin Supreme Court further noted that under the second factor, suppression occurs whether it is intentional or not, and that an "open file policy" it is even more likely that the suppression could be intentional because then the Defendant is less likely to look for further information, id. In *Capp v. State*, however, the Franklin Court of Appeals further clarified the government's possession requirement. The *Capp* court held, that possession by the government is not found if the government entity holding the potentially exculpatory evidence is not the "investigating police department or other government entity involved in the investigation or prosecution," *Capp* (citing *Kyles*). The *Capp* court further held that a "prosecutor is not required to furnish a defendant with Brady material if that material is fully available to the defense through the exercise of due diligence, *Capp*. Finally, the Franklin Supreme Court further noted that materiality is determined on the basis of whether "had the jury been provided with the evidence, there is reasonable probability that the result would have been different," *Haddon*. The Court went on to note "The State's obligation is not a piece-by-piece obligation. Rather it is a cumulative obligation to divulge all favorable evidence." *id*.

Here, Ms. Reed's second statement, fails part two and three of this analysis. Under the first *Brady* prong, the statement made by Ms. Reed would have provided the ability to impeach Det. Jones' statement at trial. Thus, Ms. Reed's second statement is favorable to Mr. Hale's defense. Although the prosecution is deemed to have been in possession of the statement – since a police officer investigating the crime was in possession of it, it is deemed to be held by the prosecution even under *Kyles* – Ms. Reed's second statement still fails the second prong of *Brady*. Under *Capp*, the defense through due diligence could have learned of this statement. Mr. Hale and Ms. Reed married. The day after their marriage, Ms. Reed went to the police station and recanted her statement. Mr. Hale or his attorney through due diligence could have discovered that Ms. Reed made this recanted statement. The ease of this discovery by Mr. Hale, under *Capp*, requires the Court find no violation of *Brady* since all three factors are required. However, Ms. Reed's second statement also fails the test of materiality. Had Ms. Reed's second statement been introduced, it is unlikely a change in result would have occurred, because the

prosecution would have impeached her credibility by the way she acted when Det. Jones' was asking her questions. Ms. Reed felt compelled by her marriage and by Mr. Hale directly to recant her story, stating, "He just told me to tell you that he didn't do it." Direct Testimony of Detective Mark Jones. There is no reasonable probability that a jury would believe this second statement in light of this. Therefore, there is no materiality violation, and hence further weight to no *Brady* violation.

Franklin Rule of Criminal Procedure 33 allows a court, in its discretion, to vacate a judgment and grant a new trial "if an error during or prior to trial violated a state or federal constitutional provision, statute, or rule, and if the defendant was prejudiced by that error." Here, there was no constitutional violation in the prosecution failing to provide the second statement by Ms. Reed. Since no statute or rule was violated either, the court should not vacate the judgment and should not grant a new trial.

2. Exclusion of Mr. Trumbull's First Statement Was Not a Violation of *Brady* Because It Did Not Violate *Brady's* Possession Requirement.

Exclusion of Mr. Trumbull's first statement was not a violation of *Brady* because it did not violate *Brady's* possession requirement. As noted above, the *Brady* test has three parts, which have further been defined by subsequent court rulings, all noted previously. Critical here, is a violation of *Brady's* second requirement, the possession of exculpatory evidence by the prosecution, is not imputed on the prosecution where government possession is outside of the police or investigating body's possession, *Kyles*. Further, a *Brady* violation does not occur where the defense had an equal opportunity through due diligence to discover the evidence, *Capp*.

Here, Mr. Trumbull's first statement fails either of these tests. First, under *Brady's* first prong, Mr. Trumbull's statements were favorable to the defense because they could have been used to impeach his testimony. Second, under *Brady's* third prong, this information was material. The fact that Mr. Trumbull and Mr. Hale were feuding could cause a jury to believe that maybe the shooting happened for another reason, such as Mr. Trumbull attempting to lunge at Mr. Hale. However, Mr. Trumbull's statement fails the second prong of *Brady*. Here, an EMS driver is not considered to be in the prosecutorial or investigative chain of the government. An EMS driver's job is to transport sick patients to the hospital. This is similar to the fact pattern of *Capp* where hospital records held by a government-owned hospital were not found to be in the chain. Further, Hale could have discovered this information on his own by subpoenaing EMT Gil Womack to testify. It would not have required any more than due diligence to determine what EMTs were working on Mr. Trumbull. Therefore, Mr. Hale's claim of a *Brady* violation fails.

Here, there was no constitutional violation in the prosecution failing to provide the second statement by Ms. Reed. Since no statute or rule was violated either, the court should not vacate the judgment and should not grant a new trial, because Franklin Criminal Procedure Rule 33 was not properly invoked.

3. Hale was not prejudiced by the inclusion of Reed's hearsay statements because Hale married Reed to improperly prevent her from testifying.

Hale was not prejudiced by the inclusion of Reed's hearsay statements because Hale married Reed to improperly prevent her from testifying. Under the Franklin Criminal Statute § 9907, a defendant can prevent his spouse from testifying so long as they are married at the time of trial, and such a finding makes the witness to be unavailable. Under Franklin Rules of Evidence 804(b)(6), hearsay statements which are normally inadmissible, can be admitted where the defendant causes a witness to be unavailable by improper means. In *Preston*, the Franklin Court of Appeals, found that simply marrying someone after charges have been instituted does not constitute an improper unavailability of one's spouse, where the parties were engaged to be married beforehand and did not change their time frame for their wedding to force the spouse to be unavailable, *Preston*.

Here, Hale did improperly cause Reed to be unavailable, so the admittance of Reed's statement was proper. In this case, the prosecution called Reed to the stand and Hale properly invoked privilege under § 9907, thus making Reed unavailable to testify. Reed and Hale's marriage was clearly an attempt to only make her unavailable, however, as seen by the statement Ms. Reed gave to Det. Jones. Det. Jones noted that Reed made her second statement the day after the wedding, noting Hale told her to go and make a statement, that she was afraid Hale would leave her if she didn't recant, and that when asked if Reed was afraid of Hale she shrugged, all while refusing to make eye contact with her shoulders slumped. Further, Reed and Hale had only been dating for a short time and were not engaged when the alleged crimes occurred. Therefore, the movement from not even engaged to married in under a month, while being investigated for the attempted murder of Trumbull, makes Reed's use of the marriage to prevent testimony a likely reason for making her unavailable. This is not like *Preston*, where the couple was engaged and stuck to a set timeline for their marriage. Rather, it was an intentional abuse of the privilege and should be found to have improperly resulted in Reed's unavailability, so Det. Jones' in-court statement of Reed's out-of-court statement should be allowed to stand.

Since there was no violation of Rules of Criminal Procedure 33, this court should not overturn the trial court's allowance of this hearsay statement under the 804(b)(6) exception.

# MPT 2

***Rugby Owners & Players Association***

The examinee's law firm has been retained by two entities, the Rugby League of America (the League, made up of the owners of each of the eight teams) and the Professional Rugby Players Association (the union representing the Players). The parties want the law firm's assistance in the creation of an unincorporated membership association, the Rugby Owners & Players Association (ROPA). ROPA will be a joint venture of the League and the Players to exploit various commercial opportunities, such as broadcast rights and merchandising, presented by professional rugby. Although the League and the Players each have their own counsel, they need neutral counsel to assist them in the creation of ROPA, as neither side entirely trusts the other. The examinee is asked to draft only those provisions of ROPA's Articles of Association that deal with the association's governance (e.g., quorum requirements, voting rules, filling vacancies on the board, naming a chair, apportioning revenue, and amending the articles). In doing so, the examinee is instructed to provide a brief explanation of each of his or her recommendations and describe how the recommended language comports with both Franklin law and the clients' wishes for how the association should operate. The File contains the instructional memorandum, an interview with the representatives of the League and the Players, and an initial draft of selected provisions of the ROPA Articles of Association, with blanks to be filled in for both substantive language and explanation for those provisions the examinee is to draft. The Library contains excerpts from a treatise on Franklin corporate law, which also is applicable to unincorporated membership associations, as well as a case from the Franklin Court of Appeal addressing quorum and voting requirements.

ARTICLE IV - BOARD OF DIRECTORS

SECTION 1. GOVERNMENT.

**Language**: The government of the Association shall be vested in, and its affairs shall be managed by, a Board of Directors, consisting of sixteen directors, who shall represent each class of the members as follows: Each of the 8 teams comprising the League would be represented by one director on the board. Thus, each team would select one director to represent them, and the individual team is in charge of selecting that person to be their director. The other 8 directors will represent each of the Teams' players. The director for each team will be the representative that the team selected as the team's representative to act as a liaison with the Rugby Union.

**Explanation**: According to Walker's Treatise on Corporations, Franklin law requires an association like this to have a minimum of three directors. Usually there is an odd number of directors to prevent deadlock, but the ROPA will include two classes of members on the board, making this even number of directors acceptable. Although this even number might lead to deadlock, this even representation could also lead to cooperation to ensure that both sides' viewpoints are heard. Also, the Players and the League have made it very clear that they do not want either side to control the organization, and they do not want independent directors appointed under any circumstances. It may be in our clients' best interest to tell the Players and the League that adding one independent director would then create an odd number and potentially prevent deadlock, but based on our prior conversations with the League and the Players, it is doubtful that they would accept this proposition. Thus, in order to achieve our clients' main goal of equal control over the organization, it would be the best course of action to ensure that both parties have an equal number of directors on the board. That is why there would be 8 directors each representing a member team of the League, and 8 directors each representing the Players on each of those member teams. Our clients have told us they will use their own internal processes to determine who that director is.

ARTICLE IV - BOARD OF DIRECTORS

SECTION 5. VACANCY IN BOARD OF DIRECTORS

**Language**: Vacancies on the board will be fulfilled by the class in which the director represents. If a director represents an owner of one League team, then that particular team's owner can name the new director. The director filling each owner's seat would continue in office until the ownership of the team changed or the team no longer wants that individual to represent the team on the board. As for the Players, if the Player's representative to the Union changes, then the specific team represented will be allowed to choose a new director.

**Explanation**: This provision is meant to fulfill our clients' goal of being able to name their own directors. Walker's treatise states that there are a variety of ways that a director's vacancy can be filled, and one method is to allow the class members to fill any vacancy in that class. This is what we meant to achieve here. If one particular team owner's director stepped down, then that particular team's owners would fill the spot. The same process would be used for the Player's directors.

ARTICLE IV - BOARD OF DIRECTORS

SECTION 6. MEETINGS OF THE BOARD

**Language**:

b. Quorum: A quorum will be present if 9 members of the Board of Directors are present, but in addition at least two representatives of each class of members must be present.

c. Voting: For resolutions in the ordinary course of business, a majority of directors from each class, plus one, must be present and voting affirmatively for each class vote of any proposed resolution in order for the resolution to be adopted. If the resolution requires a substantial change in the business, like the resolution seeks to change the split of distributions of income or a change the composition

of or voting requirements for the Board of Directors, then the resolution must be approved by a 2/3 supermajority of the entire board.

**Explanation**: Under Walker's treatise, a quorum of a majority of the board of directors is necessary to take action. If there are different classes, then there could be additional requirements to ensure that the classes are represented. This provision is drafted to reflect the predicament in *Schraeder v. Recording Acts Guild*. That case is very similar to our clients' situation here because the association had two classes of people who did not trust each other. The Articles attempted to quell that distrust by providing for certain checks in order for substantial changes to be approved. One particular provision is included in ROPA's articles: the court in *Schraeder* found that by requiring a quorum to include at least two directors from each side, the articles effectively prevented either side from gaining an advantage should the other side not be present to vote. This provision is incorporated in ROPA's articles. An action will not be valid unless there are at least two directors from each side present. Also, our client is concerned about distrust and unequal voting power, and our client wants to ensure that neither side can control the organization. Therefore, in order for a substantial change in the organization to be approved, there must first be a quorum in which at least two directors from each side will be present, and then, in addition, there is a supermajority vote required for the action to pass. Thus, even if one side's directors all vote in favor of a substantial change, there must be some of the other side's directors that also agree in order for the change to be valid. This should help even out the power between the two classes. Also, the Players said they were fine with having simple matters approved by a majority to ensure ROPA functions property. Thus, if a resolution is an ordinary resolution made in the course of business, it can be approved by a simple majority.

But, on the other hand, our clients should be aware of potential disadvantages. Because ROPA's quorum requirements would be more demanding, it will be more difficult for valid resolutions to pass. This could cause a problem for ROPA because our clients want to get ROPA off the ground and functioning as quickly as possible. These hightened requirements could make it more difficult to pass even ordinary resolutions, which could hinder ROPA's ability to function quickly and efficiently. We should also inform our clients about this potential down-fall.

ARTICLE V – OFFICERS

**Language**: The Board of Directors shall appoint the following officers: a Chair, a Secretary, and a Treasurer. The Chair shall be appointed from each class every six months. The Chair shall first be appointed from one class, who will serve a six-month term, then will be appointed from the other class, and serve a six-month term.

**Explanation**: Our clients do not agree at all about how to create the Chair position. The Players want the Chair to be a non-voting director, but the Owners do not want any other directors sitting on the board. Both parties made clear that they do not want an independent director. Thus, the lesser of two evils would be to appoint a Chair from each class on a rotating six-month basis. This would be *slightly* successful in preventing deadlock or favoritism because the Chair would have an extremely high turnover rate. But, it may be important to revisit this issue with our clients before we enact ROPA's Articles. Even though both sides specifically stated they did not want an independent director to be the Chair, that is likely the most plausible solution to truly meet our clients' goal of cooperation and equal power between the two groups. As previously stated, a rotating Chair would likely only slightly prevent deadlock and favoritism. Although the six-month term is short, the Chair likely can still accomplish his class' goals. The best way to ensure equal power between the two groups is to appoint a neutral, independent Chair.

ARTICLE VII - APPORTIONMENT & DISTRIBUTION OF REVENUES

**Language**: The Players and Owners both agree that Players and Owners will market all tangible and intangible property in order to maximize revenue. The Players and Owners agree to market these items for their mutual benefit. If there is any income remaining after ROPA's expenses are paid, then that income is to be split 50-50 between the League and the Players. If the League or the Players want to change this distribution, then the change must be approved by a 2/3 majority according to Article IV Section 6.

**Explanation**: It is important to our clients that they split the income 50/50. Our clients have already spent numerous hours bargaining trying to reach a solution. Thus, it is important to draft this provision in a way that will preserve the terms of their bargain. In light of *Schraeder*, our clients want to make sure that this change cannot be made by a simple majority vote. Thus, this section includes a cross-reference to the voting section in which a change to this provision will require a 2/3 vote and also a quorum including at least 2 directors from each class. This should help maintain our clients' bargained-for status quo. But our clients should be aware of the potential down-sides. Even though this may be the best way to accomplish our clients' goal and make sure that one class cannot unilaterally make these important changes, this rule will make it more difficult for either class to pass important resolutions.

ARTICLE VIII

**Language**: These Articles may be amended by a 2/3 majority vote of the directors during a meeting in which a quorum is present.

**Explanation**: This provision will accomplish our clients' goal of ensuring that one class of members cannot unilaterally make a crucial change to the organization. However, our clients should be aware that this might run contrary to another stated goal. The clients mentioned that they may want to add more teams to ROPA if they get the organization off the ground. But, this is a substantial change that should still be approved by a super-majority of the directors as required under Article IV Section 6. It might, therefore, be more difficult to add teams to ROPA later on. We would have to discuss with our clients whether they would be interested in including a special carve-out with different rules for adding a new member-team.

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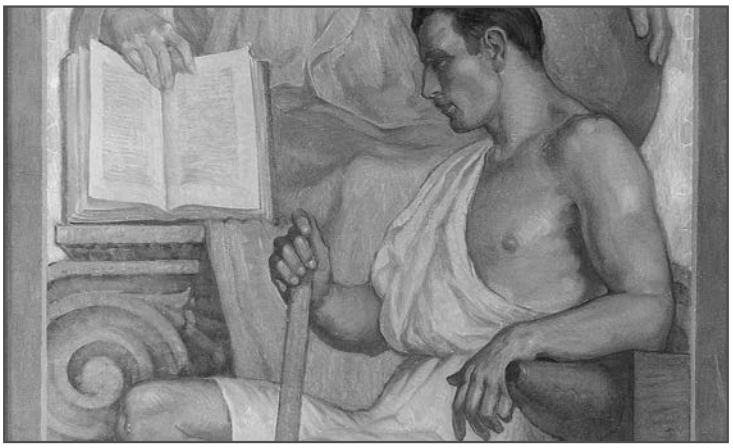

*On the cover:*

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# The Supreme Court *of* Ohio

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