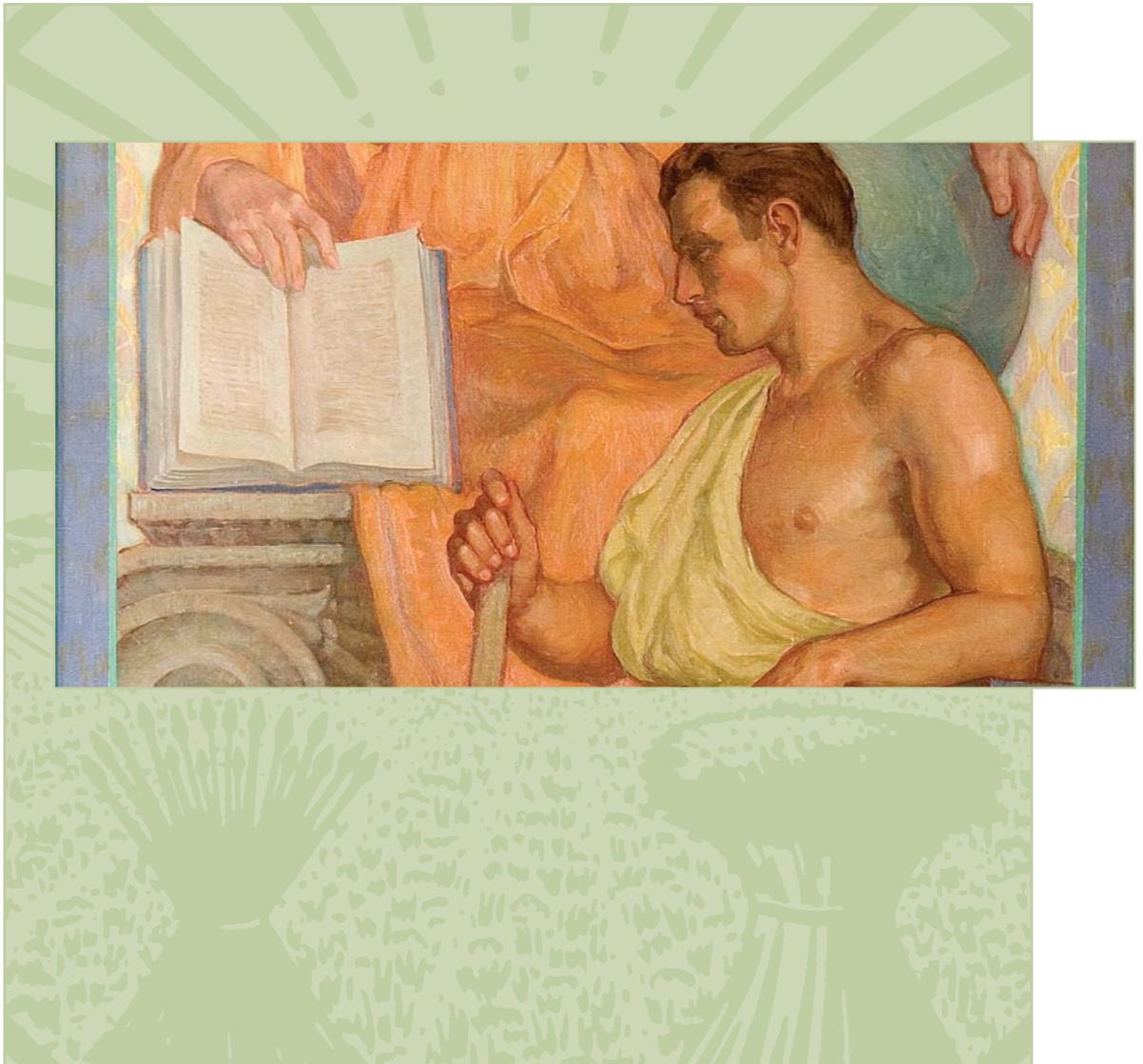


# THE SUPREME COURT *of* OHIO

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## February 2012 Ohio Bar Examination Essay Questions & Selected Answers Multistate Performance Test Summaries & Selected Answers



*On the cover:*

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

# THE SUPREME COURT *of* OHIO

FEBRUARY 2012 OHIO BAR EXAMINATION

Essay Questions & Selected Answers

Multistate Performance Test Summaries & Selected Answers



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# OHIO BAR EXAMINATION

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**February 2012**

**Essay Questions and Selected Answers**

**MPT Summaries and Selected Answers**

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

**The essay and MPT answers published in this booklet merely illustrate above-average performance by their authors and, therefore, are not necessarily complete or correct in every respect.**

They were written by applicants who passed the exam and consented to the publication of their answers. See Gov. Bar R. I(5)(C). The answers selected for publication were transcribed as written by the applicants. To facilitate review of the answers, the bar examiners may have made minor changes in spelling, punctuation and grammar to some of the answers.

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

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

Copies of the complete February 2012 MPTs and their corresponding point sheets are available from NCBE. Check NCBE's website at [www.ncbex.org](http://www.ncbex.org) for information about ordering.



# QUESTION 1

One afternoon at Discount Store in Anytown, Ohio, Worker and Coworker had been assigned the job of rounding up shopping carts in the parking lot. As Discount Store employees routinely did, Worker and Coworker competed to see who could be the first to clear the carts from their assigned half of the parking lot. Discount Store managers never attempted to stop the cart races between the employees because, although they realized that the races posed a risk of injury to the employees and others in the parking lot, the competition kept the employees motivated to bring the carts back into the store.

Determined to win the cart race against Coworker, Worker ran through the parking lot collecting carts as fast as he could. He was so focused on winning the race that he did not see Patron walking out of the store. Worker accidentally struck Patron with a cart, knocking him to the ground and causing physical injuries to Patron's left arm and wrist. Worker helped Patron to a bench near the store entrance and asked him to wait there while he put the carts inside and got his manager.

Patron waited briefly on the bench, but decided to walk to his nearby car to get his first aid kit. Worker had just finished returning the carts inside the store when he observed Shoplifter leaving the checkout line without paying for a bag of merchandise. Discount Store trained all of its employees to pursue shoplifters leaving the store with Discount Store merchandise, even though it was aware that pursuit of fleeing shoplifters might involve the use of force, which could result in injury to its employees, the shoplifter, and others nearby. As he was leaving the store, Shoplifter noticed that he was being followed and took off running.

Shoplifter ran into the parking lot and, as he was looking behind him to see whether Worker was still behind him, collided with Patron, who had just unlocked his car. Both Shoplifter and Patron fell to the ground and, just as the two were getting back up on their feet, Worker emerged from the store. Worker yelled to Coworker, who was still collecting carts in the parking lot, "Stop the shoplifter!" Believing that Shoplifter was trying to flee in Patron's car, Coworker rammed Shoplifter with a shopping cart, which knocked both Shoplifter and Patron to the ground again, causing Patron to sustain significant physical injuries to his right arm and both knees. As Patron was screaming in pain on the ground and Coworker came to assist him, Shoplifter grabbed his keys and made his getaway in Patron's car. Patron never saw his car again.

Patron plans to file a civil action against Discount Store in an Ohio court. Without discussing any potential causes of action against Worker, Coworker, or Shoplifter, fully explain your answers to the following questions:

1. Can Discount Store be held liable for the acts of Worker and Coworker?
2. What tort theories should Patron plead in his complaint against Discount Store to recover for his physical injuries?
3. May Patron recover from Discount Store for the loss of his car?

## 1. Vicarious Liability

Under vicarious liability, an employer may be held liable for the negligent torts of its employees when they are committed within the scope of employment. A tort is committed within the scope of employment when it is done at the employer's direction or the employee performs the action for the employer's benefit. When Worker struck Patron with his cart the first time, he was working to collect carts to benefit Discount Store (DS). Thus, Discount Store will be liable if that conduct was tortious.

An employer may generally not be held vicariously liable for intentional torts committed by employees, except torts committed in the course of a job activity requiring intentional force, such as a bouncer. Here, Coworker was trained to pursue shoplifters, even though DS knew that such training would result in the use of force and potential injury. Thus, DS may be held vicariously liable for intentional or negligent torts committed by Coworker and Worker in the pursuit of shoplifter.

2. Patron may pursue a general negligence claim against DS for Worker's negligent collision with Patron. As discussed above, DS is vicariously liable for the collision. Negligence torts require duty, breach, causation, and injury. Here, Worker owed a duty of reasonable care to customers who might foreseeably be in the way of his cart. He breached that duty by racing with the carts instead of using ordinary care. This caused him to collide with Patron, causing injury.

Patron may also pursue a negligent supervision claim against DS. Negligent supervision requires a supervisor to fail to use ordinary care to prevent foreseeable harms that their employees may cause to foreseeable plaintiffs. Here, it was foreseeable that Patron would walk in the parking lot, and the facts tell us that DS managers knew that the races posed a risk of injury to those in the parking lot. This is a violation of ordinary care, which caused the racing activity to continue, which caused injury to Patron.

Patron may claim battery against DS for Coworker ramming him with his cart. DS may be held vicariously liable for this tort, as discussed above. Battery requires that a defendant intentionally cause an offensive touching that injures the plaintiff. The doctrine of transferred intent applies: a defendant may be liable for an action aimed at person A that causes harm to person B. Here, Coworker intentionally rammed Shoplifter, trying to stop his flight. But the action harmed Patron as well, so transferred intent means that Patron has a battery claim against Worker, and vicarious liability means that DS is liable.

Patron may charge DS for negligent supervision for training its employees to pursue shoplifters. The facts state that DS gave this training even though it was aware that force could result in injury to employees, shoplifters, or others. As a tenant or owner of land, DS owes a duty of reasonable care to business invitees. A business invitee is a person invited onto premises for business purposes. Knowingly instructing employees to act in a way that foreseeably might harm an invitee while on the premises is a breach of that duty.

3. Patron may recover for the loss of the car. Causation requires both but for causation and proximate causation. The "chain" of proximate causation can be "broken" by the intervening intentional torts of third parties. Shoplifter's getting in Patron's car and driving away was not a foreseeable result of DS's or its employees' acts. However, Ohio uses modified comparative negligence. A plaintiff can recover the percentage fault from each defendant. He may recover some amount from DS for the amount that the pursuit made Shoplifter more likely to commit torts.



# QUESTION 2

Paul was injured in an automobile accident in Anytown, Ohio, when his car was struck by an automobile driven by Dan. Paul filed a negligence action in an Ohio State Court against Dan to recover damages for injuries he sustained in the accident. At the jury trial in the case of *Paul v. Dan*, the following opinions were proffered:

1. The police officer (Officer) who investigated the collision after the occurrence of the accident was called by Paul as an expert. Officer testified that Dan was traveling faster than 65 mph (the legal speed limit) and, consequently, was not able to stop in time to avoid the collision. The sole basis for Officer's opinion is that Mary, another driver and witness to the accident, signed an affidavit stating that she was traveling at exactly 65 mph when Dan passed her. Mary's affidavit was not in evidence at the trial.
2. John, another driver who witnessed the accident, was also called as a witness by Paul. John testified that he was traveling at 65 mph when Dan passed him just 50 yards from the accident scene. Therefore, John opined that Dan was traveling more than 65 mph.
3. Rita, a qualified accident and reconstruction expert, was called as an expert by Paul. She testified that, based upon the length of the skid marks and the weather conditions at the time of the accident, it was her opinion that Dan was driving negligently.
4. Paul's wife, Wilma, called as a witness by Paul, testified that as a result of the accident, Paul was no longer able to sit for more than 2 hours at a time and, accordingly, he would never be able to go to movies, operas, and other events that required sitting for more than 2 hours.
5. Dr. Smith, a physician who examined Paul after the accident, was called as an expert by Paul. Dr. Smith testified that Paul told him that he hurt his back as a result of the accident. It was Dr. Smith's opinion, therefore, that the accident proximately caused Paul's back problems.
6. Dr. Wilson, a physician who examined Paul on behalf of Dan, was called as an expert by Dan. Dr. Wilson testified that she learned from an outside source that Paul had played baseball for 10 years and that, in her opinion, Paul's injuries are consistent with that of someone who plays baseball. Therefore, she testified that his injury was the result of playing baseball and not the accident.
7. Nurse Andy, a nurse practitioner for 25 years, but not a physician, was called as an expert by Dan. Nurse Andy testified that he had extensive experience in reviewing and interpreting X-rays. He testified that he had reviewed X-rays taken of Paul both before and after the accident and concluded that Paul sustained a back injury before the accident.

What specific objections should be made to the admission of the testimony being proffered in each of the foregoing scenarios and how should the court rule?

Explain your answers fully.

1. Dan's attorney should object to the opinion of Officer on the grounds that it is not based on facts in evidence. In Ohio, an expert can only testify based on personal knowledge or facts in evidence at the trial. This is different than the Federal Rules, which allow experts to consider outside evidence in forming their opinions, such as material customarily and routinely relied on by experts in the field. Here, Officer wishes to base his opinion on Mary's affidavit which has not been offered into evidence. The Court should sustain the objection.
2. Dan's attorney should object on the grounds that John is not qualified to estimate the speed of Dan's vehicle. However, a lay person is permitted to offer an opinion that estimates the speed of a vehicle. John is a driver, which means he would be permitted to estimate the speed of the vehicle operated by Dan from his personal observation. The Court should overrule the objection and permit John to offer his opinion as to the speed of Dan's vehicle at the time of the accident.
3. Dan's attorney should object on the grounds that Rita's opinion is a legal conclusion. A witness is not permitted to offer an opinion which states a legal conclusion. Here, Rita wants to testify that it is her opinion that Dan was driving negligently. Negligence is a legal standard and is to be determined by the jury. Rita should be permitted to testify as to the cause of the accident and her observations concerning the skid marks and weather conditions, but the legal conclusion should be excluded. The Court should sustain the objection.
4. Dan's attorney should object on the grounds that Wilma's testimony is impermissible lay person testimony. A lay person may testify to facts on which they have personal knowledge. Here, Wilma would have personal knowledge of Paul's condition because she is his wife. If she has personally observed Paul's inability to sit for more than two hours, she should be permitted to testify to his inability to sit for more than two hours. The Court should overrule the objection.
5. Dan's attorney should object on the grounds that Dr. Smith is offering a legal conclusion. Proximate cause is a legal standard necessary for a finding of negligence. It is a legal conclusion that must be determined by the jury. Dr. Smith may testify about what Paul told him regarding his back because it is admissible under the hearsay exception for statements of medical treatment or diagnosis. However, the legal conclusion of proximate cause should be left to the jury. The court should sustain the objection.
6. Paul's attorney should object on the grounds that Dr. Wilson's expert testimony is based on facts not in evidence. Dr. Wilson does not have any personal knowledge that Paul plays baseball and the source from which Dr. Wilson learned this information has not been identified. Therefore, it will be impermissible for Dr. Wilson to base his expert opinion on such facts, because they are not in evidence. The Court should sustain the objection.
7. Paul's attorney should object on the grounds that Nurse Andy's testimony is not based on facts in evidence. The X-Rays should be properly authenticated and admitted into evidence before Nurse Andy is permitted to offer testimony regarding his opinion on Paul's injuries. The Court should sustain the objection.



# QUESTION 3

Accountant, Inventor, and Marketer entered into a written agreement forming an Ohio general partnership named Specialty Lighting Co. (Company). The agreement stated that the purpose of Company would be limited to developing a new light bulb to replace existing lighting, obtaining a patent for the same, manufacturing a prototype, and selling the patent and a prototype to a third party. The agreement also provided that Accountant would keep the books and records and contribute \$20,000 to Company. Inventor would contribute the work he has done on the project, his agreement to complete the work, and his computer program valued at \$10,000. Marketer would use his expertise to find a single purchaser for the patent and prototype, and contribute \$5,000. There were no other provisions in the Agreement. Accountant and Marketer made their agreed cash contributions, and Inventor transferred and assigned his existing work and computer system to Company.

While working on the development of the patent and prototype, Inventor, without the knowledge of Accountant and Marketer, also operated another business which used Company's computer program. He was paid \$50,000 for such use.

Marketer has found Manufacturer, who purchased the prototype and patent for \$100,000, which has been paid to Company. Manufacturer has also paid Marketer a finder's fee of \$40,000, which Marketer did not disclose. Company has expended all of its funds for expenses.

Accountant informed his partners that he intended to dissolve Company. Inventor and Marketer demanded that Company be continued since Inventor has a new idea for another invention, which will be profitable.

Accountant has commenced an action to dissolve Company. The following issues are before the Court for a determination:

1. Whether Company should be dissolved.
2. Accountant discovered that Marketer received a \$40,000 finder's fee from Manufacturer and seeks to require Marketer to pay that money to Company.
3. Accountant discovered that Inventor continued to use the computer system for his other business and demands that Inventor pay Company the amount he has received for the use.
4. Marketer seeks to be paid for the one year of time and effort he has spent in finding Manufacturer to purchase the patent and prototype and claims the reasonable value of his services is \$100,000.
5. Inventor demands the return of the computer program he contributed to Company.
6. Marketer and Inventor demand that Accountant permit them to examine the books and records of Company, and Accountant has refused the request.
7. Accountant seeks to be paid for his time in dissolving Company and winding up the affairs of Company.

How is the Court likely to decide each of the foregoing issues?

Explain your answers fully.

1. **Dissolution of Company.** The Company should be dissolved because it has achieved its limited purpose. In Ohio, general partnerships may be created for any legal business purpose. General partnerships may also be created for a specific, limited purpose. A general partnership may dissolve upon the completion of its limited purpose, by the occurrence of a specified event in its partnership agreement, or through judicial means. In this case, the Company has achieved its limited purpose of developing, obtaining a patent for, manufacturing a prototype of, and selling the patent and prototype of the new light bulb. Thus, the court will rule that the Company should be dissolved.
2. **Marketer's Finder's Fee.** Partners in a general partnership have a duty to disclose information pertinent to the partnership to the other partners. Further, partners have a general duty of loyalty to the general partnership. The finder's fee paid to Marketer was money paid to Marketer for undertaking his duties under the partnership agreement, meaning that such money should have been paid to the partnership. A court will find that in accordance with the duties described above, Marketer should have notified the other partners of the finder's fee and had it paid to the Company.
3. **Inventor's Other Business.** As touched on above, partners in a general partnership have duties of loyalty and disclosure to their other partners. The duty of loyalty requires a partner to disclose possible business opportunities to the partnership before usurping such opportunities for him or herself. Further, once property is contributed to the partnership, it becomes the property of the partnership and may only be used for partnership purposes, unless the partner receives the partnership's consent to use it otherwise. In this case, Inventor used partnership property to run another separate business without the partnership's consent. For the foregoing reasons, the court is likely to require Inventor to pay the amount he received to the Company.
4. **Under Ohio law, general partners are not entitled to be compensated for their services to the partnership unless otherwise agreed on by the partners.** In this case, the partnership agreement is silent regarding compensation, and so, Marketer is not entitled to compensation for his services. Thus, the court will likely find in favor of the Company and not require any money to be paid to Marketer.
5. **Upon dissolution, the assets of the partnership are distributed first to creditors and then to the partners, first to repay capital contributions and then equally unless otherwise agreed upon by the partners.** If a partnership does not have liquid cash to repay its creditors, then it may need to auction off its other tangible assets. However, nothing here indicates that there are creditors of the Company. However, the facts do indicate that no funds are left. Thus, tangible property will need to be sold in order to repay each partner their capital contribution, and Inventor may not receive his computer program. Thus, the court is likely to order a sale of the Company's assets and Inventor will not get his computer program back.
6. **Request to Examine Books.** Under Ohio law, all general partners have the right to examine the books and records of the partnership. Thus, the court is likely to allow Marketer and Inventor to examine the books and records of the Company.
7. **Under Ohio law, although partners are not entitled to compensation for their services to the partnership, they are entitled to a reasonable amount of compensation for dissolving and winding up the partnership.** This compensation is paid before the partner's capital contributions are repaid. So, the Court will likely award a reasonable amount of compensation to Accountant.



# QUESTION 4

Drew and Marie married in 1988. Marie had been married previously and had one child, Alan, from the prior marriage. Marie's first husband had passed away shortly after Alan was born. Drew never adopted Alan.

Drew and Marie had one child together, Gina, who was born in 1990. In 1991, Marie drafted and executed a valid Ohio will, which had the following dispositive provisions:

1. I give to my son Alan, Lot X and Lot Y at Quiet Acres Lake, in Franklin, Ohio, which I inherited from Alan's father.
2. I give \$10,000 each to Alan and Gina, if they survive me.
3. I give all the rest and residue of my estate to my husband Drew.

Alan married Sandy in 2005. In 2008, Alan made and executed a valid Ohio will, which had the following dispositive provision:

I give all of my property to my wife Sandy, if she survives me. If my wife Sandy does not survive me, I give all of my property to my mother, Marie.

Shortly after Alan executed his 2008 Will, Sandy divorced Alan. Alan began drinking heavily and quickly lost his job. Drew and Marie visited Alan shortly thereafter and an argument about Alan's drinking ensued. Alan bolted out of the door, got into his car, and while quickly backing out of his driveway, inadvertently struck Marie with his vehicle. Marie died the next day. She was survived by Drew, Alan, and Gina.

Several weeks after Marie's death, Alan was charged with involuntary manslaughter for negligently causing Marie's death. Alan entered a guilty plea to the charge. While awaiting sentencing, Alan, using a jail laptop computer, drafted and sent the following email to Drew:

I am considering taking my own life for the horrible accident involving my mother, Marie. I want you to know that I disclaim any interest that I may have in her estate or any other property that she owned. I am sending this email to you so that you know my feelings. Please let Gina know that I loved our mother and feel horrible about what happened.

Alan never sent any subsequent emails, nor did he ever send any type of signed document regarding his interest in Marie's estate. Drew immediately contacted the jailer, who placed Alan under a 24-hour watch. Despite the increased security, Alan took his own life one week later. He was survived by Drew, Gina, and Sandy.

Several years prior to her death, Marie had sold Lot X at Quiet Acres Lake. She used the proceeds to purchase a vintage Mustang convertible. At the time of her death, Marie owned the following property: Lot Y at Quiet Acres Lake; \$150,000 in a brokerage account titled solely in Marie's name; and the vintage Mustang convertible.

At the time of his death, Alan owned a \$100,000 certificate of deposit held in his name in County Bank.

1. To whom and in what proportions should Marie's estate be distributed?
2. Identify what property is included in Alan's estate. To whom should it be distributed?

Explain your answers fully.

## Marie's Estate:

Under the Ohio law of Wills, property will be distributed pursuant to the terms of a will if that will is validly executed and the testator had testamentary capacity and intent. Here, the facts state that Marie's will was validly executed. On her death, the contents of Marie's estate were Lot Y in Quiet Acres, \$150,000 in a brokerage account titled solely in her name, and a vintage mustang convertible. Pursuant to her will, the specific devise of Lot Y should be distributed to Alan. Lot X cannot be distributed to Alan because that property was not owned by Marie at her death, therefore the gift is adeemed and it fails. The slayer rule states that a beneficiary may not inherit a legacy if they intentionally and feloniously killed the testator. Although Alan pled guilty to involuntary manslaughter in the death of Marie, he did not kill her intentionally, and therefore Lot Y should still be distributed to him. Although Alan drafted an email to Drew purporting to disclaim his interest in Marie's estate, his disclaimer was invalid because it was not executed with the proper formalities, namely it was not signed and it was not attested to by any witnesses.

Alan and Gina should each be distributed \$10,000 pursuant to Marie's will. Both of them satisfied the condition of surviving Marie because both outlived Marie by more than 120 hours. Alan did not take his life until several weeks after Marie's death. Although the will did not state where the \$20,000 total was to come from, a general devise such as this will be satisfied through other assets in the estate at the time of death. Because Marie had a brokerage account with more than adequate funds, the \$10,000 devises to Alan and Gina will be satisfied by taking from that account. Drew is entitled to the residue of the estate, which includes the mustang and the remainder of the brokerage account. The mustang is part of the residue because it was not specifically devised to anyone else, and the \$130,000 left in the brokerage account likewise will go to Drew because it is not disposed of in the will other than through the satisfaction of the money devise to Alan and Gina.

## Alan's Estate:

At the time of his death, Alan's estate includes Lot Y, and a \$100,000 certificate of deposit. Although it might be assumed that his \$10,000 inheritance from Marie is included in his certificate of deposit that constitutes all of his money, it may also be true that the \$10,000 is not currently in his estate, but is still in probate at the time of his death, and will be included in his estate later. Regardless, Alan's entire estate should be given to Gina pursuant to Alan's will and the Ohio anti-lapse statute. Although Alan's will names Sandy as his sole beneficiary, her rights to inherit under the will are terminated by law upon their divorce. The will remains valid, but all devises to Sandy are void. Under Alan's will, if the property did not go to Sandy it was to go to his mother Marie. Generally, when a beneficiary of a will dies before the testator the gift lapses and fails. However, under the Ohio anti-lapse statute, the gift will be saved if the beneficiary was related to the testator and if the beneficiary had descendant's who survived the testator. Here, Marie was Alan's mother and her daughter Gina survived Alan. Thus, Alan's devise of his entire estate to Marie should pass to Gina under the anti-lapse statute. Nothing from Alan's estate should go to Drew.



# QUESTION 5

Plaintiff filed a Complaint against Dr. Jones for negligent treatment of a severe head injury. During discovery Plaintiff learned that Dr. Jones carried \$2 million in malpractice insurance and that his employer, Health Corp., carried an additional \$1 million of insurance to cover separately the negligent acts of its employee, Dr. Jones. Plaintiff obtained leave to amend the Complaint to add Health Corp. as a defendant based upon its alleged vicarious liability. Plaintiff's sole purpose was to increase the amount of insurance available to satisfy Plaintiff's judgment.

Plaintiff properly served the statutory agent (Agent) of Health Corp. Agent timely forwarded the Amended Complaint to Health Corp.'s attorney, Litigator. Unfortunately, Litigator's secretary shredded the Amended Complaint because she thought it was a duplicate of the initial Complaint.

Litigator first learned of the Amended Complaint when Plaintiff filed a motion for default judgment against each defendant. Litigator filed a memorandum opposing entry of default and in addition moved the Court for a hearing on damages. The Court denied the motion for default judgment against Dr. Jones but granted the motion for default judgment against Health Corp. and, without a hearing, awarded damages in the amount of \$1 million based solely on the allegations in Plaintiff's motion for default judgment.

The case proceeded to trial on the claim against Dr. Jones. At trial, Plaintiff, a genuinely sympathetic figure in her wheelchair, moved the jury to tears. Plaintiff's economic expert opined that Plaintiff's economic losses totaled \$4 million. Dr. Jones' economic expert witness, who was prepared to testify that Plaintiff's losses were less than \$1 million, fell seriously ill only a few days before the trial. The Court denied a motion by Litigator for a two-week continuance to allow the expert to recover from his illness or to give Dr. Jones time to obtain a new economic expert. Thus, Dr. Jones was unable to present any evidence rebutting Plaintiff's economic evidence. The jury returned a verdict of \$5 million in favor of Plaintiff.

Fifteen days after the verdict, Litigator received a phone call from a juror's roommate, who stated he would swear under oath that Juror had Googled Dr. Jones and learned that Dr. Jones' medical license had at one time been suspended for drug abuse.

Three weeks after the Court entered judgment on the jury verdict for \$5 million, Litigator prepared a number of post-trial motions seeking relief from the jury verdict against Dr. Jones and the default judgment against Health Corp.

Assume the Ohio Rules of Civil Procedure apply to the following questions.

1. What post-trial motions are available to seek relief from a jury verdict, and would each such motion filed by Litigator on behalf of Dr. Jones be likely to succeed?
2. On what bases should Litigator seek relief from the default judgment against Health Corp., and would the Court be likely to grant the relief?
3. Would the filing of any of the post-trial motions discussed in response to questions 1 and 2 toll the time for appeal of Plaintiff's jury verdict?

Explain your answers fully.

Litigator may file the following motions: JNOV, new trial, remittitur and relief from judgment. Litigator's motions for JNOV, a new trial and remittitur are likely to be denied as untimely because they were not filed within 14 days of the verdict. The Rule 60 motion may prove successful based on a claim of jury misconduct. Motions for JNOV could be filed on the basis that the evidence is not sufficient to support the jury award. A request for remittitur could also be made based on a claim that the award was excessive. As noted, these motions would be untimely and likely denied. Even if timely, they are likely to fail. The evidence showed that the plaintiff sustained \$4 million in economic damages. The additional \$1 million likely reflects an award for pain and suffering and is unlikely to be set aside or reduced. A new trial motion is also proper. A new trial may be granted on one of several grounds, including prejudicial error during the trial and juror misconduct. Litigator should seek a new trial based on both because of the Trial Court's failure to grant a continuance and the alleged juror misconduct he learned about from the juror's roommate. Even if the timeliness issue were overcome, the first ground for relief is likely to be denied as the Court may be reluctant to revisit its prior denial of a continuance. However, the potential that there was juror misconduct is likely a ground for relief. Because of this timeliness issue, Litigator should also file an alternative motion under Rule 60 seeking relief from judgment. Because Litigator could not have learned of this misconduct in time to seek a new trial, he is likely entitled to relief under Rule 60. The Trial Court's refusal to grant a continuance is likely reversible error and warrants relief on appeal.

Litigator should seek relief from judgment on two grounds: (1) excusable neglect and (2) failure by the court to hold a hearing on damages. Litigator is unlikely to be able to demonstrate excusable neglect. His assistant's actions, though likely negligent, are not the sort of conduct Courts generally excuse.

The motions for JNOV, a new trial and remittitur would toll the period for appeal. The Rule 60 motion would not toll the time for an appeal.



# QUESTION 6

The following events occurred in Utopia, Ohio:

**The cell phone:** As Bob got up to leave the Utopia Transit Authority (UTA) bus he was riding in, his cell phone fell from his rear pocket onto his seat. Bob left the bus without realizing the phone had fallen out of his pocket. Tom, another passenger, boarded the bus and found Bob's phone on the seat. The phone contained lots of telephone numbers but no clue as to ownership. Because Tom did not know the identity of the owner of the phone, he placed the phone in his pocket, intending to keep it.

After another passenger informed the bus driver that he saw Tom pick up the phone, the bus driver approached Tom and demanded that Tom surrender the phone so that it could be turned over to the "lost and found" department. Tom refused, left his contact information, and exited the bus.

When Bob got home, he discovered his cell phone was missing. He searched for it but could not find it.

A few days later, Tom received a letter from UTA informing him that, although UTA did not know who had dropped the phone on the seat, UTA demanded that Tom surrender the phone to UTA for safekeeping until someone made a claim for it. Tom refused.

Several weeks later, Bob retraced his steps and concluded that he must have dropped the phone on the bus. He checked with UTA, which gave him Tom's contact information. Bob demanded that Tom return the phone. Tom refused.

**The purse with \$500 in it:** Finder is employed as a janitor by Hospital. During his shift, Finder found a woman's purse containing \$500 and cosmetics lying on top of the patient checkout desk of the Hospital. The purse did not contain any identification.

Finder turned the purse and its contents over to the "lost and found" department of Hospital. Hospital contacted current and former patients and employees, the police, and local media about the purse to see if anyone could identify the owner. After one year, no one had claimed the purse.

Finder claimed that the purse and its contents, including the \$500, now belonged to him and demanded that Hospital release it to him. Hospital refused to do so.

**The quilt:** Quilter took her quilt to Dry Cleaner for cleaning. She informed Dry Cleaner that the quilt was handmade and one of a kind. The quilt did not have a cleaning care label on it. It was adorned with painted murals and colorful embroidered floral displays. Dry Cleaner assured her that he could clean the quilt without damaging it. Quilter watched as Dry Cleaner followed his ordinary practices and tested areas of the quilt with paint, oil, and grease remover to check for dyes and paint that could potentially bleed in the dry cleaning process. After testing the quilt and discovering no problems with colorfastness, Dry Cleaner placed the quilt in the dry cleaning machine.

As soon as a chemical known as "pop-it" came in contact with the quilt, the dyes on the quilt began to bleed. "Pop-it" was not used by the Dry Cleaner in his pre-testing process, and it is not similar to any of the pre-testing chemicals used by Dry Cleaner. Dry Cleaner promptly stopped the machine, extracted the "pop-it" from the machine, and put the quilt through a dry cycle in the machine.

When the quilt was returned to Quilter, it was in a damaged condition. Quilter confronted Dry Cleaner who refused to accept responsibility for the damage to the quilt. Dry Cleaner stated that the quilt did not have a cleaning care label attached and that he followed his normal pre-cleaning testing practices.

1. Who has the superior right to the phone as between:
  - a. UTA and Tom?
  - b. Tom and Bob?
2. As between Hospital and Finder, who has the superior right to the purse and its contents?
3. Is Dry Cleaner liable to Quilter for the damage to the quilt?

Explain your answers fully.

1. Superior Phone rights. Lost property is property that has been inadvertently left behind by the owner. Possession of lost property belongs to the person who finds the lost property and this possessory right is superior to everyone in the world, except for the true owner of the lost property. The finder of the lost property must act as a bailee of the lost property and must take reasonable efforts to find the true owner of the lost property. Mislaid property is property that is purposefully placed in a certain location but is thereafter forgotten about and left behind. Possession of mislaid property goes to the owner of the locus whether the mislaid property is found, rather than the person who finds the mislaid property. Abandoned property is that which the true owner seeks to divest all interest in. Possession of abandoned property goes to the finder over all others.
  - (a) As to UTA and Tom — The phone is lost property because it was not intentionally placed on the bus, but was inadvertently left there. As such, Tom has superior right to possession over UTA because Tom is the actual finder of the lost phone. UTA has no interest in the lost phone because the property was lost, rather than mislaid. If the phone had been mislaid, UTA would have superior right to the phone as owner of the locus.
  - (b) As to Tom and Bob — Bob has the superior right to the phone rather than Tom because Bob is the actual owner of the phone. The finder of lost property can never have rights superior to the true owner. The property was not abandoned because Tom did not intentionally seek to divest himself of the right of ownership and control. Therefore Bob has superior rights to Tom in the phone.
2. Hospital has superior rights. The purse is mislaid property because it's likely that the owner intentionally placed their purse on the counter of the hospital and then inadvertently forgot about it later, which makes it mislaid, rather than lost. Possession of mislaid property goes to the owner of the locus where the mislaid property is discovered. Here the mislaid property was recovered by the finder, but possession did not go to the finder upon discovering the purse, rather it went to the hospital because they owned the locus where the mislaid property was found. The result would be the same if found by a hospital employee. Again, the hospital only has superior rights to everyone other than the true owner of the mislaid property and must act as bailee in trying to find the rightful owner, which hospital did here.

3. Dry Cleaner is liable for damage as bailee. A bailor is a person who gives possession of a piece of real property to another for a specific purpose, but does not give up ownership or title therein, and who receives that same property back at a stated time or event. If different property can be returned, it constitutes a sale rather than bailment. A bailee accepts possession of a piece of property for a specific purpose and must act with reasonable care to protect said property until returned. Bailee is not an insurer of item, but is responsible for its own damage to the bailed item. The duty of care owed depends on the purpose of the bailment — if solely for bailee there is a high duty of care, if mutual there is an ordinary level of care and if for the sole benefit of bailor there is a low duty of care. Here because the bailment is for benefit of the bailee and the bailee is a merchant, there is a high duty of care owed. This would be measured by the care normally exercised by a dry cleaner. If the court finds that the bailor acted negligently in that it did not act as an ordinary dry cleaner would, that this breach directly caused a foreseeable harm and resulted in damages, the Dry Cleaner will be held liable for the damage to the quilt. A court will find Dry cleaner liable for damages.

# QUESTION 7

Homer, an Ohio resident, wanted to update, maintain, and enhance his home. In due course, the following events occurred:

1. Landscape Co. mailed a written offer to Homer to mow Homer's lawn once a week for one year for a set price. Homer mailed a letter back to Landscape Co. stating, "I accept your offer," but he placed an incorrect mailing address on the envelope, resulting in a failure of delivery. Landscape Co. never received the letter and has since increased the price it charges for lawn mowing services. Landscape Co. refuses to recognize the existence of any contract between it and Homer.
2. Gutter Co. mailed a written offer to Homer to fix Homer's gutters for a set price and invited Homer to accept the offer by mail. Homer mailed a letter back to Gutter Co. stating, "I accept your offer." The next day, Homer telephoned and informed Gutter Co. that he had mailed an acceptance but that he had since changed his mind. A few days later, Gutter Co. received the acceptance that Homer had originally mailed. Gutter Co. claims the existence of a contract between it and Homer.
3. Sprinkler Co. mailed a written offer to Homer to install a lawn irrigation system on Homer's property at a set price. Homer mailed back a rejection, stating his belief that Sprinkler Co. was inept. The next day, Homer had a change of heart, and mailed an apology letter to Sprinkler Co., along with a letter stating his acceptance of the original offer. Sprinkler Co. received the rejection letter first (but after the acceptance letter had been mailed), scheduled a different job relying on the rejection, and vowed never to perform work for Homer. Sprinkler Co. refuses to recognize the existence of any contract between it and Homer.
4. Homer had a written option contract to purchase from Sandy the vacant lot at the rear of Homer's house at a fixed price by July 1. On June 30, Homer mailed his acceptance to purchase the property for the price stated in the option contract. However, Sandy did not receive this mailing until July 5. The property has since been sold to someone else. Sandy refuses to recognize Homer's acceptance and denies any contractual liability to him.
5. Stump Co. mailed a written offer to Homer to remove a tree from Homer's property for a fixed price. Homer mailed a letter back to Stump Co. stating in his letter that, "I agree to your offer, provided that the job is done in a workmanlike manner, but I believe that the price is far too high, and I wish you would do it for less." Stump Co. denies the existence of a contract between it and Homer.
6. Paint Co. mailed a written offer to Homer to paint Homer's house for a set price. Homer's daughter, Patty, lives next door to Homer in an identical house. Homer gave Paint Co.'s letter to Patty. Patty then quickly mailed a letter purporting to accept Paint Co.'s offer on her own behalf to paint her home. Paint Co. denies the existence of a contract between it and Patty or Homer.
7. Cement Co. mailed Homer a letter offering to install a concrete driveway on Homer's property at a fixed price. Homer mailed a letter back to Cement Co. stating, "I agree to have the work done at that price as long as Cement Co. will also install a concrete walkway as part of the deal." Cement Co. refuses to install a walkway but claims the existence of a contract between it and Homer to install the driveway.

In each of the foregoing scenarios, has an enforceable contract been formed?

Explain your answers fully.

1. No enforceable contract has been created. At issue is whether Homer's improper mailing was a valid acceptance. For a contract to be formed, there must be both an offer and an acceptance. Landscape Co.'s mailing to Homer constitutes an offer because it exhibits the requisite intent to contract. Unless stated otherwise in the offer, an offer may be accepted in any reasonable manner, including by mail. Under the mailbox rule, an acceptance is valid upon proper dispatch. Here, Homer failed to address the letter correctly, thereby ensuring a failure of delivery to Landscape Co. It was an improper dispatch and there is no valid acceptance — thus, no contract.
2. A contract has been created. The mailbox rule applies here as well. Rejection, on the other hand, is valid upon receipt. Here, Homer mailed the acceptance, thereby validly accepting Gutter Co.'s offer, and then rejected the next day. The acceptance was made prior to the rejection; therefore, Homer accepted Gutter Co.'s offer, and there is a contract.
3. No contract has been created. At issue is whether Homer's acceptance or rejection controls. The mailbox rule applies again here; however, is slightly altered because if a rejection is mailed prior to an acceptance, and the rejection is received first and the offeror relies on it, then there is no contract. Here, Homer first mailed a rejection and then an acceptance. His acceptance was again valid upon dispatch. Nevertheless, his mailing of the rejection first meant that Sprinkler Co. received the rejection prior to the acceptance. Sprinkler Co. relied on the rejection by scheduling a different job. Therefore, the rejection controls and there is no enforceable contract.
4. No contract has been created. At issue is whether Homer accepted prior to the expiration of the offer. Again, generally an acceptance is valid on dispatch per the mailbox rule. However, an exception exists for option contracts — option contracts are only accepted upon receipt of the acceptance. Moreover, an acceptance is only valid if it is received prior to the expiration of the offer, otherwise the offer is revoked. Here, Homer's mailing of his acceptance on July 1 would typically mean that he accepted prior to the expiration of the offer. Because it is an option contract, his acceptance is not valid until Sandy receives the acceptance. Therefore, when Sandy received the acceptance on July 5, the offer had already expired — thus, no enforceable contract is created.
5. A contract has been created. At issue is whether Homer's conditional acceptance created a counteroffer. A counteroffer acts as a rejection of an original offer, and a new offer that must be accepted by the original offeror. However, counteroffers must be distinguished from mere inquiries. Here, Homer states that he wishes Stump Co. would do the work for less; however, he is not stating that he will not accept the offer as it currently stands. Also, his condition that Stump Co. act in a workmanlike manner is not a counteroffer either, because this is required of Stump Co. anyway. Therefore, Homer's acceptance is valid and a contract is created.
6. No contract has been created. At issue is whether Patty could accept. Generally, only the person to whom an offer is made has the power to accept. There is an exception if a person is among a class of people to whom an offer has been made. However, under these facts, Homer is the only person who has received Paint Co.'s offer; therefore, only he may accept the offer to paint his home — thus, no contract is created.
7. No contract has been created. Homer's acceptance has a condition of additional work to be performed by Cement Co. and, therefore, is a counteroffer. Again, a counteroffer acts as a rejection of the offer.



# QUESTION 8

After two masked men held up a local gas station in Anytown, Ohio, Defendant and Co-Defendant (Co) were arrested and charged with aggravated robbery. An indictment charging both men with aggravated robbery and a firearm specification was returned. Separate lawyers were appointed for Defendant and Co.

Defendant's lawyer sought a plea bargain for his client that would allow him to plead guilty to the reduced charge of robbery if the firearm specification was dropped and the prosecutor would recommend the minimum sentence for robbery. The prosecutor agreed to Defendant's proposal, conditioned upon Defendant testifying against Co at trial. During these plea negotiations, Defendant told the prosecutor that he was in on the aggravated robbery with Co but that Co had the gun and used it to commit the offense. After hearing Defendant's statement, Defendant and the prosecutor agreed to the terms of the plea bargain.

Co did not want to plea bargain his case because he claimed he was innocent. He filed a motion to suppress testimony concerning his identification on the ground that his identification from a photographic array presented to a witness was impermissibly suggestive and led to irreparable mistaken identification of Co as a perpetrator of this crime. At the hearing on the motion, Co testified that, although he participated in the alleged crime, he was incorrectly identified as the person who used the gun because it was Defendant who actually possessed and used the gun and wore the clothes of the suspect identified by witnesses. Co's motion to suppress was overruled by the court.

Based on the above testimony from Co, detectives discovered that the firearm used in the aggravated robbery had actually been purchased by and registered to Defendant about two weeks before the crime was committed. They also learned that the clothing worn by the man who used the gun in the aggravated robbery was similar to the clothing Defendant wore when he was arrested. Based on this evidence, the prosecutor informed Defendant's counsel that he was withdrawing the plea bargain previously offered to Defendant.

Defendant immediately filed a motion to enforce the plea agreement but the motion was overruled by the Court. The cases against Defendant and Co were ordered joined for trial over objection of Defendant. At trial, the prosecutor offered the statement Defendant made to him during plea negotiations as evidence of the crime committed by Defendant and Co. It was received over objections of both Defendant and Co. The prosecutor also offered Co's testimony from the suppression hearing as evidence of the crime. The transcript of said testimony was received in evidence over objection of Defendant.

The clothing worn by the gunman and the written registration of the gun were also admitted into evidence over Defendant's objection that those items had been improperly obtained by the police through Co's testimony at his suppression hearing. Neither Defendant nor Co testified at trial.

1. Was the Court correct to overrule Defendant's motion to enforce the plea bargain?
2. Did the Court correctly overrule the objections of Defendant and Co to the prosecutor's offer of Defendant's statement during plea negotiations?
3. Was the Court's ruling on Defendant's objection to the admissibility of the transcript of Co's testimony at the suppression hearing correct?
4. Was Defendant's objection to the admissibility of the clothing and registration of the gun properly overruled?

Explain your answers fully.

1. The court properly overruled the motion to enforce. Ohio uses a contract theory of plea agreements, which generally allow the court to let a D withdraw guilty pleas where the prosecutor fails to uphold her end of the bargain. Additionally, a defendant can withdraw the plea prior to sentencing by right. However, the plea agreement here was not entered before the court, and Defendant had not fulfilled his end of the bargain. Defendant (D) had not yet pled guilty. If he had, the terms would be enforceable, but here the Prosecutor withdrew the plea agreement prior to acceptance, and it cannot be enforced. Further, the facts indicate that D was untruthful during the plea negotiations. When a defendant does not hold up his end of the bargain, to give truthful testimony in exchange for a lighter sentence, the court would not bind the prosecutor once the deception is discovered. To require the prosecutor to uphold a plea bargain where evidence strongly shows the D is lying would be unjust.
2. Court was incorrect to overrule objection. Statements made during the course of a plea agreement are not admissible in order to encourage plea bargains. Here, using the statement would be against the Ohio Rules of Evidence, and counter to public policy. Thus, it cannot be used against D as evidence of guilt. Additionally, they cannot be used against Co-D because their use violates the confrontation clause. The confrontation clause of the 5th Amendment requires that a party be able to cross-examine the witnesses against them. Since D is not testifying in this joint trial, his statements cannot be introduced against Co, because Co cannot compel D to testify. They are not admissible hearsay against Co, not made in furtherance of a conspiracy, and he has a right to confront the witnesses against him. Objections should be sustained for both.
3. Court was incorrect. Again, this situation presents a problem of the confrontation clause. Defendant has a 5th Amendment right to confront the witnesses against him. Co is not testifying, which is his constitutional right under the 5th as well. Because Co is not testifying, the court should not permit that testimony to be used against Defendant as evidence of the crime. It may be permissible to use against Co if he was testifying as impeachment evidence, or as an admission, but he has not raised this defense. Since this is not the case, the evidence should not be admitted in a joint trial because the jury may be prejudiced against D, or at the very least, be admitted with a strict limiting instruction that it only be considered against Co for his participation of the crime, and not for the guilt or innocence of D.
4. The gun and clothing should be admitted. Here, the statements by Co are not admissible in court against D, due to the confrontation clause. The statements were not made in violation of Co's constitutional rights, for example in a police interrogation without being Mirandized or without counsel, nor under duress of any sort. Therefore, the court may properly admit the physical evidence against Defendant, even though Co is not testifying. Defendant does not have a right to suppress the statements of Co, because he would not have standing to enforce those rights had the conversations occurred in a normal police interrogation, or here in a suppression hearing. Even if the statements were improper and in violation of the Constitution, the prosecutor would have a very strong argument for inevitable discovery, as the police would likely have run the number on the gun. Since the gun was registered to D, they would likely have made the connection, and discovered the clothing that the defendant was wearing at the time of the crime during the course of their normal investigation. However, that is immaterial because the evidence was found as the result of Co's statement, and the physical evidence is properly admissible.



# QUESTION 9

The following transactions occurred in Ohio:

1. Bill wrote a check to Mary on his personal account at Bill's Bank in the amount of \$10,000. On May 1, 2011, Mary took the check to her bank (Mary's Bank) and properly indorsed it to Mary's Bank. Mary's Bank gave Mary \$200 in cash and posted a credit to Mary's account in the amount of \$9,800.

On May 2, 2011, thinking she had \$9,800 in her account at Mary's Bank, Mary wrote a check to Ohio State University for her fall semester tuition.

On May 3, within its midnight deadline, Mary's Bank received notice of dishonor of Bill's check from Bill's Bank and subsequently gave Mary proper notice of dishonor. Mary's check to the University "bounced" and she was denied admission. Mary sued Mary's Bank claiming that, because her bank had already posted the \$9,800 credit to her account, the bank improperly refused to honor her check to the University. Mary's Bank has denied that its dishonor of her check was improper and Mary's Bank has also filed a counterclaim against Mary for the return of the \$200 cash.

2. Acme Corporation made a claim against Bogus Co. that it had sold to Acme defective material, which resulted in damage to Acme. As a result, Acme refused to pay Bogus Co.'s invoice (Invoice No. 00020) in the amount of \$100,000 for the material. After extensive negotiations, Adam, the President of Acme, finally agreed with Bob, the President of Bogus Co., to "settle the matter" by Bogus Co. reducing the amount of its invoice to \$45,000. There is nothing in writing memorializing this settlement and Bogus Co. never sent a corrected invoice to Acme.

One month later, Adam wrote a check for \$45,000 to Bogus Co. and placed on the back of the check (above the indorsement section) the following language in bold type: "Accepted in full payment of Invoice No. 00020." Bogus Co. cashed the check.

One week later, Bob called Adam. He stated that Bogus Co. cashed the check in its normal process. Bob informed Adam that Bogus Co.'s accounting department routinely uses an electronic deposit indorsement and that he was therefore never aware of the qualifying language. Bob also accused Adam of "cleverly putting the qualifying language on the back of the check like the miserable sneak you are!" Bob also argued that there was never any settlement and that Acme still owes the balance of \$55,000 to Bogus Co. Finally, Bob told Adam that he had mailed a check to Acme to return the \$45,000.

3. On January 2, 2005, Sam executed a promissory note in the amount of \$20,000 in favor of Jones to pay Jones for work done by Jones on Sam's property. The note was properly executed and delivered in all respects. The note called for a partial payment of \$5,000 on May 1, 2005, with the entire balance of \$15,000 due on August 1, 2005. The note also provided that if Sam defaulted upon the \$5,000 partial payment on May 1, 2005, then the "entire balance shall become due and payable at that time."

Sam defaulted on both the May 1, 2005, and the August 1, 2005, payments. Jones filed suit against Sam to collect the full amount of the note (\$20,000) on June 1, 2011. Sam asserted two defenses: (1) that Jones' suit is barred by the statute of limitations and (2) that Jones never made any actual demand for payment at the times that the payments were due.

1. Which party should prevail on Mary's claim against Mary's Bank for the \$9,800 check and on Mary's Bank's counterclaim against her for the \$200?
2. Which party should prevail on Bogus Co.'s claim against Acme for the \$55,000 balance on the invoice?
3. Which party should prevail on Jones' claim against Sam and on each of Sam's defenses?

Explain your answers fully and do not discuss holders in due course or the statute of frauds.

1. Mary will lose on her claim for \$9,800. A depository bank is not required to make the full amount of a personal check deposited into a customer's account available for withdrawal or for payment based on a check written by the customer of a payor bank if the deposited check is dishonored within the time limit and the Bank promptly notifies the customer of the dishonor. Here, the Bank merely credited Mary's account with the \$9,800 difference between the \$10,000 check from Bill and the \$200 that Mary received from the Bank. Crediting the account is a "provisional credit" only and does not entitle Mary to withdraw the money or for the Bank to pay the money based on a check that Mary wrote believing that the money was in her account. Thus, Mary's Bank should prevail on Mary's claim for the \$9,800 because Bill's check was dishonored, the Bank received notice of dishonor within the applicable time period and the Bank gave Mary prompt notice.

The Bank will lose the counterclaim for the \$200 paid to Mary, however, when a bank provides immediate cash to a customer when the customer cashes a check, the customer is entitled to the cash regardless of whether the check is eventually dishonored. Here, the Bank gave Mary \$200 in cash when Mary endorsed the check to Mary's Bank. Once the Bank cashed the check, the Bank has no right to recover the \$200 from Mary.

2. Acme should prevail on the \$55,000 balance. When a check contains a statement above the endorsement that the check is "accepted in full payment," the check is effective to settle a bona fide dispute because it operates as an accord (i.e., an agreement to settle the dispute for a smaller sum) that is satisfied when the endorser endorses and cashes the check. Here, Adam wrote "Accepted in full payment of Invoice No. 00020," on the back of the check above the endorsement section, which operated as an accord. When Bogus Co. endorsed and cashed the check, Bogus Co. cashed the check in satisfaction of the disputed invoice, precluding Bogus Co. from recovering the \$55,000 balance. It does not matter that Bogus Co. did not know of the endorsement or that Bogus Co. used electronic endorsement unless Bogus Co. had specifically advised Acme to send the check to a particular recipient, which it did not. Thus, Acme should prevail on the \$55,000 balance.

3. A promissory note containing an “acceleration clause” that an entire balance is due upon default is effective. Here, Jones should prevail on his claim against Sam because when Sam defaulted on May 1, 2005, the entire note became payable on the date of default, i.e., May 1, 2005. Thus, Jones is entitled to the payment of the entire amount. It does not matter that the amount was split into 2 payments and that the date on which the note was due could be different depending on when Sam defaulted.

- (1) The statute of limitations for a promissory note is 6 years from when payment is due. Here, the issue is whether the note was payable on May 1, 2005, when Sam defaulted and payment of the entire balance was due or on August 1, 2005, when the last payment was due under the note. If the note was payable on May 1, 2005, Sam’s defense will prevail because the claim was brought 6 years after that date, if the note was payable on August 1, 2005, Sam will lose because the claim was brought within 6 years of that date. Here, Sam’s defense will prevail because the note was payable on May 1, 2005 because of Sam’s default and Jones did not bring the suit until June 1, 2011, more than 6 years after the payable date of May 1, 2005. It is the earliest date of default that begins the statute of limitations on a promissory note.
- (2) Jones should prevail on Sam’s defense that Jones never made an actual demand for payment at the times that payments were due. The maker of a promissory note is not required to demand payment when a promissory note that calls for a definite payment at a definite time. Here, the note called for a \$5,000 payment on May 1, 2005, and a \$15,000 payment on August 1, 2005. Thus, Jones was not required to demand payment when payment was due in order to be entitled to payment. So, Jones should prevail on this particular issue.

# QUESTION 10

Owner owned the real property (Property) at 123 Forest Road, Anytown, Ohio, in fee simple. Over the years he granted the following rights to the following parties:

First, Owner granted Neighbor an easement over Property allowing Neighbor to run her water and gas lines to her house. Owner and Neighbor reduced this easement to writing and it was properly drafted and executed. The easement was never recorded.

Second, Owner orally granted Friend a right to use Property for hunting two weeks every November. Friend exercised his right for several years.

Third, Owner and his Mother entered into a written lease granting Mother the right to continually live at Property until her death in exchange for an annual rent. Mother immediately occupied Property and is still living at Property. The lease was never recorded.

Owner then sold Property to Buyer for \$100,000. Owner told Buyer that Mother was living at Property for her life under a written lease. However, Owner forgot to mention either the unrecorded easement he previously granted to Neighbor or the agreement he had with Friend allowing Friend to hunt on Property.

Owner prepared and signed a warranty deed that stated in its entirety as follows:

#### GENERAL WARRANTY DEED

OWNER, single and never married, of Any County, Ohio, for valuable consideration paid, grants, with general warranty covenants, to Buyer, whose tax-mailing address is 123 Forest Road, Anytown, Ohio, the following property:

123 Forest Road  
Anytown, Ohio

Prior Instrument Reference: Volume 1, Page 2.  
Executed this 1st day of February 2012.

\_\_\_\_\_  
/s/ OWNER

Owner delivered the warranty deed to Buyer's agent, who recorded it with the county recorder. Although Buyer did authorize his agent to accept the deed and record it, Buyer was never in possession of the original executed deed and in fact never even saw it. Buyer, aware that the deed was recorded, began preparations to move onto Property.

Neighbor, Friend, and Mother learned of the sale to Buyer. Neighbor approached Buyer, told him about her easement over Property for her water and gas lines, and demanded that Buyer not make any changes that might affect either utility line. Friend also approached Buyer and told him about his hunting rights and said he intended to continue exercising those rights. Mother, who shows no sign of dying any time soon, declined to vacate Property and said she intended to continue living there and pay the rent to Buyer.

Buyer seeks your advice on the following questions:

1. Was the deed sufficient to convey Property from Owner to Buyer and, if so, at what point in time was the conveyance effective?
2. What are the covenants of title that were included in the deed from Owner?
  - a. Were any of these covenants breached by Owner?
  - b. If any of the covenants were breached, would Buyer be entitled to recover damages?

Explain your answers fully.

1. Deed was sufficient to convey the property: Under Ohio law, for a deed transfer to be effective, it must have formalities that comply with the Statute of Frauds (SOF); it must contain a sufficient description of the land, and it must be signed by the grantor with the intent to transfer. Any transfer in land for over one year is subject to the SOF, which requires that the transfer be in writing, containing the material terms, signed by the party charged. Here, grantor/owner signed the warranty deed with the terms of the sale (general warranty deed/consideration paid), and it contained a description of the property with the exact address at issue - the SOF is satisfied. The grantor also intended to make the transfer as a sale took place with Buyer.

For an effective deed delivery there must also be delivery and acceptance. Here, Owner delivered the deed to Buyer's agent, and as such there was effective delivery to one authorized to act on behalf of the Buyer. Acceptance is implied unless refused, and as such, there was a valid deed transfer, as intended by the Owner on February 1, 2012. For an effective deed transfer, physical possession of the deed is unnecessary — the grantor (Owner) must have simply intended the transfer such as here. The fact that Buyer was never in possession of the deed or never even saw it is irrelevant as the transfer was intended — Buyer even affirmatively accepted by his awareness that the deed was recorded.

2. Covenants: Under Ohio law, there are 4 covenants of title that are granted by a warranty deed. Three covenants are present and personal to the grantee: Covenant of seisin (promising valid ownership by grantor); covenant of title or conveyance (promising the right to transfer title); and the covenant against encumbrances. Ohio only recognizes one future covenant effective against the warrantor (up to the purchase price paid to her) by all subsequent transferees — the covenant of warranty. This covenant guarantees that the warrantor will defend against reasonable claims of title by third parties and that the warrantor will compensate the grantee for any losses due to paramount title.

3. Breach of any covenants: Owner breached a covenant by the written lease with Mother, however, Buyer had notice of the encumbrance and should be estopped from recovery. Owner and Mother had a written lease, and as such the transfer (of interest for more than one year) was reduced to writing to satisfy the SOF. A lease need not be recorded to be effective. Where a grantee has notice (actual, inquiry, or constructive), he takes subject to such. Here, the Buyer had inquiry notice as he had a duty to inspect the premises; likewise, he had actual notice by being told about Mother.

Owner did not breach a covenant regarding hunter. An oral license is effective, but is revocable at any time unless money is spent in further of the property. Here, the hunter only hunted two weeks out of the year, and nothing indicates that he spent any money on the land. As such, the license is revocable and is not an encumbrance.

However, the easement is an encumbrance but only if it is enforceable. The grantee of a servient estate takes subject to an easement appurtenant only if he had notice of it. Since the easement was never recorded, there is no constructive notice. Likewise, there is no inquiry notice as the water and power lines are likely underground. However, a court would likely find the easement effective as necessary for Neighbor's water and gas, and as such there likely is an effective easement (encumbrance) against Buyer.

4. Damages: As a rule for breach of covenants in a warranty deed, the Buyer can only recover up to the purchase price he paid the Owner. Here, that would be up to \$100,000, even if the damages exceed this amount.

# QUESTION 11

Blogger lives in the state of Franklin and publishes an online blog that concentrates on Franklin politics and state government. Blogger's writings range from straight postings of information to opinion columns and satirical entries.

Last year, Senator X was subpoenaed to testify in front of a grand jury that was investigating corruption in state government. His grand jury testimony was secret, but Blogger afterwards got an anonymous phone call from someone who claimed to be a member of the grand jury. The caller said that Senator X had "taken the Fifth" and refused to answer any questions. The next day, Blogger published an entry under the heading "What You Hiding Senator?" in which he announced that Senator X had taken the Fifth, and concluded that, "In my opinion, this can't mean anything other than that he's got his hand deep into the till." In fact, Senator X had answered all the grand jury's questions fully and was not personally a target of the investigation.

The next day, Senator X's lawyer, Lawyer, e-mailed Blogger and demanded that he post a retraction or, "We will pursue all legal remedies against you." Blogger responded with a post to his blog that said, "I stand by my story and will not be intimidated by an ambulance chaser like Lawyer." Lawyer, in fact, had a business practice. He had been active in bar association work, and through that and some of his cases, had occasionally been the subject of stories in the media. He had never been involved in personal injury work.

Senator X called Advisor on his cellular phone to discuss how to respond to the press. In the course of the conversation, Senator X asked, "What are we going to do about this nutcase?" The call was intercepted and recorded by Hacker, who anonymously forwarded it to Blogger. Blogger posted an audio link to the "nutcase" portion of the conversation on his blog, along with the commentary that, "This is further proof Senator X is guilty, because he is attacking his accuser."

A lawsuit has been filed in state court against Blogger on behalf of Senator X and Lawyer alleging three separate claims:

1. Blogger's statements about Senator X regarding the grand jury testimony were false and constituted libel and defamation of character;
2. Blogger's labeling of Lawyer as an "ambulance chaser" was false and constituted libel;
3. Blogger's publication of the cell phone conversation between Advisor and Senator X violated federal privacy laws, which prohibit the interception of private electronic communications.

Blogger's attorney has responded that all of Blogger's statements and actions are protected speech under the First and Fourteenth Amendments to the United States Constitution.

In each of the three claims listed above, which party will prevail?

Explain your answers fully, but limit your analysis to whether the speech in each of the above three situations is protected by the First and Fourteenth Amendments to the U.S. Constitution. You may assume that state action is present in all three situations.

1. The First Amendment, incorporated against the States by the Fourteenth Amendment, protects freedom of speech and of the press. As an initial matter, it makes no difference when Blogger is treated as a member of the press or as an ordinary speaker. The press's protections under the First Amendment are coextensive with those of ordinary speakers, so no discussion is necessary of whether a blog counts as the press. When speech is protected, government regulation of the speech is permissible only in rare circumstances. Several categories of speech, however, are unprotected, meaning they have little or no First Amendment protection. Defamation, which involves a defamatory statement published to third parties, is a form of unprotected speech. Even though defamation is unprotected speech, the First Amendment still limits the extent to which States may authorize civil liability for defamatory speech. Exceptions exist as to matters of public concern, in order to ensure a robust marketplace of ideas. As to such matters, speakers cannot be liable for defamation merely for publication of false information. Under *New York Times v. Sullivan*, when public figures like Senator X assert defamation claims, they must prove actual malice. Actual malice is shown by proving that the speaker knew that the statements were false or acted in reckless disregard for the truth. Mere falsity will not suffice. Blogger did not act with actual malice. His statement that X had taken the Fifth was false, but he had grounds to believe it was true, and his reliance on an anonymous source, while imprudent, does not rise to the level of reckless disregard.
2. Unlike Senator, Lawyer is not a public figure, so he does not need to meet the "actual malice" standard. Being active in bar association work and earning a little press does not convert a private citizen into a public figure. Public figures are elected officials, major appointed officials, celebrities, and others who are the regular subject of the news and have accepted a higher level of public scrutiny. Lawyer's actions do not rise to that level. When a speaker makes a defamatory statement about a private individual, the standard depends on whether the statement involves a matter of public concern or merely a matter of private concern. Lawyer's representation of Senator X is a matter of public concern; Lawyer must therefore prove that Blogger acted negligently in publishing the statement. Lawyer will likely not prevail in this action. Consider the context: a blogger who regularly writes satirical postings calls a lawyer he disrespects an "ambulance chaser." Blogger's post did not mean to suggest that Lawyer was a personal injury lawyer who engaged in shady methods of engaging new business. He meant instead to suggest that Lawyer was asserting a meritless claim to try to make quick money. Seemingly false statements made in the context of satire enjoy additional First Amendment protection. The truth, or Blogger's negligence, of whether Lawyer literally chases ambulances is not the real issue. It does not change things that Blogger's actions would have constituted slander per se if spoken. Defamatory speech about a licensed professional's reputation as a professional is one of four slander per se categories, under the common law tradition. The rules are different for libel, however, and per se categories do not exist.
3. Blogger cannot be held liable for publication of cell phone conversations, even though they were illegally collected by a third party. The U.S. Supreme Court has held that the publication of illegally obtained newsworthy information is protected speech. Hacker may be liable under federal privacy laws, but Blogger's publication of the information that Hacker collected is not punishable. In this way, Blogger's publication sanitizes or cleanses the illegally obtained information.



# QUESTION 12

Ace, an Ohio lawyer, stopped at a bar for drinks with Betty, who is his client and fiancée. After they each consumed several alcoholic beverages and were mildly intoxicated, they went out to the parking lot to celebrate their recent court victory by having sex in Ace's customized, luxury automobile. After having sex, Ace instructed Betty to prepare lines of cocaine from a stash that he kept in the glove box of the car, confident that the car's heavily tinted windows would insure privacy. Ace then started the car and began driving as Betty began to unwrap the cocaine.

Officer Jones observed Ace driving erratically as he exited the parking lot. Based on his experience and training, he believed that the driver was probably under the influence of alcohol. He followed Ace's car for a short distance and then signaled for Ace to pull over and stop. Ace and Betty switched seats so that it would appear that she was driving. Ace told Betty he would then act as her attorney in the defense of any charges.

Ace exited the passenger side of the car to confront Officer Jones while Betty hid the drugs under the floor mat. When Officer Jones demanded that Ace step away from the vehicle and put his hands on his head, Ace identified himself as a lawyer, stated that he owned the car, and that he was very well acquainted with both the local Judge and Officer Jones' superiors in the police department.

Officer Jones asked Betty to exit the vehicle and arrested her for impaired driving, a misdemeanor. The car was towed to the police impound lot where an inventory was performed and the drugs were discovered. Betty was then charged with the additional crime of possession of illegal drugs, a felony.

As he promised, Ace appeared in court as Betty's attorney to defend the criminal charges. Betty was offered the opportunity to enter an intervention program which required her to plead guilty to a low-level drug felony. If she completed the program successfully, all charges would be dismissed after one year.

Ace recommended to Betty that the diversion program was a good deal and she should take it. Ace told Betty that because Ace was a lawyer he would not be given the same deal if it was discovered that he was either the driver or the owner of the drugs. He stated that he was reluctant to take her case to trial because he already had a full trial schedule. Ace told Betty that he was concerned that she might say something that would reveal his culpability, which would likely cause him to lose his law license, making it financially impossible for them to get married. Betty accepted his advice and, with Ace by her side, pled guilty. After being put under oath she answered in the affirmative the judge's questions, "Are you in fact guilty, was it your cocaine, and were you driving the car?"

Before Betty could complete the diversion program, she failed a random drug test, was arrested, and was held in jail for a week while waiting for a hearing. Frustrated and angry because Ace never came to see her in jail, Betty contacted the Office of Disciplinary Counsel (ODC) and complained about the quality of Ace's representation, giving a detailed and truthful account to the ODC investigator. She also broke off her engagement to Ace.

What ethical violations is it likely that Ace committed?

Explain your answer fully.

In Ohio, lawyers are governed by the Ohio Rules of Professional Conduct ("RPC"). Lawyers are required to abide by these rules all the time, whether or not they are acting in their capacity as a lawyer. Violations of the RPC may result in temporary or permanent suspensions or disbarment. Ace, an Ohio Lawyer, has committed several ethical violations that may subject him to discipline.

Ace's sexual relationship with Betty may violate the RPC. A lawyer may not engage in a sexual relationship with a client unless the sexual relationship pre-dated the representation. Here, it is unclear whether Betty became a client before or after the sexual relationship began. If Betty was Ace's client before they became engaged or began a sexual relationship, having sex with her would violate Ace's professional responsibility duties.

Ace's drug use may violate the RPC. A lawyer can be subject to discipline for an illegal act that reflects negatively on the lawyer's honesty, trustworthiness, or fitness as a lawyer. Here, drug use and, particularly drug use while driving a car reflects negatively on Ace's character and fitness. Not only is Ace breaking the law, but he is putting others in danger by his actions.

Ace may also be subject to discipline for switching seats with Betty when pulled over by Officer Jones. A lawyer may not engage in dishonesty, fraud, deceit, or misrepresentation. Here, Ace switched seats with Betty in order to deceive Officer Jones as to who was operating the vehicle. This action actually deceived Officer Jones and caused him to file misdemeanor charges against Betty and allowed Ace to escape any criminal charges or professional responsibility repercussions. This conduct was dishonest, fraudulent, and deceitful.

Ace may also be subject to discipline for telling Officer Jones he was well acquainted with the local Judge and his superiors. A lawyer may not state or imply an ability to improperly influence a judge or public official in the discharge of their duties. Here, Ace is implying that he could influence the Judge or Officer Jones' superiors, which violates the RPC.

Ace may be subject to discipline for representing Betty. A lawyer must not undertake a representation in which there is a substantial risk that the representation would be materially affected by the lawyer's personal interests. Here, Ace has a personal interest in Betty's case proceeding a certain way, so as to avoid any criminal liability or disciplinary proceedings. It is improper for Ace to represent Betty.

Ace can also be subject to discipline for taking Betty on as a client if did not have the time to do so. A lawyer has a duty of care toward each client, and must not undertake the representation of a client unless he or she has the time, mental capacity, and legal knowledge to adequately serve the client. Here, Ace told Betty she should not take her case to trial because he already had a full trial schedule. If this is true, it was improper for Ace to accept Betty's case.

Ace may also be subject to discipline for not correcting Betty's false statement to the Court. A lawyer has a duty of honesty and candor toward the tribunal. Here, Ace knew that the cocaine was not, in fact, Betty's and that she was not the one driving the car. Ace did nothing and allowed Betty to answer falsely when the Court addressed her during the proceeding in which she entered a plea of guilty.



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# MPT 1

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## *Franklin Resale Royalties Legislation*

In this performance test, examinees are employed by the law firm that represents the Franklin Artists Coalition. The Coalition supports enactment of legislation which would require a five percent royalty to be paid to artists and their heirs on the resale of their visual artworks. To this end, the Coalition has asked the law firm to prepare a document which they can hand out to legislators and which will set forth the need for and benefits of the legislation, especially in light of the fact that similar legislation was introduced but not adopted in the neighboring state of Olympia. Examinees' task is to draft the "leave-behind" — a persuasive document that will convince legislators to vote in favor of the resale-royalties legislation. In doing so, examinees must set out the arguments in favor of the legislation, respond to the objections to the legislation, and address the legal issue of whether the legislation is preempted by the 1976 federal Copyright Act. The File contains the instructional memorandum from the supervising attorney, a letter from the client, a template for the "leave-behind," and testimony by three witnesses before the Olympia State Senate regarding the similar legislation in that state. The Library contains the text of the proposed legislation, excerpts from the federal Copyright Act, and two cases bearing on the legal issue of preemption.

## THE FRANKLIN ARTISTS COALITION URGES SUPPORT FOR F.A. 38

**The Franklin Artists Coalition, representing over 5,000 visual artists who live and work in our state, urges your support for Franklin Assembly Bill 38.**

**Introduction:** The new Franklin Assembly Bill 38 (F.A. 38) will pay 5% royalties on visual artwork (i.e. paintings, graphics, sculptures, other pieces of physical art) which are not mass-produced, to artists and their heirs (up to 70 years after an artist's death), on secondary sales of artworks (no royalty on initial sale).

### **Why Legislation Is Necessary and Appropriate:**

Common arguments for the legislation include:

1. Protection of local artists. This legislation protects local artists and Franklin residents by providing a modest royalty payment on works that are being re-sold and have increased in value.
2. Fair pay for local artists. Many local artists make a very modest income (\$35,000/year) based on their initial sales of works which pays for all of their materials out of pocket. Once an item of work is sold - they never receive any additional payment even if their work increases greatly in resale value. These artists do not get "royalty" payments like other artists such as performers, singers, dancers, etc. Therefore most artists work to become well-known and in-demand. When their initial pieces increase in value, they never reap the benefit, only the collectors do. Artists should also share in the increased value of their pieces when they are sold on the secondary market.
3. Encouragement of local art. This protection will encourage more artists to thrive in the community and invite other artists into the community to share their work.

### **Against Legislation**

1. Dealers will lose profits on sales between dealers. This is not true — dealers are exempted on sales of artworks to other dealers under the proposed bill within 10 years of initial sale.
2. Artists will lose sales. This is not true — initial sales of art work are exempted under the proposed bill, only secondary sales of artwork are taxed with the 5% royalty.
3. People will be discouraged from selling off artwork. The secondary sale royalty only applies to pieces whose profit is greater than \$1,000. Therefore, pieces with only minimal increases in value will be exempted.
4. Artists will be discouraged from creating artwork. This is not true — artists will be encouraged to make a name for themselves in our community because they will benefit greatly through recognition and re-sale of their artwork. Artists will see a benefit when selling their initial pieces and when their older work is re-sold in the community — thus encouraging them to make a name for themselves. If an artist doesn't encourage a secondary market for sales they will not receive any payments.
5. Sales of art will decline. As was seen in our sister state, Columbia, art sales may decrease initially, but the art market will recover. This is a small price to pay for allowing artists their fair share of profits from their work in the secondary market.
6. Restrict freedom of contract. The proposed bill allows for contract provisions to modify the 5% tax and to have this right assigned to other persons.

## **Why Any Legal Objection Is Not Valid:**

While *Samuelston v. Rogers* addressed copyright protect as it existed under the Copyright Act of 1909, it is still valid today. Here's why:

- 1. Columbia Resale Act was not preempted by Federal Copyright Act of 1976.** In *Samuelston v. Rogers* the court found that Resale Royalties Act was not pre-empted by Federal Copyright Act of 1909. In order for a Federal Law to pre-empt a state law, the Federal Law must "fully occupy" the field of law. It was shown that the Federal Copyright Act of 1909 protected: (1) the right to vend the copyrighted work and (2) the right against restrictions on transfer by the copyright holder. Further, the court found that the Columbia Resale Royalties Act did not infringe on either of these rights by requiring a royalty payment on secondary sales, rather the Columbia Resale Royalties Act provided "additional protections" that the 1909 Copyright Act did not provide. Therefore the court found that it was not preempted by the Copyright Act of 1909. Under both the Federal Copyright Act of 1909 and the Columbia Resale Royalties Act, the holder was free to vend and transfer their pieces without restriction. Because the Federal Copyright Act of 1909 did not fully occupy the field of law, the Columbia Resale Royalties Act did not infringe on the rights provided by the Federal Copyright Act of 1909 and because the Columbia Resale Royalties Act only provided additional protections that the Copyright Act did not, the court upheld the Columbia Resale Royalties Act.
- 2. F.A. 38 is also not pre-empted by the new Federal Copyright Act of 1976.** As was previously stated above, in order for a Federal Law to pre-empt a state law, the Federal Law must "fully occupy" the field of law. Further, *Franklin Press Services vs. E-Updates* defines the 1976 Copyright Protection Act's preemption to create a two-part test for preemption: (a) the work must come within the subject matter of the copyright and (b) the rights involved must be within the "exclusive rights" granted to a copyright owner. The language of the Federal Copyright of 1976 protects: (1) pictorial, graphic or sculptural works, (2) gives the owner the exclusive right to distribute copies of copyrighted work and (3) provides the holder of the piece the right to sell or otherwise dispose of property without the copyright owner's authority.

Applying *Franklin Services*, it is obvious that visual artwork is protected by the Federal Copyright Act of 1976, so part (a) is satisfied. However, the rights in question (the right to receive royalties on a secondary sale) is not an exclusive right protected as an "exclusive right" as defined by the act. Rather, the two rights protected by the Federal Copyright Act (the right to distribute copies and the right to sell the piece without authority of the copyright owner) are completely unaltered and unaffected by F.A. 38. As was the case in *Samuelston* discussed above, F.A. 38 does not impair the ability of the holder of the artwork to transfer or sell the artwork and does not require the authority of the artist to make such a sale. Further, F.A. 38 only provides additional protections (the right to receive royalty payments) that the Federal Copyright Act of 1976 does not. Therefore, F.A. 38 is likely to be found to be a valid exercise of state law that is not pre-empted by the Federal Copyright Act of 1976 based on *Samuelston*, *Franklin Services* and the federal preemption doctrine.

**Franklin's visual artists, who contribute so much to our state's economy and culture, look to the legislature to enable them to earn a fair living as artists by enacting F.A. 38.**

**F.A. 38 DESERVES YOUR SUPPORT.**



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# MPT 2

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*In re WPE Property Development, Inc.*

Examinees' law firm represents WPE Property Development, Inc., a developer of low-income housing properties in Franklin. WPE contracts with Trident Management Group to manage many of its properties in compliance with Internal Revenue Code provisions to ensure tax-exempt status. One of these properties has now lost its tax-exempt status as the result of Trident's mismanagement. WPE and Trident have a long-term business relationship that is valuable to both parties. Thus, while WPE appears to have a strong breach of contract claim against Trident (for tax liabilities and penalties resulting from Trident's failure to maintain the tax-exempt status), the client, WPE's CEO, is reluctant to file suit against Trident, hoping that a settlement can resolve the matter short of litigation and thereby avoid negative publicity for the housing project. However, despite many assurances from Trident's counsel that Trident is willing to reach a settlement and make WPE whole for its losses, no final agreement has been reached, and the statute of limitations on a claim against Trident will run in just 15 days. The senior partner must advise WPE's CEO of the legal consequences of not filing the complaint against Trident before the deadline. Examinees are asked to draft a letter to WPE's CEO for the senior partner's signature analyzing the potential legal consequences to WPE if it decides not to file its complaint against Trident and whether there might be any theories under which WPE could recover against Trident after the limitations period has run. The File consists of the task memorandum from the senior partner, a memo to the file summarizing WPE's concerns, and several pages of correspondence between counsel for WPE and Trident discussing the proposed settlement of the breach of contract claim. The Library contains three cases on the statute-of-limitations issue.

Dear Mr. Moreno,

The purpose of this letter is to advise you of the options available to WPE Property Development, Inc. ("WPE") should you decide to wait until the statute of limitations expires before bringing a complaint against Trident Management Group ("Trident"). The law recognizes two bars to a defendant asserting the running of the statute of limitations as a defense to a complaint: (1) equitable estoppel and (2) promissory estoppel. For the reasons discussed below, while WPE is likely to prevail on a claim of equitable estoppel, it is unlikely to prevail on a claim of promissory estoppel. However, despite our viable claim of equitable estoppel, you should understand that the only way to assure that the action will not be barred is to file the complaint before the statute of limitations expires.

### **Equitable Estoppel**

WPE will likely be successful asserting that Trident is equitably estopped from raising the statute of limitations as a bar to its breach of contract action. To succeed on a claim of equitable estoppel, a plaintiff must show, by clear and convincing evidence, that: (1) the defendant has done or said something that was intended or calculated to induce the plaintiff to believe in the existence of certain facts and to act upon that belief; (2) the plaintiff, influenced thereby, has actually done some act to his or her injury which he otherwise would not have done; (3) the plaintiff has exercised due diligence by not acting with careless indifference or ignoring highly suspicious circumstances which should warn of a danger or loss. *Henley v. Yunker* (Franklin Ct. App. 2005). While the third element will be the hardest to establish, WPE would likely be able to successfully assert equitable estoppel.

Trident's statements to WPE are clearly intended to induce WPE to believe that settlement is a practical certainty, and that filing a lawsuit is unnecessary. The Franklin Court of Appeals has held that taking active steps to prevent a plaintiff from suing in time, such as promising not to plead the statute of limitations, are sufficient to give rise to a claim of equitable estoppel. *Merchants' Mutual Ins. Co. v. Budd* (Franklin Ct. App. 2010). Indeed, "[o]ne cannot justly or equitably lull his adversary into a false sense of security, and thereby cause him or her to subject a claim to the bar of the statute, and then be permitted to plead the very delay caused by such conduct as a defense to the action when brought." *Id.* Trident's attorney has repeatedly assured WPE that settlement is a certainty, and that therefore filing a complaint is unnecessary. On April 15, 2011, in response to my initial letter regarding a breach of contract action and possible settlement, Trident's counsel, Ms. Hamilton, wrote: "I would ask that you not file your complaint at this time, as we believe the matter should be settled without resort to costly litigation." On April 26, 2011, Ms. Hamilton, sent me a letter agreeing that Trident would pay all damages related to the loss of the exemption and all costs incurred in regaining the tax exemption. Following that letter, on June 16, 2011, Ms. Hamilton sent me another letter, expressly stating: "We are going to get this resolved ... our settlement discussions are indeed on track, and there is no need for a lawsuit." Then, on October 6, 2011, in response to a letter from me setting a deadline of October 25, 2011 for resolutions without resorting to litigation, Ms. Hamilton wrote: "The settlement is still on track. There is no need to file your complaint." Lastly, and significantly, on January 10, 2012, during a telephone conversation, Ms. Hamilton expressly agreed to toll the statute of limitations in this matter for a period of six months, and this agreement was memorialized in a letter from me to Ms. Hamilton that same day. These repeated assurances that settlement was on track and that filing a complaint was unnecessary, particularly when combined with an oral agreement to toll the statute of limitations, will likely be held to be statements intended to assure WPE that filing a complaint was not necessary.

WPE will be able to establish that its failure to pursue its rights before the expiration of the statute of limitations was due to Ms. Hamilton's assurances. The written correspondence clearly shows that WPE was ready and able to exercise its rights, and that absent settlement, it intended to exercise those rights. In my April 12, 2011 letter to Ms. Hamilton, I expressly stated that "[w]e have drafted a complaint against Trident for breach of contract, which we intend to file unless the parties can reach a settlement." I again stated my intention to file a complaint absent

settlement in a letter to Ms. Hamilton on June 13, 2011, and again on October 4, 2011. Therefore, a court would likely find that WPE's decision not to bring an action was based on Ms. Hamilton's assurances that settlement was certain.

The most difficult element to meet is that WPE did not ignore highly suspicious circumstances that should have warned of a danger or loss. When I sent the tolling agreement to Ms. Hamilton, I requested that she confirm our agreement by signing the tolling agreement, which she has not returned. Instead, she sent a letter providing new conditions for the settlement. A court could find that the lack of a signed settlement agreement or tolling agreement amounted to highly suspicious circumstances that would bar WPE from claiming equitable estoppel. However, because of Ms. Hamilton's express agreement to toll the statute of limitations during our telephone conversation, combined with her repeated assurances that filing a complaint is unnecessary, in all likelihood a court would find that more would be needed to negate the belief that Trident would not raise a statute of limitations defense. Therefore, while element three is where WPE faces the greatest risk, it would likely ultimately prevail.

### **Promissory Estoppel**

WPE would not prevail on a claim that Trident's statute of limitations defense is barred by promissory estoppel. To establish promissory estoppel, a plaintiff must show, by clear and convincing evidence, that (1) there is a promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee, (2) the promise must actually induce such action or forbearance, (3) the action or forbearance must be reasonable, and (4) injustice can be avoided only by enforcement of the promise. *DeSonto v. Pendant Corp.* (Franklin Ct. App. 2005). While WPE could argue that Ms. Hamilton's agreement to toll the statute of limitations and promises that settlement was forthcoming constitute a promise that it reasonably relied upon, it is likely that the court would find that while factual representations were made (which is sufficient to establish equitable estoppel), there was not a clear enough promise to give rise to reasonable reliance, and therefore a claim of promissory estoppel.

WPE will be unable to establish that Ms. Hamilton's statements regarding settlement were a sufficient promise to give rise to a claim for promissory estoppel. A statement is not a promise where it is conditional and subject to modification or withdrawal. *Id.* Further, "reliance on an expression of future intention cannot be reasonable within the rule because such expressions do not constitute a sufficiently definite promise." *Id.* Indeed, a party cannot reasonably rely on "promises" that are conditioned on the approval of a third party. *Id.* Ms. Hamilton's statements regarding settlement were all statements of future intention, conditioned upon her client's approval. Indeed, the conditional nature of her statements regarding settlement is exemplified in her final letter on January 25, 2012, which provided new conditions her client required to be included in a settlement agreement.

WPE will not be able to establish that it reasonably relied on the "promise" to toll the statute of limitations. "Where it is clear that the parties contemplate a formal written contract, it is unreasonable for a party to act in reliance on an oral 'promise' until the writing has been executed." *Id.* Here, while Ms. Hamilton orally agreed to toll the statute of limitations, my letter to her explicitly requested her confirmation by signing a tolling agreement. Therefore, a court will not find reasonable reliance absent the signed agreement.

For the reasons stated above, should you choose to wait on filing an action until after the statute of limitations expires, you have a strong claim for equitable estoppel. However, I cannot stress strongly enough that the only foolproof way to avoid a statute of limitations defense is to file the action prior to the expiration of the statute of limitations. Please let me know how you would like to proceed.

Sincerely,  
Thomas Perkins



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